YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1973

Volume II

Documents of the twenty-fifth session including the report of the Commission to the General Assembly

UNITED NATIONS
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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word Yearbook followed by suspension points and the year (e.g. Yearbook...1970) indicates a reference to the Yearbook of the International Law Commission.

A/CN.4/SER.A/1973/Add.1
CONTENTS

Filling of casual vacancies in the Commission (agenda item 1)

Document A/CN.4/268: note by the Secretariat .......................... 1

Succession of States in respect of matters other than treaties (agenda item 3)

Document A/CN.4/267: Sixth report on succession of States in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—draft articles with commentaries on succession to public property. ....................... 3

Question of treaties concluded between States and international organizations or between two or more international organizations (agenda item 4)

Document A/CN.4/271: Second report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur .................................................. 75

Priority to be given to the topic of non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)) (agenda item 5 (b))

Document A/CN.4/270: Supplementary report on the legal problems relating to the non-navigational uses of international watercourses requested by the General Assembly in resolution 2669 (XXV)—Advance report submitted by the Secretary-General pursuant to General Assembly resolution 2926 (XXVII) ............... 95

Most-favoured-nation clause (agenda item 6)

Document A/CN.4/266: Fourth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur—draft articles (articles 6-8) with commentaries (continued) 97

Document A/CN.4/269: Decisions of national courts relating to the most-favoured-nation clause digest prepared by the Secretariat ............................ 117

Co-operation with other bodies (agenda item 8)


Report of the Commission to the General Assembly


Check list of documents referred to in this volume ....................... 237

Check list of documents of the twenty-fifth session not reproduced in this volume 239
FILLING OF CASUAL VACANCIES
IN THE COMMISSION
[Agenda item 1]

DOCUMENT A/CN.4/268

Note by the Secretariat

[Original text: English]
[29 March 1973]

1. Following the death on 14 March 1973 of Mr. Gonzalo Alcivar and the election on 30 October 1972 of Mr. Nagendra Singh, Mr. José María Ruda and Sir Humphrey Waldock as judges of the International Court of Justice, four seats have become vacant on the International Law Commission.

2. In this case, article 11 of the Commission's Statute is applicable. It prescribes:

   In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 2 reads:

1. The Commission shall consist of twenty-five members who shall be persons of recognized competence in international law.
2. No two members of the Commission shall be nations of the same State.
3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The term of office of the members to be elected by the Commission will expire at the end of 1976.
SUCCESSION OF STATES
IN RESPECT OF MATTERS OTHER THAN TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/267

Sixth report on succession of States in respect of matters other than treaties,
by Mr. Mohammed Bedjaoui, Special Rapporteur

Draft articles with commentaries on succession to public property

[Original text: French]
[20 May 1973]

CONTENTS

Abbreviations ........................................ 9
Explanatory note: italics in quotations .................. 9

Part One. Preliminary provisions relating to succession of States in respect of matters other than treaties . . 1-2 9
   Article 1. Scope of the present articles ................ 9
   Article 2. Cases of succession of States covered by the present articles .......................... 9
   Article 3. Use of terms ................................ 9

Part Two. Draft articles on succession to public property .............................................. 3-4 9

I. PRELIMINARY PROVISIONS
   Article 4. Sphere of application of the present article ........................................ 9
   Article 5. Definition and determination of public property ........................................ 9

II. GENERAL PROVISIONS
   Article 6. Transfer of public property as it exists ........................................... 10
   Article 7. Date of transfer of public property ............................................. 10
   Article 8. General treatment of public property according to ownership ................... 10

III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES
   Article 9. General principle of the transfer of all State property ............................. 10
   Article 10. Rights in respect of the authority to grant concessions .......................... 10
   Article 11. Succession to public debt-claims .................................................. 10

IV. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES
   Section 1. Partial transfer of territory
                Article 12. Currency and the privilege of issue ........................................ 10
                Article 13. Treasury and public funds .................................................. 10
                Article 14. Archives and public libraries ............................................ 10
                Article 15. Property situated outside the transferred territory .................... 10
CONTENTS (continued)

Section 2. Newly independent States

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16</td>
<td>Currency and the privilege of issue</td>
<td>10</td>
</tr>
<tr>
<td>17</td>
<td>Public funds and Treasury</td>
<td>11</td>
</tr>
<tr>
<td>18</td>
<td>Archives and public libraries</td>
<td>11</td>
</tr>
<tr>
<td>19</td>
<td>Property situated outside the territory of the newly independent States</td>
<td>11</td>
</tr>
</tbody>
</table>

Section 3. Uniting of States and dissolution of unions

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>20</td>
<td>Currency and the privilege of issue</td>
<td>11</td>
</tr>
<tr>
<td>21</td>
<td>Public funds and Treasury</td>
<td>11</td>
</tr>
<tr>
<td>22</td>
<td>Archives and public libraries</td>
<td>11</td>
</tr>
<tr>
<td>23</td>
<td>Property situated outside the territory of the union</td>
<td>11</td>
</tr>
</tbody>
</table>

Section 4. Disappearance of a State through partition or absorption

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>Currency and the privilege of issue</td>
<td>11</td>
</tr>
<tr>
<td>25</td>
<td>Public funds and Treasury</td>
<td>11</td>
</tr>
<tr>
<td>26</td>
<td>Archives and public libraries</td>
<td>11</td>
</tr>
<tr>
<td>27</td>
<td>Property situated outside the absorbed or partitioned territory</td>
<td>11</td>
</tr>
</tbody>
</table>

Section 5. Secession or separation of one or more parts of one or more States

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>28</td>
<td>Currency and the privilege of issue</td>
<td>12</td>
</tr>
<tr>
<td>29</td>
<td>Public funds and Treasury</td>
<td>12</td>
</tr>
<tr>
<td>30</td>
<td>Archives and public libraries</td>
<td>12</td>
</tr>
<tr>
<td>31</td>
<td>Property situated outside the detached territory</td>
<td>12</td>
</tr>
</tbody>
</table>

V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>32</td>
<td>Definition of public establishments</td>
<td>12</td>
</tr>
<tr>
<td>33</td>
<td>Public establishments of the transferred territory</td>
<td>12</td>
</tr>
<tr>
<td>34</td>
<td>Property of the State in public establishments</td>
<td>12</td>
</tr>
<tr>
<td>35</td>
<td>Case of two or more successor States</td>
<td>12</td>
</tr>
</tbody>
</table>

VI. PROVISIONS CONCERNING TERRITORIAL AUTHORITIES

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>Definition of territorial authorities</td>
<td>12</td>
</tr>
<tr>
<td>37</td>
<td>Public property proper to territorial authorities</td>
<td>12</td>
</tr>
<tr>
<td>38</td>
<td>Property of the State in territorial authorities</td>
<td>12</td>
</tr>
<tr>
<td>39</td>
<td>Divided territorial authorities</td>
<td>12</td>
</tr>
</tbody>
</table>

VII. PROPERTY OF FOUNDATIONS

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
<td>Property of foundations</td>
<td>12</td>
</tr>
</tbody>
</table>

Part Three. Commentaries and observations on the preliminary provisions on succession of States in respect of matters other than treaties

<table>
<thead>
<tr>
<th>Article</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Scope of the present articles</td>
<td>13</td>
</tr>
<tr>
<td>2</td>
<td>Cases of succession of States covered by the present articles</td>
<td>13</td>
</tr>
<tr>
<td>3</td>
<td>Use of terms</td>
<td>15</td>
</tr>
<tr>
<td>A</td>
<td>Definition of succession of States</td>
<td>15</td>
</tr>
<tr>
<td>B</td>
<td>Definition of the terms “predecessor State” and “successor State”</td>
<td>15</td>
</tr>
<tr>
<td>C</td>
<td>Other terms used</td>
<td>15</td>
</tr>
</tbody>
</table>
## CONTENTS (continued)

