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54th Meeting of the Committee of the Whole

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with other signatory States which had not ratified the Convention to be subject to its provisions? It appeared from the present text of the article that such a State could not benefit from the provisional application of the Convention.

48. Speaking as the representative of the United Arab Emirates, he said that the Committee of the Whole should examine and clarify the question. It would seem undesirable to formulate the paragraph in such a way that it operated only for one year.

49. Mr. MAIGA (Mali), said that, according to the opening sentence of paragraph 2, a successor State might make a declaration "at the time of expressing its consent to be bound by the present Convention or at any time thereafter". The second sentence began with the phrase "Upon the entry into force of the Convention ..."; he would like to ask the Chairman of the Drafting Committee to explain the scope of the paragraph, which his delegation had difficulty in interpreting. His misgivings about paragraph 3 had been increased by the United Kingdom amendment. In general terms, it was possible to have a separate paragraph regulating the provisional application of the Convention. However, he had difficulty in supporting a paragraph which laid down that provisional application was available for one year but that it could not be applied in respect of another signatory State unless the latter had ratified the Convention. The Drafting Committee had done its best but it was for the Committee of the Whole to state clearly exactly what its wishes were in the matter.

50. The CHAIRMAN suggested that further discussion of article 7 be deferred and that States with a particular interest in the article should consult informally among themselves.

51. The Drafting Committee had not yet taken a decision with regard to the division of the Convention into parts and the titles of those parts. He suggested that the Drafting Committee be requested to submit its recommendations to the Committee of the Whole.

It was so agreed.[33]

The meeting rose at 1.10 p.m.

[33] For resumption of the discussion, see 56th meeting, paras. 1-15.

54th MEETING

Friday, 18 August 1978, at 11.35 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*)

SECOND REPORT OF THE INFORMAL CONSULTATIONS GROUP (A/CONF.80/C.1/L.62)[1]

Articles 12 and 12 bis

Draft resolution concerning article 30

1. Mr. RITTER (Switzerland), Chairman of the Informal Consultations Group, said that the Group's second report (A/CONF.80/C.1/L.62) contained a proposed additional paragraph 3 to article 12 and a proposed new article 12 *bis*. Although those two provisions were submitted in the order in which they should appear in the convention, the Group had in fact approved the text of the proposed new article 12 *bis* before considering the proposed paragraph 3 to article 12. As stated in paragraph 5 of the report, the Group wished to emphasize the link between the proposed new article 12 *bis* and article 12.

2. There was one small drafting point: the Spanish-speaking members of the Group had pointed out that, in the Spanish version of the proposed paragraph 3 of article 12, the words *"obligaciones convencionales"* were not a correct rendering of the term "treaty obligations" and should be replaced by *"obligaciones derivadas de tratados"*.

3. Lastly, the report also contained a proposed draft resolution concerning article 30, for consideration by the Committee.

4. Mr. MONCAYO (Argentina) said that the Informal Consultations Group had rightly emphasized the link between article 12 of the International Law Commission's draft and the proposed new article 12 *bis*, which established the pre-eminence of the "principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources". Only by establishing a direct relationship between the two rules, which together formed a coherent whole, would the new provision acquire its full significance and would the extent of its object and purpose so far as succession of States in respect of treaties was concerned be completely understood.

5. Before analysing the content of the new provision, it was first necessary to consider the nature of article 12 as proposed by the International Law Commission. There was no doubt that it presented the Conference with one of its most complex problems. Indeed, at the 20th meeting of the Committee, held on 20 April 1977, the Expert Consultant had himself pointed out that, from the point of view of drafting and purport, article 12 was the most difficult of all those drafted by the International Law Commission.[2] The Italian representative, for his part, had deemed it to be the most important article in the draft, yet at the same time one of the most ambiguous and had even referred to it as something of a nightmare.[3] Many other delegations had

[1] See 50th meeting, foot-note 1.

[2] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. I, *Summary records of the plenary meetings and the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.78.V.8), p. 140, 20th meeting, para. 34.

[3] *Ibid.*, p. 142, 21st meeting, paras. 14-15.

expressed their concern at a text which embodied such vague concepts.

6. In the face of an article of such complexity and importance, it was only right that a conference engaged in the work of codification should first ask itself whether article 12 codified an international custom, or whether it established a new rule for the progressive development of international law. The answer was difficult, and that difficulty stemmed from the broad-ranging nature of the article itself.

