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42nd Meeting of the Committee of the Whole

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ARTICLE 34 (Position if a State continues after separation of part of its territory)[4]

63. Mrs. THAKORE (India) said that article 34 embodied the *ipso jure* continuity rule, subject to the usual exceptions in respect of a State which continued to exist after separation of a part of its territory. Since it dealt with treaties applicable to the predecessor State and not to the successor State or States, article 34 was acceptable to the Indian delegation as it stood.

64. The amendment proposed by France and Switzerland (A/CONF.80/C.1/L.41/Rev.1) appeared to be consequential to their amendment to article 33, and could only be considered by the Drafting Committee, if the amendment proposed by France and Switzerland to article 33 were adopted.

The meeting rose at 5.50 p.m.

[4] The following amendment was submitted: France and Switzerland, A/CONF.80/C.1/L.41/Rev.1.

42nd MEETING

Thursday, 3 August 1978, at 10.25 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 33 (Succession of States in cases of separation of parts of a State)[1] (*continued*)

1. Mrs. DAHLERUP (Denmark) said that her delegation supported paragraphs 1 and 2 of article 33, which guaranteed continuity and stability in treaty relations between States which had negotiated and accepted rights and obligations of their own free will. The amendment proposed by France and Switzerland (A/CONF.80/C.1/L.41/Rev.1) would have the advantage of establishing a single rule, but in cases of separation, that rule might lead to an unnecessary legal vacuum, when a whole system of freely negotiated treaties already existed. After the adoption of article 30, the amendment proposed by France and Switzerland would lead to strange results. In the case of a union of two States, their treaty régimes would be maintained, but if the new State thus formed subsequently broke up, the same treaties which had been maintained in force would no longer be applicable, which would create a legal vaccum.

2. The Danish delegation approved of the idea underlying paragraph 3, since the situation to which it applied might arise in the future. Nevertheless, the Drafting Committee should try to improve the wording, in order to prevent the abuses to which it might give rise. In any case, provision should be made for some means of settling the disputes which might result from the not very precise description of the situations covered by paragraph 3.

3. Mr. MASUD (Pakistan), introducing his delegation's amendment (A/CONF.80/C.1/L.54), said that article 33, paragraph 3, had raised doubts as to the true nature of the situations it dealt with. As a matter of fact, such situations fell within the twilight zone between part III of the draft, which dealt with newly independent States and called for application of the "clean slate" principle and part IV, which dealt with the uniting and separation of States and called for application of the continuity principle. Some delegations considered that there was no difference between the situations dealt with in article 33, paragraph 3, and those covered by article 15. It was nevertheless clear that article 33, paragraph 3, did not deal with cases of formation of a newly independent State, but with cases in which part of the territory of a State separated from it and became a State in circumstances which were essentially of the same character. In the former situation, the right to self-determination was exercised, and the will of the people of the territory which had become independent had not been consulted in the treaty-making process. Other delegations considered that it was not necessary to make provision for the situation referred to in article 33, paragraph 3, since all such situations were covered by paragraphs 1 and 2 of the article. But the reason why the International Law Commission had drafted paragraph 3 was, precisely, to cover the category of situations which were similar to cases of formation of newly independent States, but nevertheless distinct from those cases. That was why it had provided for application of the "clean slate" principle to those situations.

4. Nevertheless, the wording of paragraph 3 was not entirely satisfactory. First, the idea of "circumstances which are essentially of the same character" was not precise; secondly, according to that paragraph, situations which were not absolutely identical would have to be treated in the same way. What the Commission had intended was, precisely, to give situations in the special category referred to an intermediate position between cases falling under part III of the draft and those falling under part IV. And it was in order to give a separate status to the cases dealt with in paragraph 3 that Pakistan had submitted its amendment, which proposed restricting the application of the continuity principle to cases in which the successor State had "derived any benefits, directly or indirectly, under a treaty". That was the case when a State had received loans from another State and the part of its territory which had benefited from the loans separated from it; it was then natural that the successor State should assume the corresponding obligations.

[1] For the amendments submitted, see the 40th meeting, footnote 9.

5. Mr. SETTE CÂMARA (Brazil) said that in spite of the stimulating debate to which the amendments to article 33 had given rise, his delegation still favoured the International Law Commission's draft of that article. The amendment by France and Switzerland would alter the structure of the draft and the respective spheres of application of the "clean slate" and continuity principles. It would extend the application of the "clean-slate" rule to new States emerging from a uniting or a separation of States. In support of that amendment, the Swiss representative had tried to base the "clean slate" rule on the exception of *res inter alios acta*, thus disregarding the importance of self-determination. As the new State had not participated in the conclusion of the treaty, it would constitute a *res inter alios acta*, which could not bind the successor State. But the authors of the amendment appeared to forget the sovereign presence, in the treaty-making process, of the predecessor State, whose legacy of rights and obligations the successor State could not simply brush aside. The situation was completely different when a newly independent State was formed, because the will of the dependent people had been completely ignored in the conclusion of treaties by the predecessor State. That was why newly independent States should not inherit any treaty concluded by the predecessor State. Such treaties were much more of a *res inter alios acta* than those contemplated in the amendment proposed by France and Switzerland.