<table>
<thead>
<tr>
<th>Paragraphs</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part Four. Draft articles on succession to public property, with commentaries</strong></td>
<td>5-51</td>
</tr>
<tr>
<td><strong>INTRODUCTION</strong></td>
<td>5-15</td>
</tr>
<tr>
<td><strong>I. PRELIMINARY PROVISIONS</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Article 4. Sphere of application of the present articles</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Article 5. Definition and determination of public property</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td>A. Public property</td>
<td></td>
</tr>
<tr>
<td>B. Rights and interests</td>
<td></td>
</tr>
<tr>
<td>C. Unliquidated claims and rights</td>
<td></td>
</tr>
<tr>
<td><strong>II. GENERAL PROVISIONS</strong></td>
<td>16-19</td>
</tr>
<tr>
<td><strong>Article 6. Transfer of public property as it exists</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Article 7. Date of transfer of public property</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Article 8. General treatment of public property according to ownership</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td><strong>III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES</strong></td>
<td>22</td>
</tr>
<tr>
<td><strong>Article 9. General principle of the transfer of all State property</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Article 10. Rights in respect of the authority to grant concessions</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td>A. Definition of a “concession”</td>
<td></td>
</tr>
<tr>
<td>1. A concession is an act of the public authorities</td>
<td></td>
</tr>
<tr>
<td>2. A concession is an act granting permission to manage a public service or exploit a natural resource</td>
<td></td>
</tr>
<tr>
<td>3. The concessionaire is a private person or enterprise or sometimes even a State</td>
<td></td>
</tr>
<tr>
<td>B. “Rights in respect of the authority to grant concessions” and their legal nature</td>
<td></td>
</tr>
<tr>
<td>C. Obligations in respect of concessions, a question to be left pending</td>
<td></td>
</tr>
<tr>
<td><strong>Article 11. Succession to public debt-claims</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Commentary</strong></td>
<td></td>
</tr>
<tr>
<td>A. Introduction</td>
<td></td>
</tr>
<tr>
<td>B. Patrimonial rights “defined by law”</td>
<td></td>
</tr>
<tr>
<td>C. Observations on article 11</td>
<td></td>
</tr>
<tr>
<td><strong>IV. Provisions relating to each type of succession of States</strong></td>
<td>20-51</td>
</tr>
<tr>
<td><strong>Introduction: Types considered</strong></td>
<td>20-51</td>
</tr>
<tr>
<td>A. Succession without the creation or disappearance of a State (case of partial transfer of territory)</td>
<td></td>
</tr>
<tr>
<td>B. Succession by creation of a State not entailing the disappearance of the predecessor State (case of newly independent States)</td>
<td></td>
</tr>
<tr>
<td>C. Succession by creation of a State and disappearance of the predecessor State or States (cases of uniting of States, dissolution of unions, merger and creation of “composite” States)</td>
<td></td>
</tr>
<tr>
<td>D. Succession without the creation of a State but entailing the disappearance of the predecessor</td>
<td></td>
</tr>
<tr>
<td>E. Special case of separation of part of a State (secession)</td>
<td></td>
</tr>
</tbody>
</table>
**CONTENTS (continued)**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Partial transfer of territory</strong></td>
<td>34</td>
</tr>
<tr>
<td>Article 12. Currency and the privilege of issue</td>
<td>34</td>
</tr>
<tr>
<td>Commentary</td>
<td>34</td>
</tr>
<tr>
<td>A. Introduction</td>
<td>34</td>
</tr>
<tr>
<td>B. The privilege of issue</td>
<td>35</td>
</tr>
<tr>
<td>C. Currency</td>
<td>35</td>
</tr>
<tr>
<td>D. Case of partial transfers of territory to various pre-existing successor States</td>
<td>35</td>
</tr>
<tr>
<td>Article 13. Treasury and public funds</td>
<td>36</td>
</tr>
<tr>
<td>Commentary</td>
<td>36</td>
</tr>
<tr>
<td>A. Public funds</td>
<td>36</td>
</tr>
<tr>
<td>1. State public funds</td>
<td>36</td>
</tr>
<tr>
<td>2. Funds proper to the transferred territory</td>
<td>36</td>
</tr>
<tr>
<td>B. Treasury</td>
<td>37</td>
</tr>
<tr>
<td>Article 14. Archives and public libraries</td>
<td>37</td>
</tr>
<tr>
<td>Commentary</td>
<td>37</td>
</tr>
<tr>
<td>A. Definition of items affected by the transfer</td>
<td>38</td>
</tr>
<tr>
<td>B. The principle of the transfer of archives to the successor State</td>
<td>38</td>
</tr>
<tr>
<td>1. Archives of every kind</td>
<td>38</td>
</tr>
<tr>
<td>2. Archives as an instrument of evidence</td>
<td>38</td>
</tr>
<tr>
<td>3. Archives as an instrument of administration</td>
<td>38</td>
</tr>
<tr>
<td>C. The archives-territory link</td>
<td>39</td>
</tr>
<tr>
<td>D. Archives situated outside the territory</td>
<td>39</td>
</tr>
<tr>
<td>1. Archives which have been removed</td>
<td>40</td>
</tr>
<tr>
<td>2. Archives established outside the territory</td>
<td>41</td>
</tr>
<tr>
<td>E. Problem of the “ownership” of archives</td>
<td>42</td>
</tr>
<tr>
<td>F. Special obligations of the successor State</td>
<td>42</td>
</tr>
<tr>
<td>G. Time-limits for handing over the archives</td>
<td>42</td>
</tr>
<tr>
<td>H. Transfer and return free of cost</td>
<td>42</td>
</tr>
<tr>
<td>Article 15. Property situated outside the transferred territory</td>
<td>43</td>
</tr>
<tr>
<td>Commentary</td>
<td>43</td>
</tr>
<tr>
<td>A. Introduction</td>
<td>43</td>
</tr>
<tr>
<td>B. Property proper to the transferred territory which is situated outside that territory</td>
<td>44</td>
</tr>
<tr>
<td>1. Property proper to the territory which is situated in the predecessor State</td>
<td>44</td>
</tr>
<tr>
<td>Non-transferability of ownership of property of this kind</td>
<td>44</td>
</tr>
<tr>
<td>Modification of the legal régime governing property of this kind</td>
<td>44</td>
</tr>
<tr>
<td>2. Property proper to the transferred territory which is situated in a third State</td>
<td>44</td>
</tr>
<tr>
<td>C. Property of the predecessor State which is situated outside the territory retained by that State</td>
<td>44</td>
</tr>
<tr>
<td>Section 2. Newly independent States</td>
<td>45</td>
</tr>
<tr>
<td>Article 16. Currency and the privilege of issue</td>
<td>45</td>
</tr>
<tr>
<td>Commentary</td>
<td>45</td>
</tr>
<tr>
<td>Article 17. Public funds and Treasury</td>
<td>47</td>
</tr>
<tr>
<td>Commentary</td>
<td>47</td>
</tr>
<tr>
<td>A. Public funds</td>
<td>47</td>
</tr>
<tr>
<td>1. Funds proper to the territory</td>
<td>47</td>
</tr>
<tr>
<td>2. State funds</td>
<td>47</td>
</tr>
<tr>
<td>B. Treasury</td>
<td>47</td>
</tr>
</tbody>
</table>
## CONTENTS (continued)