7. The International Law Commission, in its commentary to article 11 (A/CONF.80/4, pp. 37 *et seq.*), had not hesitated to affirm that a boundary treaty was not affected by a succession of States. That view was supported by an impressive body of evidence, based on State practice and legal doctrine, and had been further strengthened and confirmed by the decision of the United Nations Conference on the Law of Treaties to exclude boundary treaties from the rule relating to fundamental change of circumstances. Article 11 restated the principle laid down in the Vienna Convention on the Law of Treaties which guaranteed the sanctity of treaties that established a boundary or boundary régime. That was only right and necessary. Article 11 embodied a recognized rule, based on accepted custom, which had been codified in a convention and which had a specific material content.

8. But what was neither right nor necessary was to vest with the same character of sanctity indiscriminately, all the other territorial régimes covered by article 12, where it spoke of the "use of any territory" and "restrictions upon its use", without further qualification. In his delegation's view, there was no customary rule, based on practice and recognized as mandatory, which imposed respect for all obligations and rights arising under a treaty relating to the use or restrictions upon the use of any territory and which was thus so-called embracing in character as to make of article 12 a hermetically-sealed provision allowing for no exception or attenuation whatsoever.

9. The International Law Commission's commentary to article 12 (*ibid.*) only served to confirm his delegation in its view. Nothing therein suggested that any practice existed which extended to all possible uses or restrictions upon the use of a territory for the benefit of a foreign territory or of a group of States established by treaty; nor that the practices described were sufficiently general and constant; nor, again, that they had been uniformly and spontaneously agreed. That the International Law Commission was itself aware of those facts was apparent from the observation in paragraph 35 of its commentary to articles 11 and 12 that: "Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties" (*ibid.*, p. 46). The International Law Commission had further noted that, in the case of territorial treaties, those covered by article 12, "not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the allegedly limited competence of the predecessor State" (*ibid.*), elements which did not affect boundary treaties.

10. From those facts, therefore, the first conclusion to be drawn was that treaties covered by article 11 were not to be placed on the same footing as treaties covered by article 12. There was thus no justification for the absolute rule laid down in article 12 which sought to regulate in the same manner as article 11 a different type of situation. Article 11, unlike article 12, translated custom into a treaty. There were, of course, certain territorial régimes which did give rise to special situations affecting the successor State. He had in mind, for example, such rights, established by treaty, as rights of passage, rights relating to free zones and rights relating to freedom of communication. The evidence did not however suggest—and he would again refer to the International Law Commission's commentary to article 12—that that "category of treaties should embrace a very wide range of so-called territorial treaties" (*ibid.*).

11. His delegation could see no valid reason for laying down a general rule on the basis of a few limited cases. Indeed, it would resist a rule that was lacking in precision and that introduced assumptions unsupported by a sound body of practice. It was for that reason that it considered it necessary to draw attention to those cases which did not fall strictly within the terms of such a rule and which, as the result of an erroneous interpretation arising out of the unduly general nature of its formulation, might otherwise be deemed so to do. That had been the purpose of the Argentine sub-amendment (A/CONF.80/C.1/L.27) to a Mexican amendment (A/CONF.80/C.1/L.19) to article 12 in providing that that article should not apply to treaties which impeded "the full exercise by the successor State of its sovereignty over the natural wealth and resources of its own territory". There was no doubt that treaties relating to the establishment of military bases in the territory of the successor State, as well as treaties inhibiting the exploitation of its natural resources, fell outside the terms of article 12, since they lacked the truly objective territorial nature of localized treaties which the rule embraced. The United Kingdom representative,[4] and the Expert Consultant,[5] had taken the view that the Mexican amendment and the Argentine sub-amendment thereto served no useful purpose, since, in their opinion, they bore no relationship to article 12. But his delegation none the less considered that the article must set out clearly what was implicit, so as to leave no room for doubt.

12. The aim of his delegation was to ensure that, between the basic "clean slate" principle, as laid down in articles 14 and 15, and the specific exception provided for in article 11, nothing of a general and ambiguous nature was imported which would create uncertainty and open the way for important derogations from the general principle. Any such uncertainty was in large measure dispelled by the terms of the proposed article 12 *bis*.

13. Neither article 12 nor any other article in the draft affected the right of the successor State to permanent sovereignty over its natural wealth and resources. That right

[4] *Ibid.*, p. 137, 20th meeting, para. 17.