6. Furthermore, their amendment assimilated cases of uniting and separation of States to cases of formation of newly independent States, which would be possible only if colonial territories were regarded as part of the metropolitan territory, in accordance with the obsolete doctrine of overseas territories. In paragraphs 12 and 26 of its commentary on articles 33 and 34 (A/CONF.80/4, pages 102 and 105), the International Law Commission had emphasized the evolution of trends of thought on that question, observing that before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial Power. Hence, the amendment proposed by France and Switzerland would be a regression.

7. It was easier to follow the International Law Commission, which based the "clean slate" rule on the principle of self-determination—a principle that was undoubtedly a peremptory norm of contemporary international law. It was one thing to protect newly independent States from the burden of treaties to which they had not given their consent, but it was another to use that rule to brush aside all commitments of predecessor States in normal cases of uniting or separation of States.

8. He could not support the amendment submitted by the Federal Republic of Germany (A/CONF.80/C.1/L.52), either, because he did not see why bilateral treaties should be excepted from the general rule of continuity unless the parties so agreed, either expressly or implicitly.

9. It was obvious that paragraph 3 of article 33 was a saving clause designed to cover all kinds of accession to independence through decolonization. It purported to do away with any possible obstacles to the application of the "clean slate" principle where the formation of newly independent States had not strictly followed the pattern of the decolonization process. It was true, however, that the drafting of the provision was somewhat obscure and could be improved by the Drafting Committee.

10. The amendment submitted by Pakistan was inspired by highly commendable considerations. If the successor State had derived any benefit, directly or indirectly, under a treaty, it was only equitable that it should discharge the corresponding obligations. Nevertheless, the text of paragraph 3 was already so heavy and obscure that the amendment proposed by Pakistan could hardly be added to it. Consequently, the Brazilian delegation could not support that amendment.

11. Mr. HAFNER (Austria), noting that the majority of delegations had difficulty in determining what situations were covered by article 33, proposed that, at the appropriate time, the proposals to delete paragraph 1 (*a*) and paragraph 3, contained in the amendment submitted by France and Switzerland, should be put to the vote separately.

12. Mr. NATHAN (Israel) said that the considerations which called for application of the continuity principle in cases of uniting of States also called for its application in cases of separation of parts of the territory of a State: the "clean slate" rule was no more applicable in one case than in the other. If that rule was excluded from article 30 on the uniting of States, there was no reason for its special application to bilateral treaties under article 33. The reasons advanced by the International Law Commission in support of the special régime established in article 23 for newly independent States were not valid in the case of separation of parts of a State. Why should not the continuity principle also apply in the case of article 33 and of article 30?

13. It was necessary to maintain paragraph 3 of article 33, because it dealt with situations which were not covered by part III of the draft, relating to newly independent States. In fact, part III dealt only with newly independent States as defined in article 2, paragraph 1 (*f*). A newly independent State meant a successor State the territory of which immediately before the date of succession of States was a dependent territory for the international relations of which the predecessor State was responsible. But paragraph 3 of article 33 applied to the case in which part of the territory of a State separated from it, not to the case in which a whole territory acceded to independence.

14. It seemed that paragraph 3 of article 33 provided for cases of "revolutionary" separation of part of the territory of a State, involving a clean break, whereas paragraph 1 covered cases of "evolutionary" separation. In both cases, new States were formed, but it was only in the former case that a newly independent State within the meaning of the draft was born. It might be that the two cases called for different solutions: it would be interesting to have the opinion of the Expert Consultant on that point.

15. Mr. BJÖRK (Sweden) said that his delegation supported the International Law Commission's draft of article 33. It could hardly be changed without upsetting the balance of the future Convention. Of course, the application of the article and other related articles might give rise to difficulties, particularly article 33, paragraph 3, which introduced an intermediate category on which there might be conflicting views. That emphasized the need to supplement the International Law Commission's draft by appropriate rules on the settlement of disputes. In those circumstances, his delegation was unable to support any of the amendments to article 33.

16. Mr. FLATLA (Norway) supported paragraphs 1 and 2 of article 33, as drafted by the International Law Commission. On the other hand, he thought it would be preferable to delete paragraph 3, which raised certain difficulties. Like other delegations, his delegation doubted whether it was desirable to introduce a new category of States, having regard to the element of subjectivity involved. But before taking a final position on the question, he would be interested to hear the opinion of the Afro-Asian group. If the Committee adopted paragraph 3, it would be essential to lay down a procedure for the settlement of disputes.