<table>
<thead>
<tr>
<th>Article 18. Archives and public libraries</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>47</td>
</tr>
<tr>
<td>A. The archives-territory link</td>
<td>48</td>
</tr>
<tr>
<td>B. Archives situated outside the territory that has become independent</td>
<td>48</td>
</tr>
<tr>
<td>1. Archives which have been removed</td>
<td>48</td>
</tr>
<tr>
<td>2. Archives established outside the territory</td>
<td>49</td>
</tr>
<tr>
<td>C. Special obligations of the newly independent States</td>
<td>49</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 19. Property situated outside the territory of the newly independent State</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>49</td>
</tr>
<tr>
<td>A. Property proper to the territory that has become independent</td>
<td>50</td>
</tr>
<tr>
<td>1. Property which is situated in the former metropolitan country</td>
<td>50</td>
</tr>
<tr>
<td>2. Property which is situated in a third State</td>
<td>51</td>
</tr>
<tr>
<td>B. Property belonging to the predecessor State which is situated in a third State</td>
<td>52</td>
</tr>
</tbody>
</table>

### Section 3. Uniting of States and dissolution of unions

<table>
<thead>
<tr>
<th>Article 20. Currency and the privilege of issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>52</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 21. Public funds and Treasury</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>52</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 22. Archives and public libraries</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>53</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 23. Property situated outside the territory of the union</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>54</td>
</tr>
</tbody>
</table>

### Section 4. Disappearance of a State through partition or absorption

<table>
<thead>
<tr>
<th>Article 24. Currency and the privilege of issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>54</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 25. Public funds and Treasury</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>55</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 26. Archives and public libraries</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentaries and observations</td>
<td>55</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 27. Property situated outside the absorbed or partitioned territory</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>55</td>
</tr>
</tbody>
</table>

### Section 5. Secession or separation of one or more parts of one or more States

<table>
<thead>
<tr>
<th>Article 28. Currency and the privilege of issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>57</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 29. Public funds and Treasury</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>57</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 30. Archives and public libraries</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>57</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 31. Property situated outside the detached territory</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commentary</td>
<td>58</td>
</tr>
</tbody>
</table>
## CONTENTS (continued)

### V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>32</td>
<td>Definition of public establishments</td>
<td>59</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>59</td>
</tr>
<tr>
<td>A</td>
<td>The public establishment administers a public service</td>
<td>59</td>
</tr>
<tr>
<td>B</td>
<td>The public establishment may engage in an economic activity</td>
<td>60</td>
</tr>
<tr>
<td>C</td>
<td>The establishment of public utility or general interest</td>
<td>60</td>
</tr>
<tr>
<td>D</td>
<td>The public or public utility character</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>1. Link with the population</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>2. Link with the economy of the territory</td>
<td>60</td>
</tr>
<tr>
<td>E</td>
<td>Criteria for a definition</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>1. Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles</td>
<td>60</td>
</tr>
<tr>
<td></td>
<td>2. Decision of the United Nations Tribunal in Libya</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td>3. Decision of the P.C.I.J. in a case relating to a Hungarian public university establishment</td>
<td>61</td>
</tr>
<tr>
<td>F</td>
<td>Determination by treaty</td>
<td>61</td>
</tr>
<tr>
<td>33</td>
<td>Public establishments of the transferred territory</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>62</td>
</tr>
<tr>
<td>34</td>
<td>Property of the State in public establishments</td>
<td>62</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>62</td>
</tr>
<tr>
<td>A</td>
<td>Automatic and complete succession</td>
<td>63</td>
</tr>
<tr>
<td>B</td>
<td>Succession limited to the property of public establishments situated in the territory</td>
<td>64</td>
</tr>
<tr>
<td>C</td>
<td>Succession on condition of purchase</td>
<td>64</td>
</tr>
<tr>
<td>D</td>
<td>Temporary use of property by the predecessor State</td>
<td>65</td>
</tr>
<tr>
<td>35</td>
<td>Case of two or more successor States</td>
<td>65</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>66</td>
</tr>
</tbody>
</table>

### VI. Provisions concerning territorial authorities

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>Definition of territorial authorities</td>
<td>66</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>66</td>
</tr>
<tr>
<td>37</td>
<td>Public property proper to territorial authorities</td>
<td>67</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>67</td>
</tr>
<tr>
<td>38</td>
<td>Property of the State in territorial authorities</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>68</td>
</tr>
<tr>
<td>39</td>
<td>Divided territorial authorities</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>68</td>
</tr>
</tbody>
</table>

### VII. PROPERTY OF FOUNDATIONS

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>40</td>
<td>Property of foundations</td>
<td>69</td>
</tr>
<tr>
<td></td>
<td>Commentary</td>
<td>69</td>
</tr>
<tr>
<td>A</td>
<td>Patrimonial situation unchanged</td>
<td>69</td>
</tr>
<tr>
<td>B</td>
<td>Exceptions to the principle</td>
<td>71</td>
</tr>
<tr>
<td>C</td>
<td>Property of the State in foundations</td>
<td>72</td>
</tr>
<tr>
<td>D</td>
<td>The property of the Moslem Institute and of the Mosque in Paris</td>
<td>72</td>
</tr>
</tbody>
</table>
Succession of States in respect of matters other than treaties

ABBREVIATIONS

I.C.J. International Court of Justice
I.C.J. Reports I.C.J., Reports of Judgments, Advisory Opinions and Orders
P.C.I.J. Permanent Court of International Justice
P.C.I.J., Series A/B P.C.I.J., Judgments, Orders and Advisory Opinions

* * *

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

Part One

Preliminary provisions relating to succession of States in respect of matters other than treaties

1. The following provisions relate to the whole field of "succession of States in respect of matters other than treaties" and should consequently precede consideration of succession of States in respect of public property. They are, of necessity, fragmentary and will be supplemented as the International Law Commission progresses in its work in the various fields under consideration.

2. For the time being, these preliminary provisions comprise the following articles:

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

Article 3. Use of terms

For the purposes of the present articles:

(a) "Succession of States" means the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty;

(b) "Predecessor States" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States.

Part Two

Draft articles on succession to public property

3. In his third, fourth and fifth reports, the Special Rapporteur prepared a set of draft articles, with commentaries and observations, on succession of States in respect of public property.

4. Having reconsidered his draft and deemed it necessary to take into account the work of the International Law Commission in the field of succession of States in respect of treaties, he submits below the following draft articles:

I. PRELIMINARY PROVISIONS

Article 4. Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

Article 5. Definition and determination of public property

For the purposes of the present articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory affected by the change of sovereignty or which are necessary for the exercise of sovereignty by the successor State in the said territory.

II. GENERAL PROVISIONS

Article 6. Transfer of public property as it exists
1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.
2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

Article 7. Date of transfer of public property
Save where sovereignty has been restored and is deemed to be retroactive to the date of its termination or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty
(a) occurs de jure through the ratification of devolution agreements, or
(b) is effectively carried out in cases where no agreement exists or reference is made in an agreement to the said effective date.

Article 8. General treatment of public property according to ownership
All other conditions established by the present articles being fulfilled.
(a) Public or private property of the predecessor State shall pass within the patrimony of the successor State;
(b) Public property of authorities or bodies other than States shall pass within the juridical order of the successor State;
(c) Property of the territory affected by the change of sovereignty shall pass within the juridical order of the successor State.

III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES

Article 9. General principle of the transfer of all State property
Property necessary for the exercise of sovereignty over the territory affected by the succession of States shall devolve, automatically and without compensation, to the successor State.

Article 10. Rights in respect of the authority to grant concessions
1. For the purposes of the present article, the term “concession” means the act whereby the State confers, in the territory within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.
2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.
3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources of its territory.

Article 11. Succession to public debt-claims
1. Irrespective of the type of succession of States, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.
2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of the exercise of its sovereignty or of its activity in the territory concerned.