[5] *Ibid.*, p. 140, 20th meeting, paras. 36-37.

had been recognized as a principle of international law in many resolutions of the United Nations General Assembly, including resolutions 1803 (XVII) and 3281 (XXIX). They affirmed the right of each State to exercise full and permanent sovereignty over its natural wealth and resources, which embraced the right to possess, use and dispose of such wealth and resources. They reflected the convictions of the whole international community; they answered a need; and they expressed an *opinio juris* which, supported by subsequent practice, had since gained the standing of a positive rule of international law.

14. The restatement in the draft of the principle of the permanent sovereignty of every State over its natural wealth and resources made it clear that the "clean slate" principle laid down in articles 14 and 15 must cover all treaties concluded by the predecessor State which related to the exploitation of the natural resources of the successor State. No treaty which compromised the natural wealth of a successor State could be imposed on that State against its will. The same basic principles applied as those underlying the "clean slate" rule—the right to self-determination and to independence and the need to guarantee that the rule of *res inter alios acta* prevailed—but those principles were further strengthened by the positive affirmation of the principle of the permanent sovereignty of every State over its natural wealth and resources.

15. With the inclusion of the proposed new article 12 *bis*, which would perfect the International Law Commission's draft, the Conference would have gone beyond the confines of the convention itself and taken a positive step forward in the promotion of the progressive development of international law.

16. For those reasons, his delegation supported the proposals submitted by the Informal Consultations Group in its second report.

17. Mr. de OLIVEIRA (Angola) said that his delegation entertained certain doubts about the proposed draft resolution concerning article 30. Those doubts arose not from any objection regarding the competence of the Conference to deal with such a matter; but solely from the view, based on a consideration of the content and purpose of the draft resolution, that it would serve no useful purpose.

18. With regard to article 12, his delegation was unable to agree with the contention that the question of military bases was entirely alien to the economy of the draft. It was therefore gratified to note that the Conference had been able to settle that question in express and unambiguous terms. It took the same view in regard to the provision for safeguarding the principle of international law relating to the permanent sovereignty of every people and every State over its natural wealth and resources.

19. The adoption of the provisions proposed by the Informal Consultations Group would make it quite clear that no undertakings in perpetuity could be given so far as military bases and the exploitation of the natural wealth and resources of peoples were concerned. The importance of those provisions, which derived from the *jus cogens* principle of the right of peoples to self-determination, was self-evident.

20. For those reasons, his delegation wholeheartedly supported both the proposed addition of a new paragraph 3 to article 12 and the proposed new article 12 *bis*, which together marked a step forward in the progressive development of international law.

21. Mr. NAKAGAWA (Japan) said that his delegation would have no difficulty in accepting the proposal relating to article 12, which was an improvement on the original text, and also the proposed draft resolution concerning article 30.

22. With regard to the proposed new article 12 *bis*, while his delegation agreed that the basic principle of the permanent sovereignty of every State over its natural wealth and resources, as laid down in resolution 1803 (XVII) of the United Nations General Assembly, was generally accepted, it considered that there was a lack of unanimity as to the exact scope of application of that principle. It also had some doubts as to its relevance to the question of succession of States in respect of treaties. In the circumstances, therefore, if a vote were taken on that proposal, his delegation would abstain.

23. Mr. PÉREZ CHIRIBOGA (Venezuela) said that, as his delegation had made clear in the Informal Consultations Group, it considered that the right place for the proposed new article 12 *bis* was immediately following article 12, in view of the essential link between the two provisions.

24. His delegation endorsed the views set forth in paragraphs 43-45 of the International Law Commission's commentary to articles 11 and 12 (A/CONF.80/4, pp. 47-48) and in paragraph 1 of its commentary to article 13 (*ibid.*, p. 48). Articles 11 and 12 in particular, and the convention in general, would be unacceptable in his delegation's view if article 13 were not included. It therefore considered that the inclusion of the proposed new article 12 *bis* would not be interpreted as in any way affecting the International Law Commission's very clear purpose in placing article 13 at the place which it now occupied in the draft.

25. Subject to that understanding, his delegation could support in their entirety the proposals submitted by the Informal Consultations Group.

26. Mrs. BEMA KUMI (Ghana) said that it might be preferable to speak in the proposed article 12 *bis* of the "principle", rather than the "principles", of international law concerning sovereignty over natural resources, in order to emphasize that the reference was to General Assembly resolution 1803 (XVII).

27. Mr. RYBAKOV (Union of Soviet Socialist Republics) said his delegation believed that there had been a general understanding within the Informal Consultations Group during the drafting of the Group's proposals concerning articles 12 and 12 *bis*, that no succession of States would affect the demilitarization of certain areas of territory, such

as Spitzbergen and the Åland Islands, the prohibition of the establishment of military bases on foreign territory, the freedom of navigation on international rivers and canals and in international straits, or international régimes such as that which applied in Antarctica. That being so, his delegation fully supported the proposals in question.