17. With regard to the amendment submitted by France and Switzerland, he was reluctant to embark on a debate on a proposal which introduced such important changes in the draft article. The extension of the "clean slate" principle would not contribute in any way to the stability of treaty relations in general. The amendment submitted by the Federal Republic of Germany might disturb the balance of the draft and consequently his delegation had difficulty in supporting it. Finally, it could not support the Pakistan amendment, because it believed that it would be preferable to delete paragraph 3 entirely.

18. Mr. PÉREZ CHIRIBOGA (Venezuela) said that to the logical arguments and examples drawn from State practice which had been advanced for or against the amendment by France and Switzerland, his delegation wished to add arguments based on justice, legal consistency and equity, which militated against that amendment. Stressing that the comments made by his delegation during the discussion on the part of the draft now under consideration were intended to facilitate the integration of States, not to encourage their disintegration, he observed that the International Law Commission had decided to make a distinction between the case of newly independent States and that of States emerging from a separation to which different rules applied. But it was difficult to define all the cases which had occurred or might occur in the future and to consider all the possible situations in a sphere which was evolving as fast as succession of States. Perhaps the International Law Commission's commentary (A/CONF.80/4, articles 33 and 34, p. 101, para. 8), explained the doubts of certain delegations about the advisability of retaining paragraph 3, which seemed to them not to fit into the structure of the draft. But in his delegation's opinion, the Committee should follow the principle of applying the same rule to the same situation. The principles of justice and equity justified the adoption of an exception clause applicable to cases of separation in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. Indeed, it would be unjust to apply to a State emerging in such circumstances different rules from those applicable to newly independent States. The fact remained, however, that the wording of paragraph 3 required improvement to make it clearer.

19. There remained the question who would determine the character of the circumstances in which a State acceded to independence. His delegation believed that the Committee should rely first on common sense, then on the methods of settling disputes established by international law, first and foremost through direct negotiation between the parties, which should produce good results in most cases.

20. Finally, for the reasons already given by other delegations, his delegation could not support the amendment submitted by the Federal Republic of Germany. On the other hand, the Pakistan amendment set out very interesting principles, which should be applied in one way or another in the draft.

21. Mr. KOH (Singapore), describing the particular situation of his country, reminded the Committee that at the time of decolonization in 1963, Singapore had united with Malaysia, from which it had separated two years later. Up to 1965, when it became an independent State, Singapore had never been empowered to conclude treaties. As indicated in paragraph 18 of the International Law Commission's commentary to draft articles 33 and 34 (A/CONF.80/4, pp. 103 and 104), Singapore had applied the "clean slate" principle on becoming an independent State. His delegation understood the wording of paragraph 3 of draft article 33 where it referred to "circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State", to be sufficiently flexible to cover the case of Singapore. Hence it considered that the deletion of that paragraph would leave a serious gap in the draft.

22. Mr. GAWLEY (Ireland) supported paragraphs 1 and 2 of article 33 as drafted by the International Law Commission. Paragraph 1 rightly applied the rule of continuity in treaty relations to successor States which, before separating from the predecessor State, had participated fully in negotiating and concluding its treaties. His delegation was unable to support the amendment submitted by France and Switzerland, as it would make for uncertainty in treaty relations and would release from their treaty obligations States which had been able to express their will before the conclusion of the treaties binding the predecessor State. The Drafting Committee should revise the wording of paragraph 3 of the article.

23. Mr. MUDHO (Kenya) supported the text drafted by the International Law Commission, but shared the concern expressed by some delegations about the wording of paragraph 3. He could not support the amendment submitted by France and Switzerland, which eliminated the

distinction made by the International Law Commission between the general case covered by paragraph 1 and a separation of States taking place in circumstances similar to those existing in the case of formation of a newly independent State. The amendment proposed by the Federal Republic of Germany was also unacceptable to his delegation, which saw no reason to make a distinction between bilateral and multilateral treaties. Lastly, his delegation considered that the Pakistan amendment could be regarded as a drafting suggestion.

24. Mr. DOGAN (Turkey), recounting Turkey's experience in the matter of the separation of States, said he would take first of all the case of Serbia, which had been granted independence in 1878. Serbia was to have emerged into the international community by the application of the "clean slate" principle, except for the capitulary obligations contracted by the Ottoman empire towards European States. In practice, however, Serbia had rendered the performance of those obligations completely inoperative. At the Congress of Berlin, Chancellor Bismarck, the President of the Congress, had made it clear that, in his view, in case of secession, one of the principles of public international law was that a part of a territory could not evade the obligations of the predecessor State in the event of its accession to independence. The Turkish delegation, however, did not share that view and believed in the existence of a new international society.

25. The case of Ireland and Turkey also reflected the consensus of the international community with regard to the consequences which might ensue from the accession to independence of a new State. Indeed, just as Ireland had done with the United Kingdom, Turkey had categorically refused to be cound by the treaties of the Ottoman Empire and the Treaty of Lausanne[2] contained provisions to that effect.

26. It was that spirit which had inspired and even accelerated the decolonization process. How then could States which had achieved independence after many years of struggle be refused the benefit of the "clean slate" rule? Whether a State achieved independence as a result of decolonization or by any other means, it was guided by the wish to live in independence.