IV. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Section 1. Partial transfer of States

Article 12. Currency and the privilege of issue
1. The privilege of issue shall belong to the successor State throughout the transferred territory.
2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds circulating or stored in the territory shall pass to the successor State.
3. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the territory transferred, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

Article 13. Public funds and Treasury
1. Public funds, liquid or invested, belonging to the predecessor State and situated in the transferred territory, shall pass into the patrimony of the successor State.
2. Irrespective of where they are situated, public funds, liquid or invested, which are proper to the transferred territory shall continue to be allocated and to belong to the transferred territory.
3. Upon closure of the public accounts relating to Treasury operations in the transferred territory, the successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

Article 14. Archives and public libraries
1. Archives and public documents of every kind relating directly or belonging to the transferred territory, and public libraries of that territory shall, irrespective of where they are situated, follow the transferred territory.
2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

Article 15. Property situated outside the transferred territory
1. Subject to the application of the rules relating to recognition, public property proper to the transferred territory which is situated outside that territory shall pass within the juridical order of the successor State.
2. The ownership of property belonging to the predecessor State which is situated in a third State shall devolve to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

Section 2. Newly independent States

Article 16. Currency and the privilege of issue
1. The privilege of issue shall belong to the new sovereignty throughout the newly independent territory.
succession of states in respect of matters other than treaties

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory concerned shall pass to the successor State.

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which the substitution of currency entails.

Article 17. Public funds and Treasury

1. Public funds, liquid or invested, which are proper to the territory that has become independent shall remain the property of that territory, irrespective of where they are situated.

2. Public funds of the predecessor State, liquid or invested, which are situated in the territory that has become independent shall pass into the patrimony of that territory.

3. The rights of the Treasury of the territory that has become independent shall not be affected by the change of sovereignty, vis-à-vis the predecessor State or otherwise.

4. The obligations of the Treasury of the territory that has become independent shall be assumed by that territory on such terms and in accordance with such rules as apply to succession to the public debt.

Article 18. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the territory that has become independent, and public libraries of that territory, shall, irrespective of where they are situated, be transferred to the newly independent State.

2. The newly independent State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the newly independent State.

Article 19. Property situated outside

the territory of the newly independent State

1. Public property proper to the territory that has become independent which is situated outside that territory shall remain its property upon its accession to independence.

2. Public property belonging to the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the latter's contribution to the creation of such property.

SECTION 3. UNITING OF STATES AND DISSOLUTION OF UNIONS

Article 20. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the territory of the union or of each State in the event of dissolution of the union.

2. In the event of dissolution of the union, the assets of the joint institution of issue shall be shared pro parte between the successor States, which in consideration of the foregoing shall assume responsibility for the obligations relating to the substitution of new currencies for the former currency.

Article 21. Public funds and Treasury

1. The union shall receive as its patrimony the public funds and Treasuries of each of its constituent States except where the degree of their integration in the union or treaty provisions allow each State to retain all or part of such property.

2. In the event of dissolution of the union, the public funds and Treasury of the union shall be apportioned equitably between its constituent States.

Article 22. Archives and public libraries

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and public documents of every kind belonging to a State which unites with one or more other States, and its public libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

Article 23. Property situated outside

the territory of the union

1. Property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution, be apportioned equitably between the successor States.

SECTION 4. DISAPPEARANCE OF A STATE

THROUGH PARTITION OR ABSORPTION

Article 24. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State in the territory absorbed or the portion of territory allocated to it in the partition.

2. The successor State or States shall take over the assets of the institution of issue and shall assume its liabilities in proportion to the volume of currency in circulation or held in the territory in question.

Article 25. Public funds and Treasury

1. The successor State shall receive the public funds and the Treasury belonging to the absorbed State in their entirety, irrespective of where the assets in question are situated. It shall assume responsibility for the obligations relating thereto so far as the rules applying to succession to the public debt permit.

2. In the event of partition of a State among two or more pre-existing States, each of them shall succeed to a portion, which shall be determined by treaty, of the public funds and the Treasury.

Article 26. Archives and public libraries

1. Ownership of archives and public documents of every kind, and public libraries, belonging to the absorbed State shall be transferred to the successor State, irrespective of where such property is situated.

2. Archives and public documents of every kind, and public libraries, belonging to the State partitioned among two or more others shall be apportioned between the successor States with particular regard to the link existing between such property and the territory transferred to each State.

Article 27. Property situated outside

the absorbed or partitioned territory

1. Subject to the application of the rules relating to recognition, ownership of all public property of the State that has disappeared which is situated outside its territory shall devolve to the successor State.

2. In the event of total dismemberment of a State in favour of two or more other pre-existing States, property situated outside the State that has disappeared shall be shared equitably among the successor States.
SECTION 5. SECESSION OR SEPARATION OF ONE OR MORE PARTS OF ONE OR MORE STATES

Article 28. Currency and the privilege of issue
1. The privilege of issue shall belong to the successor State throughout the detached territory or territories.
2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the detached State shall pass to the successor State.
3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

Article 29. Public funds and Treasury
1. Irrespective of their geographical location, public funds and Treasury which are proper to the detached territory shall not be affected by the change of sovereignty.
2. The State fortune—its public funds and Treasury assets—shall be apportioned between the predecessor State and the successor State, due regard being had to the criteria of viability of each of the States.

Article 30. Archives and public libraries
1. Archives and public documents of every kind relating directly or belonging to a territory which has become detached in order to form a separate State, and public libraries of that State, shall, irrespective of where they are situated, be transferred to that State.
2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, at their request and at their expense, save where they affect the security or sovereignty of the successor State.

Article 31. Property situated outside the detached territory
1. Where a State comes into being as a result of the detachment of a part of the territory of one or more States, the ownership of public property belonging to the said constituent territory or territories which is situated outside their frontiers shall not be affected by such change or changes of sovereignty.
2. Public property belonging to the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

Article 32. Definition of public establishments
For the purposes of the present articles, “public establishments” mean those bodies or enterprises which engage in an economic activity or provide a public service and which are of a public or public utility character.

Article 33. Public establishments of the transferred territory
Public establishments which belong entirely to the transferred territory shall not be affected by the mere fact of the change of sovereignty.

Article 34. Property of the State in public establishments
The successor State shall be automatically and fully subrogated to the patrimonial rights which the predecessor State possesses in public establishments situated in the transferred territory.

Article 35. Case of two or more successor States
Where there are two or more successor States, the patrimonial rights of the predecessor State in public establishments situated in the transferred territories shall be apportioned between the successor States in accordance with the criteria of geographical location, origin of the property and the viability of the said establishments, and subject, where necessary, to equalization payments and offset.

VI. PROVISIONS CONCERNING TERRITORIAL AUTHORITIES

Article 36. Definition of territorial authorities
Version A
For the purposes of the present articles, “territorial authority” means any administrative division of the territory of a State.

Version B
For the purposes of the present articles, “territorial authority” means any administrative division of the territory of a State which is characterized by its own territory, population and administrative authority but does not possess international legal personality.

Article 37. Public property proper to territorial authorities
Version A
The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities.

Version B
The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities, which shall be incorporated, in the same manner as the said authorities themselves, in the juridical order of the successor State.