28. Mr. DOGAN (Turkey) said that his delegation fully supported the proposed new paragraph 3 of article 12, which was the most important article in the draft convention both by reason of its form and by reason of its content. Its first and second paragraphs referred not only to legal questions related to objective situations but also to political problems which were particularly evident in peace treaties. The Turkish delegation attached the highest importance to the succession by a State to obligations arising out of peace treaties establishing the demilitarized status of parts of a territory. Demilitarization of the parts transferred to the successor State by the predecessor State, by explicit or implicit agreement, was the condition *sine qua non* for the conclusion of such treaties, which created an objective situation in the general interest of the parts of a region. Whatever change occurred in the exercise of international jurisdiction over those parts and whatever their denomination, the successor State was bound by that situation.

29. The Turkish delegation fully supported the new paragraph 3 of article 12 and also article 12 *bis*. Those changes alone would enable the draft Convention to enter into force and, at some future date, to be applied.

30. Mrs. THAKORE (India) said that the additional paragraph proposed by the Informal Consultations Group for article 12 was fully consistent with the fundamental principles of self-determination and sovereignty. It was abundantly clear that the continuation of treaties providing for the establishment of foreign military bases on what subsequently became the territory of a successor State would be incompatible with the independent status of that State. The proposed paragraph was, therefore, valuable and one to which her delegation could give its full support.

31. It also fully supported the proposed article 12 *bis*. The concept of permanent sovereignty over natural wealth and resources had been fully recognized and affirmed in resolutions of the United Nations General Assembly and international instruments. In the interests of peace and of harmony in international relations, her delegation urged the Committee to adopt both proposals, which would contribute to the progressive development of international law.

32. Mr. SAHOVIĆ (Yugoslavia) said that his delegation, which had already stated its position on the establishment of foreign military bases and the principles of sovereignty over natural resources during the first part of the session, considered the Informal Consultations Group's proposals concerning articles 12 and 12 *bis* to represent a compromise, but a compromise that was reasonable in the light of contemporary international law and the balance of forces within the Conference. Approval of those proposals was essential if the future convention was to have any chance of entering into force. While his delegation would have preferred to see the contents of both proposals incorporated in article 12, it would vote for the provisions in the form in which they had been put before the Committee.

33. His delegation recognized that the application of article 30 might give rise to the kind of dispute to which the draft resolution proposed by the Informal Consultations Group referred, but it was not convinced of the need for a separate provision relating to their settlement. Since it seemed, however, that a majority of the members of the Informal Consultations Group and of the Committee of the Whole felt that such a provision was required, his delegation would not oppose the draft resolution.

34. Mr. OKWONGA (Uganda) said that his delegation was not altogether satisfied with the proposals of the Informal Consultations Group concerning articles 12 and 12 *bis*, but would accept them in a spirit of compromise. Article 12 as currently proposed left his delegation with certain doubts which acceptance of the Argentine amendment to that article would have dispelled.

35. Mr. ZAKI (Sudan) said he agreed with the representative of Argentina that the proposed article 12 *bis* must be read in conjunction with article 12 as proposed by the International Law Commission. The proposed new article did much to alleviate the concern which had led his delegation to favour the deletion of the original text of article 12, or, failing that, the amendment of the text as proposed by the delegations of Mexico and Argentina. His delegation would therefore vote for the proposed new article and, since it believed that the general rule laid down in article 12 should not apply either to foreign military bases or to natural resources within the territory of a successor State, for the proposed addition to article 12 itself.

36. Mr. GRIGORIEV (Ukrainian Soviet Socialist Republic) said that the proposals relating to articles 12 and 12 *bis* contained in the report of the Informal Consultations Group showed the seriousness with which the Conference took the matter of treaties that established special territorial régimes. The proposed addition to article 12 was of great importance and answered the requirements of contemporary international life.

37. There was a logical connexion between that proposal and the proposed new article 12 *bis*, which referred, in wording akin to that employed in recent United Nations resolutions, to what were generally recognized principles of international law. The inclusion of those two proposals in the future Convention would constitute an important step towards the completion of the process of decolonization, and was supported by his delegation.