27. Furthermore the Turkish delegation could not support the arguments put forward by the representative of Hungary, for whom the distinction between decolonization and the other means of achieving independence lay in the fact that the decolonized countries had not participated in the preparation of the treaties of the predecessor State. But the Greeks had not participated in the preparation of the treaties concluded by the Ottoman Empire, any more than Serbia, Ireland, Romania, Montenegro, and Bulgaria had participated in the preparation of the treaties concluded by their predecessor States. The Turkish delegation did not see why a State which became independent by separating from another State should not be subject to the same legal régime as a State which emerged as a result of decolonization.

28. The Turkish delegation therefore considered that paragraphs 1 and 2 of the draft article under consideration should be retained as they stood, and that paragraph 3 should be reconsidered in the light of the amendment by France and Switzerland.

29. He supported the proposal by the representative of Austria to put the article to the vote paragraph by paragraph.

30. Mr. FARAHAT (Qatar) said that the basic formulation of article 33 by the International Law Commission was reasonable and well balanced and could be retained. It established the rule of *ipso jure* continuity, thereby contributing to the stability of international treaty relations, and made a distinction between the "clean slate" principle applicable to newly independent States and the principle of continuity applicable to successor States emerging as a result of separation. He could not support the amendment by France and Switzerland which put newly independent States into the same category as those which had become independent as a result of separation. Nor could he support the amendment by the Federal Republic of Germany for, in his opinion, multilateral treaties were as important as bilateral treaties. The Pakistan amendment embodied a very useful idea but it was already covered in the International Law Commission's formulation. However, his delegation had no objection to its being considered by the Drafting Committee.

31. Mr. CASTRÉN (Finland) said that his delegation was prepared to support article 33 as drafted by the International Law Commission, although it was not completely satisfactory, since it dealt with the dissolution of a State and the separation of parts of the territory of a State in the same way; paragraphs 2 and 3 fortunately contained several reservations which slightly modified the tone of the draft article. His delegation could not, therefore, agree to the deletion of paragraph 3, nor could it accept the other amendments, which though they had some merit, also had a number of drawbacks.

32. Mr. SCOTLAND (Guyana) said that in article 33 the International Law Commission had had two cases in mind, which were different from the cases covered by article 14; namely, the case of succession resulting from the separation of one or more parts of the territory of a State, where the predecessor State continued to exist, and succession resulting from the dissolution or disappearance of a State. The International Law Commission had rightly provided in paragraph 1 (*a*) that new States emerging as a result of a separation of territory should assume the obligations contracted by the predecessor State and applicable to their respective territory before the separation. On the other hand, it was assumed, *ex contrario*, in paragraph 1 (*b*) that the parts of the territory of a State which separated from it to form one or more independent States might be free of certain treaty obligations contracted by that State if they were applicable solely to the part of the territory which had

[2] Treaty of Peace signed at Lausanne July 24, 1923 *League of Nations. Treaty Series, vol. XXVIII*, p. 11.

not separated. It would seem logical for the predecessor State, which continued to exist after separation of part of its territory, to continue to discharge its treaty obligations, in so far as they were not rendered impossible of performance, as provided for in articles 61 and 62 of the Vienna Convention on the Law of Treaties. It was not only the existence of treaty obligations between the predecessor State and third States which determined the obligations to be inherited by the successor State, but also the fact that the obligations under that treaty fell to be discharged by the predecessor State in respect of the particular part of its territory which had acceded to independence. The delegation of Guyana considered that the way in which the principle *pacta sunt servanda* was expressed in paragraph 1 of the International Law Commission's text was satisfactory.

33. As to paragraph 2, his delegation endorsed the principle of consent stated in subparagraph (*a*), which offered an alternative to the rule in paragraph 1; on the other hand it was not altogether certain of the validity of subparagraph (*b*). That provision was similar to that employed in the case of newly independent States. But, given the diversity of political evolution, social outlook and oft-times the absence of geographical contiguity of many former colonies to the predecessor State, the provision appeared justifiable in that instance. In the case of the separation of a part of a territory, which from the examples given in the International Law Commission's commentary referred largely to separation of a part physically united to the whole territory of the predecessor State, the situation was different. His delegation had sought without success to find an example which would show that subparagraph (*a*) would not meet a new situation resulting from the emergence as a new State of the part of the territory to which a treaty had sole application. That subparagraph had the advantage of placing both categories of States—the successor State or States and third States parties to the treaty—on an equal footing. While he did not wish to submit a formal amendment, he wondered whether subparagraph (*a*) would not be sufficient to cover all the cases that might arise and whether the point should not be given further consideration.