Article 38. Property of the State in territorial authorities
1. The share of the predecessor State in the property, rights and interests of a territorial authority shall be transferred ipso jure to the successor State.
2. Where there are two or more successor States, the said share shall be apportioned between them, with due regard to the viability of the territorial authority, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

Article 39. Divided territorial authorities
Where the change of sovereignty has the effect of dividing a territorial authority into two or more parts attached to two or more successor States, the patrimonial property, rights and interests of the territorial authority shall be apportioned equitably between the said parts, due regard being had to the viability of the latter, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

VII. PROPERTY OF FOUNDATIONS

Article 40. Property of foundations
1. So far as the public policy of the successor State permits, the legal status of the property of religious, charitable or cultural foundations shall not be affected by the change of sovereignty.
2. Where the predecessor State possessed a share in the patrimony of a foundation, that share shall be transferred to the successor State; where there are two or more successor States, it shall be apportioned equitably between them.

Part Three

Commentaries on the preliminary provisions on succession of States in respect of matters other than treaties

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

COMMENTARY

(1) This article, which corresponds to the one adopted by the Commission in the draft on succession of States in respect of treaties, makes it possible to define the scope of the subject along the lines laid down in the first report by the Special Rapporteur and in accordance with the instructions given to him by the Commission at its twentieth session.

(2) It will be remembered that the Commission, at the Special Rapporteur’s request, changed the title of his topic, which was originally entitled “Succession of States in respect of rights and duties resulting from sources other than treaties”.

In paragraphs 19 to 21 of his first report, the Special Rapporteur had stated that the original title might make the subject impracticable because the word “treaty” was used in different ways, referring to a subject matter of the law of succession in the topic assigned to Sir Humphrey Waldock, and to an instrument of that law in the topic assigned to the second Special Rapporteur.

(3) The Commission agreed to take the same approach to both topics and consequently defined the topic assigned to the Special Rapporteur as “Succession in respect of matters other than treaties”.

(4) This topic encompasses the succession of States in respect of public property, public debts, legislation, nationality, personal status, acquired rights, and so on. These subjects will be covered by the provisions of the present articles and future articles, based on State practice whether expressed in treaties or not, and on internal and international judicial practice.

The succession of States in respect of these subjects may have been regulated by treaties concluded between the predecessor State and the successor State, such agreements being regarded here as a means or instrument of the law of succession, although they may already have been considered as a subject matter of the law of succession in the topic considered by the Commission on the basis of the reports prepared by Sir Humphrey Waldock.

In other words, just as in the work relating to the latter reports the problem of “succession to treaties by treaties” has not been neglected, so in this report the question of “succession by treaties to public property, public debts and so on” will be encountered. The “devolution agreements” and any other relevant treaties regulating cases of succession of States in respect of these subjects will therefore be studied from the point of view of their material content and not from the point of view of their formal and instrumental framework.

(5) The problem of the validity of these instruments will be studied not from the standpoint of principle (this has already been done in the work on the law of succession of States in respect of treaties), but from the standpoint of its practical impact on public property, public debts and so on.

(6) With regard to territorial régimes, dealt with in articles 29 and 30 of the draft articles on succession of States in respect of treaties, the Special Rapporteur noted with interest the reaction of certain members of the Sixth Committee at the twenty-seventh session of the General Assembly:

Certain representatives, who supported articles 29 and 30, doubted whether the Commission had solved the doctrinal issue involved. Should the rules in these articles be formulated in terms of the boundary or territorial régime resulting from the dispositive effects of a treaty or should they relate to succession in respect of the treaty itself? Articles 29 and 30 would seem to have been drafted from the standpoint that the question was not the continuance in force of a treaty but that of the obligations and rights which devolved upon a successor State, but it could rightly be asked how, in legal theory, the rights and obligations of parties emanating from a certain treaty could be separated from the international instrument which had created those rights and obligations.

The view was expressed that if the provisions were drafted in terms of the “régime”, more than in terms of the “treaty”, it would perhaps be more appropriate to include them in the future draft on the part of the topic relating to succession of States in respect of matters other than treaties.

The Special Rapporteur will in due course take account of these suggestions, which reinforce the view he expressed in his first report when defining the scope of the subject he was to study.

Article 2. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.


6 Ibid., pp. 216 et seq., document A/7209/Rev.1, paras. 45 et seq.

COMMENTARY

(1) In his fourth report the Special Rapporteur suggested a draft article 1, accompanied by commentaries and worded as follows:

1. Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect.

2. The State which commits an act of conquest or annexation shall not be deemed to be a successor State and, in particular, shall not acquire possession of the property of the predecessor State.

(2) The particularly heavy agenda at its twenty-third session made it impossible for the Commission to study the work of the various Special Rapporteurs, except for that of Mr. Abdullah EI-Erian, which was accorded priority at the request of the General Assembly. The Special Rapporteur was, however, able to benefit at that session by a number of suggestions made by the officers of the Commission, to whom he is particularly grateful. The following year, he therefore submitted in his fifth report a reformulation of article 1, reading as follows:

The conditions for succession of States shall include respect for general international law and the provisions of the United Nations Charter concerning the territorial integrity of States and the right of peoples to self-determination.

(3) In his commentaries on this article, the Special Rapporteur stated that irrespective of the stage at which the Commission might wish, for reasons of convenience, to take up in one way or another the problem dealt with in that article, he felt that a provision of the type suggested would inevitably have to be included, since it represented a “problem preliminary to all or any succession”.

The subsequent work of the Commission on succession of States in respect of treaties has confirmed the Special Rapporteur in his opinion. Sir Humphrey Waldock put forward at the twenty-fourth session a draft article embodying more or less the same ideas, for which two different versions were proposed, the first being based on article 73 of the Vienna Convention on the Law of Treaties.

(4) The Special Rapporteur, abandoning the idea of submitting his own formulation, suggests that the Commission should eliminate the need for further discussion of the same problem by adopting forthwith, as a preliminary provision on succession of States in respect of matters other than treaties, the same provision which it put into final form at its twenty-fourth session as article 6 of the draft on succession in respect of treaties. This article reads as follows:

*The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.*

(5) The Special Rapporteur feels it would be a pity if the Commission were to forego adopting such an article for the subject-matter dealt with in this report merely because it has already been included in the draft articles on succession in respect of treaties.

Firstly, as the Commission itself points out in its commentary to article 6, in certain situations it is not enough to rely on the general presumption that the articles prepared by the Commission are to apply only to facts occurring and situations established in conformity with international law.

Thus, in its draft articles on the law of treaties the Commission included, among others, specific provisions on treaties procured by coercion and treaties which conflict with the norms of *jus cogens* as well as certain reservations in regard to the specific subjects of State responsibility, outbreak of hostilities and cases of aggression.

(6) Secondly, contrary to the views expressed by some of its members, the Commission wisely preferred not to confine itself to discussing the need for such a provision only in the case of transfers of territory occurring in conformity with international law, considering quite rightly that “to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States.” It is precisely the concern to avoid such misunderstandings with regard to succession in respect of matters other than treaties that makes it necessary to reproduce that article here. It would therefore seem particularly inappropriate to treat each of the two sets of draft articles differently.

(7) Thirdly, it has become more essential than ever to reproduce this article, for its provisions are not automatically applicable to succession in respect of matters other than treaties simply because it was included in the draft articles on succession in respect of treaties. Indeed, precisely the contrary could be argued, i.e. that omitting the article from one draft while including it in the other would necessarily mean that it was inapplicable to the former.

Furthermore, the draft articles on succession in respect of treaties, in both their form and their scope, may have an autonomous legal existence and a destiny different from that of the articles on succession in respect of matters other than treaties.