38. Mr. KASASA-MUTATI (Zaire) said he was concerned that the use in the proposed addition to article 12 of the expression "providing for" seemed to render the paragraph applicable only to treaties relating to military bases that were not in existence at the time of succession. His

delegation believed that no successor State should have to take over any of its predecessor's obligations with respect to foreign military bases, whether existing or planned, and that that point had been covered by the amendment proposed by Argentina to the original article 12.

39. It was also concerned that the draft Convention contained no definition of the term "people", which was used for the first time in the proposed new article 12 *bis*.

40. Mr. MAIGA (Mali) said that his delegation's support for the Informal Consultations Group's proposals in relation to articles 12 and 12 *bis* should be seen in the light of its general belief that it was better to have legal rules which, although imperfect, were likely to be applied, than rules which were perfect but were unlikely to be applied. He hoped that the Drafting Committee would give some thought to the possibility of amending the proposed addition to article 12 so that, like the existing paragraphs of that article, it referred to both obligations and rights.

41. With regard to the proposed draft resolution concerning article 30, he wished to make it clear that the Informal Consultations Group had not reached a consensus on the text of the draft resolution, but had merely agreed to bring its existence to the attention of the Committee of the Whole. There had, in fact, been formal expressions of opposition to the draft resolution within the Group, and his own delegation remained convinced that the text as it stood would add nothing to the future convention. The draft resolution referred only to disputes that arose from a uniting of States and did no more than state that it would be "desirable" to settle such disputes through negotiation, whereas his own delegation considered that the procedure for the settlement of disputes which the Committee of the Whole had already adopted should automatically apply whenever any form of succession resulted in the incompatibility of treaty régimes.

42. Mr. GIL MASSA (Mexico) said that his delegation fully supported the new paragraph 3 of article 12 proposed by the Informal Consultations Group and the emphasis laid on the link between article 12 and the proposed new article 12 *bis*. Clearly the successor State should be given the opportunity not to accept obligations contracted by the predecessor State, such as those arising out of the establishment of foreign military bases. There should be no limitation on the permanent sovereignty of every people and every State over its natural wealth and resources. Commitments might be given to other countries, and that was admissible when they were given for normal purposes of trade, development or co-operation, but not when they were for the establishment of military bases or when they involved a limitation of the permanent sovereignty of peoples over their natural wealth and resources. Military bases, whether for the benefit of the predecessor State, or of third States, represented a permanent threat of the use of force and violence and constituted an element of intimidation. It was fundamental that restrictions of that kind of the free use of territory should not be transmitted to the successor State, since they imperilled its stability and the existence of good neighbourly relations, which were essential to the maintenance of the basic principles of the self-determination and independence of peoples.

43. As far as the resolution concerning article 30 was concerned, his delegation fully supported it since it was quite clear that the principle to be upheld in a convention of the kind they were preparing was that, in the event of incompatible situations resulting from treaties, the successor State and the other States parties to the treaty should use their best endeavours to solve the problem by mutual agreement, which in a great many cases would avoid having to have recourse to other more complicated forms of settlement of disputes.

44. Mr. DUCULESCU (Romania) said that his delegation fully supported the proposal to add a third paragraph to article 12, since the establishment of foreign military bases could in no way be considered as an objective situation imposing obligations on the successor State. While the first paragraph of article 12 covered a wide range of situations, requiring a clear legal and political basis for continuity, there was a new category of international agreements relating to disarmament which should be taken into consideration, notably those concerning the creation of international nuclear-weapon-free peace and security zones which, unlike military bases, could be considered as representing an objective situation opposable to all States.

45. As far as article 12 *bis* was concerned, his delegation had already stressed the need to respect the principles of international law, including that of the permanent sovereignty of States over their natural wealth and resources, as the only basis for the succession of States in respect of treaties.

46. While recognizing the usefulness of negotiation in the cases covered by the draft resolution concerning article 30, he wondered whether it was necessary to have such a provision in a special Conference resolution.

47. Mrs. VALDÉS PÉREZ (Cuba) said that her delegation supported the proposal to add a third paragraph, which included the Cuban delegation's proposal concerning military bases, to article 12. The paragraph completed the sense of the article which, in its original form, had been unacceptable. Her delegation also supported article 12 *bis* and would vote in favour of both articles at the appropriate time.

Organization of work

[Agenda item 10]

48. Mr. STUTTERHEIM (Netherlands) said he would like to ask the Chairman whether it would be possible for the work of the Conference to be so organized that the final act could be signed on the morning of Wednesday, 23 August.

49. The CHAIRMAN said that he would consult the President of the Conference and report to the Committee in due course.

The meeting rose at 12.55 p.m.