34. Paragraph 3 of article 33 referred to the case in which a part of the territory of a State separated from it and became a new State in circumstances different from those covered by paragraph 1, and having essentially the same characteristics as those contemplated in part III of the draft. Those circumstances had not been described or defined in the draft, and the International Law Commission merely said that the provisions of part III would apply in such a case. It was, in fact, impossible to define such circumstances, for there were territories which were still in a classical colonial situation and did not have the faculty to make treaties or to participate in the treaty-making process; and there were others which were not colonies and had no separate international personality, but which nevertheless had the faculty to participate in the treaty-making process and to which a treaty could not be applied without their consent. The circumstances in which those territories acceded to independence were purely hypothetical, and in the absence of objective legal criteria for determining the existence of circumstances which could place a successor State in the category covered by part III of the draft, he did not see how the possibility of recourse to procedures for the settlement of disputes, other than the procedure of negotiation employed by States in the exercise of their sovereignty, could be of any assistance in the case covered by paragraph 3. The answer to the question whether a State had been formed "in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State" might well be decisive for the future existence of that State, and his delegation did not think that any new State would voluntarily submit such a question to arbitration by third parties. Whereas all States would assert the right to declare their own status, the procedure for settlement of disputes suggested by some delegations in connexion with article 33, paragraph 3, appeared to presume different conduct on the part of the new State. The circumstances in which States coming under part III of the draft emerged were very diverse, and it could not have been the intention of the authors of paragraph 3 that only some of those circumstances should be taken into account in deciding whether a successor State fell into the category of newly independent States or not. His delegation therefore considered that the apparent ambiguity of article 33, paragraph 3, was the best formula that the Commission could devise, given the variety of circumstances in which a part of the territory of a State could become a new State.

35. The effect of the amendment proposed by France and Switzerland was to disregard the situation of the territory before its accession to independence and to accord the same treatment, at the international level, to territories which had had different faculties with regard to treaty-making. His delegation favoured equal treatment for true equals, but where as in the present case there existed inequality among the territories in question, that inequality militated against the granting of equal treatment. It considered, moreover, that the principle of consent was the central point of the treatment accorded to newly independent States in part III of the draft, and that the introduction of a different principle, such as that contained in the amendment proposed by France and Switzerland, would weaken that part of the draft and diminish its coherence. His delegation was willing, however, to consider the definition of the expression "newly independent State" proposed by France and Switzerland to see whether the notion of replacement "in the exercise of competence for international relations" could not improve the text of article 2, paragraph 1 (*f*). In that connexion he reminded the Committee that in the statement made by his delegation on article 2, at the 1977 session, his delegation had said that it might be more appropriate to refer to "a replacement in the exercise of competence for the international relations of the territory concerned".[3]

[3] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. I. *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8) p. 43, 5th meeting, para. 35.

36. He shared the view of the Federal Republic of Germany that bilateral treaties were important and should be maintained, but he thought the same applied to all treaties and that the same importance should be attached to all of them, as was done in part IV of the draft. He considered that paragraph 2 (*a*) of article 33 already took account of the principle of consent, on which the maintenance of a bilateral treaty was based, and that paragraph 2 (*b*) took account of all contingencies. Hence he was not convinced of the need for the amendment proposed by the Federal Republic of Germany and was not prepared to support it.

37. The amendment submitted by Pakistan emphasized in his delegation's view the difference between the case of separation of parts of a State, referred to in article 33, and the case of newly independent States dealt with in part III of the draft. But he did not think that it could ensure that the successor State would respect treaty obligations more strictly than in the context of normal treaty practice. Consequently, he would not support that amendment either.

38. Mr. ABOU-ALI (Egypt) supported paragraphs 1 and 2 of article 33 as submitted by the International Law Commission, which emphasized the principle of continuity. Paragraph 1 stressed the continuity of treaty relations in regard to the territory to which the treaty applied. He did not understand the reason for the amendment by France and Switzerland which deleted subparagraph (*a*) of paragraph 1 while retaining subparagraph (*b*), since the purpose of those two subparagraphs was, precisely, to establish a link between the principle of continuity and the territorial scope of a treaty. In his opinion it was essential to retain paragraph 1 (*a*), which took account of the idea expressed in the Pakistan amendment.

39. Paragraph 3 departed from the principle of continuity by introducing a more flexible but ambiguous provision, which could give rise to different interpretations and cause conflicts. He was therefore in favour of deleting it, as proposed by the representatives of France and Switzerland. He could not support the amendment submitted by the Federal Republic of Germany, because the Vienna Convention on the Law of Treaties made no distinction between bilateral and multilateral treaties, and he saw no reason to do so in the present Convention.

40. Mr. KOROMA (Sierra Leone) said that the newly independent African States were in favour of maintaining an equitable international legal order, but they found unacceptable the continuation of treaties which had been imposed on them and were incompatible with their national interests. They were also determined to maintain their unity and their territorial integrity.

41. In his opinion, the process of decolonization could not be equated to the process of separation of States which were already independent. Those were two quite different processes and to equate them would be to deny the success of decolonization. His delegation therefore supported article 33.