Finally, even if both drafts were to serve eventually as a basis for the conclusion of conventions on those subjects—as would be desirable (and as the Sixth Committee has already decided for the first set of articles according to its report)—it would be all the more advisable to include the same provision in the second report the same provision as has been included in the first, and precisely because it has been included in the first. The Commission...
is, in any case, technically accustomed to such a practice. Furthermore, there are many cases in which a given provision has been reproduced word for word, when necessary, in a number of different conventions.14

(8) It should be noted, too, that the inclusion of article 2 in the present draft is not based on theoretical considerations alone. There is a substantial corpus of relevant practice and judicial decision, relating in particular to succession to public property, which the Special Rapporteur mentioned in his fourth report.17

Article 3. Use of terms

For the purposes of the present articles:

(a) "Succession of States" means the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty;

(b) "Predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "Successor State" means the State which has replaced another State on the occurrence of a succession of States.

COMMENTARY

A. Definition of succession of States

(1) It will be recalled that the concept of "succession of States" which emerged from the work of the International Law Commission reads as follows:

... the expression "succession of States" is used throughout the articles to denote simply a change in the responsibility for the international relations of a territory, thus leaving aside from the definition all questions of the rights and obligations as a legal incident of that change.18

(2) The Special Rapporteur is well aware that

A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights or obligations previously applicable with respect to territory which has passed under its sovereignty without any nice consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned.19

(3) The Special Rapporteur feels it would not have been impossible to work out a single definition of succession of States that would have been valid both for Sir Humphrey Waldock’s draft and for his own. This view was shared by some members of the Commission.20 In any case, the definition on which the Commission based its articles on succession of States in respect of treaties is inapplicable to the present draft. It is the "legal incidents" of the change of sovereignty, excluded from the first definition, which must necessarily be taken into consideration in the Special Rapporteur’s draft.

(4) In turning from succession in respect of treaties to succession in respect of matters other than treaties, one passes from the fact of the simple replacement of one State by another in the responsibility for the international relations of a territory to the problem of the concrete content of the rights and obligations transferred as a result of that fact to the successor State in the various fields relating to public property, public debts, the status of the inhabitants and so forth. But in so doing, one must not completely lose sight of the original fact of the replacement of sovereignty which occasioned the transfer or exercise of given rights and obligations. This is the very thing which complicates the problems relating to succession of States.

(5) It is necessary—especially when the succession of States has not been regulated by treaty—to see what basic rules can be found to define the rights and obligations of each State concerned. Consequently, succession of States seems to be more than the replacement of one State by another in the responsibility for the international relations of a territory. That is why the Special Rapporteur suggests tentatively that succession of States should be taken to mean "the replacement of one sovereignty by another with regard to its practical effects on the rights and obligations of each for the territory affected by the change of sovereignty".

B. Definition of the terms "predecessor State" and "successor State"

(6) Here the Special Rapporteur has confined himself to reproducing the definitions adopted by the Commission on the suggestion of Sir Humphrey Waldock. He feels that they are acceptable in the context of his own draft and would spare the Commission further debate on these terms.

C. Other terms used

(7) Clearly, the present draft article 3 is incomplete if not embryonic and should include definitions of many more of the terms used. For the time being, the Special Rapporteur intends to leave this article in its present state.

14 For example, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 (XXI) of 16 December 1966) each contain an identical provision concerning the right of peoples to dispose of their natural resources.

17 Yearbook...1971, vol. II (Part One), pp. 163 et seq., document A/CN.4/247 and Add.1, commentary to article 1, especially paras. 11 (litigation between Haile Selassie and a cable and wireless company), 12 (case of the Franco-Ethiopian railway), 14 (restoration of Poland), 17 et seq. See also Yearbook...1970, vol. II, pp. 140-141, document A/CN.4/226, paras. 30-32 of the commentary to article 8, and passim.

18 Yearbook...1972, vol. II, p. 226, document A/8710/Rev.1, para. 30. The Commission had previously decided not to adopt a general definition of succession, for at that stage of its work it considered that that seemed to be "a theoretical or academic matter which should be avoided" being "of an abstract nature and of doubtful utility" (Yearbook...1968, vol. II, p. 217, document A/7209/Rev.1, para. 48).


20 See, for example, the statement by Mr. Ushakov (Yearbook...1972, vol. I, p. 33, 1156th meeting, para. 14.)
form and to complete it as the Commission proceeds with its work.

It will probably become necessary to regroup in article 3 the definitions of public establishments (at present the subject of article 32), territorial authorities (the subject of article 36) and perhaps public property itself (article 5), as well as the concept of concession (article 10, paragraph 1). In the interest of clarity, the Special Rapporteur will retain this somewhat fragmented approach, and will make the necessary rearrangements at a later stage of the Commission’s work.

**Part Four**

**Draft articles on succession to public property, with commentaries**

**INTRODUCTION**

5. In taking up the topic of succession of States to public property in his third and fourth reports, the Special Rapporteur did not base his approach on theory, but simply tried to state some pragmatic rules drawn from the practice of States. He therefore deliberately refrained from going into the preliminary question whether the transfer of public property is in fact part of the international law of State succession.

6. It might well be argued that since State succession consists of the replacement of one sovereignty over a territory by another, this means that the previous sovereignty automatically loses its material support and that the rights of the predecessor State to public property therefore pass ipso jure to the successor State. The right to public property would thus be seen as an effect of the coming into existence, or of the existence, of a new subject of international law in the territory concerned, and not as a consequence of State succession per se.

7. Viewed in this light, the theory of State succession would not apply to the right and obligations of the State in relation to public property. Once international law recognizes the validity of the juridical order, this would entail for the successor State a right to all State-owned public property. More precisely, international law would simply recognize the validity of the new juridical order of the State expressed by and through the municipal legislation under which the automatic transfer of the right to public property takes place.

8. This approach reduces sovereignty to something that would be inconceivable without a set of operational and material attributes such as, for example, the public property which the States uses to meet certain essential needs of the inhabitants of its territory. However, this approach is open to one rather serious objection. If the successor State automatically acquires public property by the mere fact of its own sovereignty and its own power, how does it come about that property situated outside the territory affected by the change, i.e., outside the successor State’s sphere of territorial jurisdiction, may fall within its patrimony?

9. The Special Rapporteur has accordingly abstained from any purely theoretical study of this problem and of other problems which may arise from State succession to public property, and has confined himself to preparing draft articles in terms as specific as possible. Throughout his work he has tried to keep in mind a concern which may be expressed in the form of three questions: (1) What is public property? (Problems of defining and determining such property); (2) What is transferable public property? (Is it all public property, or property of public authorities, or State property alone? Is it all State property or only the property appertaining to sovereignty?); (3) Is the ownership of the property transferred (this is a question of succession to property stricto sensu) or is the property merely placed under the control of the new juridical order (this brings in succession to legislation a well)?

10. The draft articles proposed by the Special Rapporteur in his earlier work to cover succession to public property were based on a uniform approach. They were therefore designed to be applied indiscriminately to all types of State succession.

11. In the present study the Special Rapporteur feels obliged to take into account the new element introduced by the adoption in first reading by the International Law Commission of the draft articles on succession of States in respect of treaties, based on the reports of Sir Humphrey Waldock, and the consideration of that draft by the Sixth Committee of the United Nations General Assembly.

12. In order to make the work of the International Law Commission easier, the Special Rapporteur therefore plans to follow the method and approach used in preparing the rules concerning succession in respect of treaties, so far as that is compatible with the special features of his subject-matter. This approach clearly has advantages, for it will save the Commission time and make it possible to standardize the matter examined, through a more or less parallel approach. Thus, for example, some articles, which have already been adopted by the Commission and approved by the Sixth Committee, could, as appropriate, be included in the present draft. Similarly, despite its inadequacies, the classification of types of succession on which the Commission based its work could be used in this draft, since the Special Rapporteur is prepared to cast his articles in the mould with which the International Law Commission and the Sixth Committee are already familiar. He therefore intends to review his draft, taking an analytical approach.