42. The amendment proposed by France and Switzerland was, in his opinion, an attempt to resuscitate the theory of competence for international relations, which had recently been rejected by the International Court of Justice. But the colonial situation could not be reduced to a mere exercise of competence. Consequently, he could not accept the definition of the expression "newly independent State" proposed by France and Switzerland in their amendment to article 2, paragraph 1 (*f*).

43. With regard to article 33, paragraph 3, he could not agree that the circumstances referred to in that paragraph could be assimilated to those existing in the case of formation of a newly independent State, for to support that thesis would be to degrade the process of decolonization. He therefore considered that paragraph 3 required further consideration.

44. Mr. RITTER (Switzerland) observed that, while recognizing the undeniable logic of the proposal put forward by France and Switzerland, several of the delegations which had opposed it had emphasized the essential difference which existed, in their opinion, between newly independent States, as defined in the draft, and other new States. They had criticized the amendment submitted by France and Switzerland on the ground that it reduced the scope of the important historical event of decolonization by placing the situation of a decolonized State on the same legal footing as that of any other new State. He was well aware of the considerable importance of the process of decolonization, but the future Convention would not apply to existing newly independent States, only to States which became independent in the future. The object of the Conference was not, indeed, to codify completed decolonization. While some decolonization remained to be accomplished, there was no denying that the greater part of it was done, and that the cases of separation which would occur in future would follow a pattern which was at present impossible to foresee. It was therefore necessary to seek a legal criterion by which to distinguish one situation from the other, since the historical fact of decolonization was not a criterion in itself, and reference to the past could not constitute a criterion for the future.

45. The criterion which had been proposed for distinguishing between the two categories of new States was that of participation in the management of affairs, in particular foreign policy, which was supposed to have been permitted to peoples which separated from a State, but not to colonial populations. He himself was surprised that it could be maintained that non-colonial peoples which separated from a State had participated in the conduct of that State's foreign policy. As the representative of Turkey had very rightly observed, citing examples from the history of his own country, it was impossible to claim, for example, that the Greeks had participated in the conduct of the foreign policy of the Ottoman Empire. It was equally impossible to claim that the Poles, up to 1918, had taken part in the deciding of foreign policy of the Russian Empire. In any case, he thought it was impossible to reply for those people and even more difficult to answer for the future. For how could it be known whether peoples which

separated from a State in the future under conditions impossible to foresee, would have had the right to participate in conducting the foreign affairs of that State? In any event, one thing was certain: whatever their real situation had been, those peoples would claim, rightly or wrongly, that they had not had the right of participation, in order to justify their separatist movement. To base the convention on such a criterion would thus certainly give rise to disputes, for if two categories of new States were distinguished, it could be foreseen that the States which fell into the second category would claim to be in the first.

46. Some delegations had criticized the co-sponsors of the amendment, submitted by France and Switzerland, for down-grading the principle of decolonization by making it into a political maxim. There was nothing pejorative about the expression "political maxim" however, since political principles were the motive force of history. Those principles, which had been unknown a century ago, had subsequently been supported by an advanced minority and finally accepted by everyone. The principle of self-determination had changed the face of the world in 30 years, whereas legal principles, such as *pacta sunt servanda* and *res inter alios acta*, had changed absolutely nothing.

47. The delegations of France and Switzerland had sought to remedy a paradoxical situation which consisted in attaching the "clean slate" principle to the principle of self-determination and then confining its exercise to a single category of new States. It was because they wished the "clean slate" rule to be applied without discrimination that the authors of the amendment had looked for a legal, rather than a political basis. There was indeed another principle which was no less respected than that of self-determination; the principle of equality of States; and it was that principle which should govern the codification of succession of States in respect of treaties.

48. It was true that a political principle became a legal principle when it was no longer contested by anyone, and that was what had happened to the principle of self-determination. But the best means of proving that it had become a real legal principle, was to apply it to all States without discrimination, whereas those who opposed the amendment submitted by France and Switzerland, both proclaimed the legal nature of the principle and restricted its application to only one class of new States.

49. There was one point on which the delegations of France and Switzerland appreciated the criticisms addressed to them, because those criticisms coincided with the doubts they had felt themselves when formulating their proposal: that point related to unions of States. They would have preferred, indeed, to distinguish between the case of dissolution of a union of States and other cases of separation. But they had been unable to do better than the International Law Commission itself, which, as indicated in its commentary, had found it impossible to deal with cases of unions of States because of their diversity. If it was nevertheless possible to complete their amendment with a proposal which gave satisfaction on that point, the co-authors would be the first to rejoice. There was, however, one point which should give satisfaction to those who shared their concern, namely, that article 33 applied to the separation of parts of a single State. Consequently, as soon as an examination of the political or constitutional situation showed that the dissolved entity had been in fact made up of a number of States, the article would not apply and each State which separated would retain the treaties it had concluded. That situation corresponded to the one noted by the International Law Commission in paragraph 3 of its commentary to articles 33 and 34 (A/CONF.80/4, p. 100), in the case of the separation of Norway and Sweden, which appeared to have been recognized as having separate international personalities during their union. It was indeed obvious that, if two or more States separated, each one retained the commitments into which it had entered.

50. Apart from a minority of States, most of the States of the international community—whether European, Latin American or African—had at one time or another separated from another State and benefited from the "clean slate" rule. But the international community, nearly all the members of which had enjoyed the faculty, now wished to deny it to new States in the future. In the statement he had made at the 41st meeting, the representative of the United States had tried to justify that position by invoking the stability of international relations. But those who supported that position seemed to be attempting to bind certain new States against their will and against their interests. For the stability of treaty relations was already sufficiently safeguarded by the free play of the consent of States. The proof of that could be seen in the fact that all the international treaties, without exception, which Switzerland had concluded with France and the United Kingdom, and which those two Powers had applied to colonial territories, had been maintained in force after decolonization by free agreement between the newly independent States and Switzerland, because there was a common interest. In his view, that example clearly showed that the Conference could rely on the wisdom of States, which knew where their interests lay. If it was not satisfied with the consent of States and was trying to impose on them a solution prescribed in advance, that was because there was a desire in some quarters to bind States against their interests and against their will. Moreover, that procedure was doubly ineffective; it was legally ineffective because new States, not being parties to the Convention, would not be bound by such a provision; and it was politically ineffective because even if some means were found to bind States against their will, they would rebel against any such attempt.

51. The cause defended by France and Switzerland was that of the independence, sovereignty and equality of States. They were in favour of international obligations based on the consent of States, but against international obligations imposed on States from outside by international instruments in which they did not participate.

52. Mr. KASASA-MUTATI (Zaire) said he wished to make a few comments on article 33 while awaiting a reply from the Expert Consultant to the question he had put at the 41st meeting. In his opinion, the reason why the

International Law Commission had proposed paragraph 3 of article 33 was that it had wished to provide for every possible situation that might arise out of a separation of States, in order to prevent the occurrence of what the representative of Brazil had called a "legal vaccum". As the plenipotentiary representatives of Governments, participants in the Conference were reluctant to endorse a principle that might be taken to mean that any population group could separate from a State, which would create a difficult situation, particularly in the case of newly independent States. He therefore proposed that the Committee of the Whole should refer article 33 to the Drafting Committee and defer a decision on paragraph 3 of that article until the meaning of the words "circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State" had been clarified and a definition of the expression "newly independent State" had been adopted in article 2, paragraph 1 (*f*). He asked that if the Commission decided to vote on article 33 each paragraph should be put to the vote separately.

53. Mr. BRECKENRIDGE (Sri Lanka) said that although, in paragraph 25 of its commentary to articles 33 and 34 (A/CONF.80/4, p. 105) cited by the United Kingdom representative at the 41st meeting, the International Law Commission had concluded that the principle of continuity should be applied equally to cases of separation and cases of dissolution, it was clear from the analysis of State practice in paragraphs 26 and 27 of the commentary (*ibid.*, p. 105) that there was a fundamental difference between the two cases, and that in the case of separation the successor State generally tried to secure application of the "clean slate" principle. Moreover, that was what had led the International Law Commission to propose paragraph 3 of article 33. Although its intention had been good, that paragraph nevertheless raised difficulties, as the representative of Brazil, himself a member of the International Law Commission, had acknowledged.

54. The representative of Switzerland wished to place on the same footing the formation of a newly independent State, which was connected with the process of decolonization, and the emergence of a new State as a result of a separation. The delegation of Sri Lanka considered that those two situations were fundamentally different and could not be assimilated to one another. But it was not by revising the definition of a newly independent State, as proposed by France and Switzerland, that the problem could be solved. Although it was true that the Conference had to carry out codification and progressive development of international law, as the representative of Switzerland had said, it would nevertheless have been logical to examine and regulate the problem of States which seceded by virtue of the principle of self-determination in the context of part III of the draft, which dealt with newly independent States. It was not in the context of article 33, which dealt with quite other matters, that self-determination and territorial integrity should be discussed. The Committee had not enough time left to go into the substance of the question; but it had to take a decision. To refer the article to the Drafting Committee, as the representative of Zaire had suggested, would only add to the confusion. Besides, the amendment submitted by Pakistan could not be treated as a mere drafting amendment. The best course would be for the Committee to suspend consideration of article 33 for the time being, since a vote at that stage would be pointless. He therefore formally proposed that a decision on article 33 should be deferred.

55. Mr. SCOTLAND (Guyana) referring to the statement by the representative of Switzerland that the Convention would not apply to already independent States, said that that question was not yet settled: article 7 (Non-retroactivity of the present articles) was still under consideration.

56. Mr. DIENG (Senegal) said he wished to reply to the Swiss representative, who had stated that a political principle became a legal principle when it was no longer contested. In his view the principle of self-determination which was no longer contested had become a legal principle, and even a peremptory norm of general international law within the meaning of article 53 of the Vienna Convention on the Law of Treaties.