13. However, this method clearly has its limits. First, the very concept of “succession” must be re-evaluated in the light of the meaning it must have in the area of research assigned to the Special Rapporteur. Moreover, although the close relationship established between treaty law and the law of State succession in respect of treaties proved to be very fruitful, this approach is naturally inapplicable in the case of the law of succession of States in respect of matters other than treaties.

14. On the other hand, as already indicated in all his previous reports, the Special Rapporteur feels that the principles of the Charter of the United Nations (and
in particular those relating to the right of peoples to self-determination and the right of peoples to dispose freely of their natural resources) must be fully expressed in the present draft, in the same way that those principles—or at least the principle of self-determination—were felicitously embodied in the articles on State succession in respect of treaties. In the case of succession to public property in particular, the right to self-determination (which in that case takes the form of the elementary principle of the viability of a new State), prompts the formulation of rules calling for the automatic transfer to the successor State of the property necessary for the exercise of sovereignty over the territory concerned.

15. The Special Rapporteur proposes the following provisional work plan:

- Part I: Preliminary provisions
- Part II: General provisions
- Part III: Provisions common to all types of succession of States
- Part IV: Provisions relating to each type of succession of States
  - (1) Partial transfer of territory
  - (2) Newly independent States
  - (3) Uniting of States and dissolution of unions
  - (4) Disappearance of a State through partition or absorption
  - (5) Secession or separation of one or more parts of one or more States
- Part V: Provisions relating to public establishments
- Part VI: Provisions concerning territorial authorities
- Part VII: Property of foundations
- Part VIII: Miscellaneous provisions

I. PRELIMINARY PROVISIONS

Article 4. Sphere of application of the present articles

The present articles relate to the effects of succession of States in respect of public property.

COMMENTARY

(1) There is little to be said about this draft article. It is not only useful, but so simple that comments are virtually unnecessary. The basic purpose of the article is to define the scope of the present articles: first, they deal with succession of States and not with succession of Governments or succession in international organizations, and second, they deal with public property and not other "subject-matters of the law of succession", such as public debts, legislation, the status of the inhabitants, acquired rights and so on, or with treaties, which have already been studied in another draft.

(2) This public property is not defined in the present article. It will be defined in the following article. However, the Special Rapporteur has not specified in the present article to which authority, State, territorial authority or public establishment this public property must belong. Consequently, the article does not refer only to public property belonging to the State but to all public property. The justification for this position taken by the Special Rapporteur will be found in article 5.

Article 5. Definition and determination of public property

For the purposes of the present articles, "public property" means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory affected by the change of sovereignty, or which are necessary for the exercise of sovereignty by the successor State in the said territory.

COMMENTARY

A. Public property

(1) In this third report, the Special Rapporteur proposed a draft article 1 in two versions, providing both a definition and methods for determining public property. Such property was referred to as being property which is of a "public" character because it belongs to the State, a territorial authority or a public establishment or Corporation. The long commentary by the Special Rapporteur stressed the fact: (a) that a purely internationalist approach to the notion of public property is impracticable since there is in international law no autonomous criterion for determining what constitutes public property; (b) that the determination of what constitutes public property by treaty or by international judicial decisions has its limits and does not resolve all problems; and (c) that whatever the circumstances, recourse to municipal law seems inevitable for such determination, the essential question being which legislation—that of the predecessor State, that of the successor State or that of the territory affected by the change of sovereignty—should be applied for that purpose.

(2) Since the Special Rapporteur found practice and judicial decisions somewhat contradictory, he proposed that the determination of what constitutes public property should be made by reference to the municipal law which governed the territory concerned "save in the event of serious conflict with the public policy of the successor State". He gave the reasons for this in paragraphs 9-13 of the commentary on article 1 (third report). However, as soon as the municipal law of the predecessor

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22 Cf. particularly the case of the British Protestant mission hospitals in Madagascar (ibid., p. 137, para. 18), the case of "habous" or "waqf" property in Algeria (ibid., p. 138, para. 19), the case of the Central Rhodope forests (ibid., p. 139, paras. 21-23), the case of the Italian enti pubblici in Libya (ibid., paras. 24-25), the case of the property of the Order of Saint Maurice and St Lazarus on the Little Saint Bernard Pass (ibid., para. 26), the Peter Pázmány University case (ibid., p. 140, paras. 27-30), the Chorzów factory case (ibid., pp. 141-142, paras. 31-35 and 36-42), the case of German settlers in Upper Silesia (ibid. pp. 142-143, paras. 43-45) and so on...
State or of the territory affected by the change of sovereignty has performed its function of determining what constitutes public property, it of course gives way to the juridical order of the successor State. Once the property has been characterized for the purposes of transfer, the latter State reassumes its sovereign power to change the legal status of the property devolving to it, if it so desires.

By wording the draft article in this way, the Special Rapporteur left the question open for discussion by suggesting tentatively a solution that would make it possible to apply the legislation of the successor State rather than that of the predecessor State if the contrary course entailed a risk of serious conflict with public policy.

(3) Consequently, the Special Rapporteur proposed the two following alternative formulations:

**Version A**

For the purposes of these articles, “public property” means all property, whether tangible or intangible, and rights and interests therein, belonging to the State, a territorial authority thereof or a public body.

Save in the event of serious conflict with the public policy of the successor State, the determination of what constitutes public property shall be made by reference to the municipal law which governed the territory affected by the change of sovereignty.

**Version B**

For the purposes of these articles, “public property” means all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, were not under private ownership in the territory ceded by that State.

(4) Pursuing his examination of this definition in his fourth report, in connexion with articles 5 and 5 bis, the Special Rapporteur explained that the suggested formulation was intended solely to define “public property”, whether it belonged to the State, a territorial authority or a public enterprise. Another problem was to determine whether all the public property covered by the definition was transferable to the successor State. Indeed, that was precisely the problem to be settled in the draft articles which followed. Thus the definition and determination of public property was to open the way to drawing a distinction between the effective transfer of State property and merely placing public property under the sway of the juridical order of the successor State.

(5) In his fifth report, the Special Rapporteur suggested that the Commission should retain only the variant 5 bis, since despite the wide sphere of application of article 5, the proposed definition did not cover all forms of public property. The Special Rapporteur feared that article 5 did not cover certain categories of property which were indisputably public, such as those connected with the concept of “socialist property”. Thus, for example, property of a worker-managed enterprise could not be covered by the proposed article 5 because it inherently belonged neither to the State, nor to a “territorial authority” or “public body” thereof.

(6) As recalled above, the problem of the law to be used as point of reference for the purpose of determining what constitutes public property had been the subject of lengthy commentaries, which indicated that examination of the many precedents showed clearly that the law of the predecessor State is not always taken into consideration. The successor State itself has often defined, in exercise of its sovereign powers, the public property which it considers should be included in its patrimony. Accordingly, the reference to the law of the predecessor State proposed in the fourth report (article 5 bis), which is not consistent in every respect with the very diversified practice in this sphere, needed to be modified in order to conform more closely to reality.

(7) The Special Rapporteur therefore proposed a new formulation, which has been reproduced at the beginning of the present commentary, article 5 bis having become article 5 in the present numbering. This text, while allowing some scope for the application of the municipal law of the successor State in the determination of public property, omits the inherently ambiguous and dangerous reference to the “public policy” of the successor State, contained in paragraph 2 of the first version of draft article 5 (fourth report).

(8) As the Special Rapporteur noted in his fourth report, international lawyers have rarely concerned themselves with the definition of public property. They had occasion to do so when an attempt was made in article 56 of the Regulations annexed to the Hague Convention of 18 December 1907 respecting the Laws and Customs of War on Land to provide for a system of protection of “The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property”. Similarly, the Special Rapporteur noted the existence of an internationalist approach to the definition and determination of public property within the Reparation Commission established by the peace treaties of 1919.