57. Sir Ian SINCLAIR (United Kingdom) said he would be grateful if the representative of Sri Lanka would clarify the proposal he had just made: was he proposing that the Committee should defer its decision on article 33 and on the various amendments proposed or that it should vote on the amendments, while reserving its decision on article 33?

58. Mr. BRECKENRIDGE (Sri Lanka) said he saw no objection to voting on the amendments at once, if the Committee so desired.

59. Mr. RYBAKOV (Union of Soviet Socialist Republics) said he thought it would be logical and in conformity with established practice if the Committee deferred its decision not only on article 33, but also on the proposed amendments thereto. He proposed that the Committee should suspend consideration of article 33 and take up article 34.

60. Mr. YANGO (Philippines) supported that proposal.

61. Mr. KRISHNADASAN (Swaziland) said that since the expert consultant was due to arrive shortly, it would be preferable for the Committee to wait for him before continuing its examination of article 33.

62. The CHAIRMAN proposed that the Committee should suspend consideration of article 33 and take up article 34.

It was so agreed.[4]

[4] For resumption of the discussion of article 33, see 47th meeting, paras. 32 *et seq.*

ARTICLE 34 (Position if a State continues after separation of part of its territory)[5] (*concluded*)

63. Mr. RYBAKOV (Union of Soviet Socialist Republics) observed that France and Switzerland had proposed, in paragraph 3 of their amendment to articles 2, 33 and 34 (A/CONF.80/C.1/L.41/Rev.1) that the article should be renumbered, which meant placing it in part III of the draft. That proposal was based on the idea that a colony was part of the metropolitan territory—an idea which was not accepted by all countries and was contested by the socialist countries, in particular.

64. That idea also appeared in paragraph 3 of article 33, which was one of the reasons why his delegation doubted the utility of that paragraph.

65. Consequently, the delegation of the Soviet Union could not support the amendment proposed by France and Switzerland.

66. Sir Ian SINCLAIR (United Kingdom) suggested that the Committee should refer article 34 to the Drafting Committee with the amendment submitted by France and Switzerland. The Drafting Committee should examine, in particular, the words "unless: (*a*) it is otherwise agreed" (subparagraph (*a*) of article 34), the meaning of which was clear in the case of bilateral treaties, but not so clear in the case of multilateral treaties.

67. Mr. RYBAKOV (Union of Soviet Socialist Republics) said he had no objection to the Committee of the Whole approving article 34 and referring it to the Drafting Committee, provided it was understood that the amendment submitted by France and Switzerland was attached only for reference.

68. The CHAIRMAN proposed that article 34 should be referred to the Drafting Committee and that consideration of the proposed amendment to that article should be deferred until a decision had been taken on article 33.

It was so agreed.[6]

The meeting rose at 12.55 p.m.

[5] The following amendment was submitted: France and Switzerland, A/CONF.80/C.1/L.41/Rev.1.

[6] For resumption of the discussion of article 34, see 53rd meeting, paras. 20-21.

43rd MEETING

Thursday, 3 August 1978, at 3.30 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 35 (Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State)[1]

1. The CHAIRMAN invited the Committee to examine article 35 and the amendment to that article which had been submitted by the delegation of Finland in document A/CONF.80/C.1/L.39.

2. Mr. HALTTUNEN (Finland) said that the amendment proposed by his delegation was to be seen as a drafting suggestion. It was aimed essentially at simplifying the text of article 35 as proposed by the International Law Commission, by replacing the first three paragraphs of that text by a reference to the corresponding paragraphs of article 17, which contained similar provisions.

3. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed that the Finnish proposal should be referred to the Drafting Committee as a drafting amendment.

It was so agreed.

4. The CHAIRMAN said that, if there was no objection, he would take it that the Committee provisionally adopted the text of article 35 as proposed by the International Law Commission and referred it to the Drafting Committee for consideration.

It was so agreed.[2]

ARTICLE 36 (Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval)[3]

5. The CHAIRMAN reminded the Committee that the amendment which had been proposed to the article by the delegations of Swaziland and Sweden in document A/CONF.80/C.1/L.23 had been withdrawn.

6. Mr. KRISHNADASAN (Swaziland), speaking on behalf of his own delegation and that of Sweden, requested that the text of article 36 as proposed by the International Law Commission be put to the vote.

Article 36, as proposed by the International Law Commission, was provisionally adopted by 60 votes to 3, with 12 abstentions, and referred to the Drafting Committee.[4]

7. Mr. JOMARD (Iraq) asked whether the Drafting Committee would be able to take into consideration the

[1] The following amendment was submitted: Finland, A/CONF.80/C.1/L.39.

[2] For resumption of the discussion of article 35, see 53rd meeting, paras. 22-23.

[3] The following amendment was submitted: Swaziland and Sweden, A/CONF.80/C.1/L.23. Withdrawn; see 40th meeting, para. 21.

[4] For resumption of the discussion of article 36, see 53rd meeting, paras. 24-25.