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25 See paras. 1 and 2 above.
26 *Yearbook...1971*, vol. II, (Part One), p. 175, document A/CN.4/247 and Add.1, para. 2 of the commentary to article 5.
28 Max Huber (“La propriété publique en cas de guerre sur terre”), *Revue générale de droit international public* (Paris), vol. XX (1913), p. 680, sought to determine the legal status of the property “of local administrative organs occupying an intermediate place between municipalities and the central State administration”, of “State establishments and foundations”, and of “separate patrimonies, distinct from the general patrimony of the State”, but the criteria he defined are not rigorous, and neither are the categories set out above.
29 *Yearbook...1971*, vol. II (Part One), pp. 175-176, document A/CN.4/247 and Add.1, Part Two, paras. 8-12 of the commentary to article 5.
B. Rights and interests

(9) The proposed definition of public property refers to rights and interests. Although the notion of rights—real, patrimonial, pecuniary—is well known to the law, that of interests is more intangible. So far as the Special Rapporteur is aware, there is no definition of "interests" as precise as that which could be given of "rights", the former term probably having a political rather than a legal connotation.

The Dictionnaire de la terminologie du droit international defines "interest" as a term denoting that which materially or morally concerns a natural or juridical person, the material or moral advantage presented for such person by an act or an abstention from an act, by the maintenance or of alteration in a situation.\(^{30}\)

(10) The Special Rapporteur has nevertheless used this term, despite its imprecision, in the definition he has proposed for public property. His sole reason, which he recognizes as insufficient, is that the term is used in a very large number of diplomatic agreements and texts. To take only one example, the Treaty of Versailles of 28 June 1919 includes a special section (part X, section IV) entitled "Property, rights and interests." \(^{31}\)

C. Unliquidated claims and rights

(11) A special aspect of the problem of determining what constitutes transferable public property is presented by the question of unliquidated claims and rights. Some theorists take the view that such claims can hardly be considered as "public property" capable of transfer to the successor State.\(^{32}\) Their argument is that such claims are vested in the predecessor State, for whose benefit they were established, and that, in the absence of a continuing legal relationship between the author of the damage suffered and the predecessor State—a relationship that would not survive the change of sovereignty—the successor State cannot become creditor.

There is admittedly no legal link between the predecessor State and its successor, nor any direct link between the new sovereign and the third party responsible for the damage. But in this matter, which properly belongs to the sphere of international responsibility rather than to that of State succession, there is a substitution of relationships. The damage suffered, if real, is not indeterminate; it has left some trace, or at least, if it is considered fair that there should be compensation, it has affected the exercise of sovereignty in one way or another or resulted in a more or less serious disturbance of some juridical, economic or social order attached to the territory transferred. Furthermore, the recognition or non-recognition of a right, which has been legally established but not yet liquidated, should not depend on the moment or period at which it is claimed. If the claim had been settled before the change of sovereignty, its products, either in its original form or re-used, would have in some way enriched the territory. This problem is of some practical importance, since it also affects outstanding debt-claims, particularly in respect of taxes.\(^{33}\)

II. GENERAL PROVISIONS

Article 6. Transfer of public property as it exists

1. The predecessor State may transfer a territory only on the conditions upon which that State itself possesses it.

2. In accordance with the provisions of the present articles, public property shall be transferred to the successor State as it exists and with its legal status.

COMMENTARY

(1) The Special Rapporteur merely draws attention to commentary to article 2 in his fourth report. In the first version of article 2, in the fourth report, the two paragraphs proposed for article 6 above were separated by another paragraph which has been deleted—not without hesitation—from the present version.

(2) Furthermore, paragraph 2 of article 6 as proposed above has been modified slightly as compared with the first version given in the former article 2. The transferability of property as it exists and with its legal status is no longer accompanied by the restriction that that transfer must be compatible with the municipal law of the successor State.

Article 7. Date of transfer of public property

Save where sovereignty has been restored and is deemed to be retroactive to the date of its termination or where the date of transfer is, by treaty or otherwise, made dependent upon the fulfilment of a suspensive condition or simply upon the lapse of a fixed period of time, the date of transfer of public property shall be the date on which the change of sovereignty

(a) Occurs de jure through the ratification of devolution agreements, or

(b) Effectively carried out in cases where no agreement exists or reference is made in an agreement to the said effective date.

COMMENTARY

(1) With the exception of a few negligible drafting changes, the wording of article 7 above is the same as that of article 3 in the fourth report, and the Special Rapporteur therefore draws attention to his commentary on that article.

(2) It will be recalled that in the draft articles on succession of States in respect of treaties the Commission defined

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33 See below paras. 6 and 7 of the commentary to article 11.
the term “date of the succession of States” \(^{34}\) in the following way:

“date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates. \(^{35}\)

This definition itself is influenced by the definition of succession of States, which is considered to be the replacement of one State by another in the responsibility for the international relations of a territory.

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16. At this point a provision could be inserted dealing with limitations imposed by treaty on the principle of the general and gratuitous transfer of public property. In his fourth report, the Special Rapporteur included a draft article 4 worded as follows:

Subject to the application of general international law and of the law of treaties for the purposes of the interpretation or even the invalidation of an agreement regulating a case of State succession, any limitation imposed by treaty on the principle, hereinafter enunciated, of the general and gratuitous transfer of public property shall be interpreted strictly. \(^{35}\)

17. The Special Rapporteur feels he must refrain, for the time being, from submitting a special provision of this type.

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18. Similarly, he still hesitates to submit to the Commission an article concerning the fate of public property in cases where on the one hand a former treaty, containing all or part of the provisions relating to public property, was considered not binding on the successor State by the application of the articles on the succession of States in respect of treaties and on the other, where a devolution agreement concerning public property was considered invalid by application of the general rules of the law of treaties.

19. The Special Rapporteur considers it quite obvious that the obligations imposed on the predecessor State by international law and codified in the present articles are independent of the existence or validity of treaties. This is not to say that the States concerned cannot regulate the problem of the transfer of public property by treaty. But if the treaties or devolution agreements concerning that subject were considered inapplicable or invalid, it would be the “general law” of succession of States in matters other than treaties, as codified in the present articles, which would be applied. If, for example, the predecessor State had previously concluded a treaty which had the effect of increasing its patrimony in the territory subsequently affected by the succession of States, it cannot invoke the possible non-applicability of that treaty to the successor State to evade the obligation to transfer that property. Treaty law which is invalid or null and void must clearly give way to the “general law” of mandatory and gratuitous transfer.

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\(^{34}\) Used in draft articles 7 and 8, 10-15, 18 and 19, 21-23 and 25.

\(^{35}\) Article 2, paragraph 1 (e).
Property in the first category must change owner and pass within the patrimony of the successor State, provided all other necessary conditions are fulfilled. This is not the case for the two other categories of property, which continue to belong to the territorial authority, the public body or the transferred territory. However, that property falls within the legal jurisdiction of the successor State, or in other words, is governed henceforth by a new jurisdictional order. Draft article 8 is designed solely to make that point clear.

(4) In his fifth report, the Special Rapporteur reverted to the problem of the transferability of public property belonging to the State, excluding other categories of public property. The latter property might seem to have nothing to do with the succession of States stricto sensu, but it cannot be left out completely, firstly because the property which does not pass within the patrimony of the successor State does at least pass within its sphere of competence, and secondly because the transfer does not always occur between public bodies and their counterparts, but brings into play treaty or other procedures and rules which usually involve the predecessor State and the successor State.

(5) Writers rarely give any attention to property proper to the territory affected by the change of sovereignty. The amount of such property is, however, considerable. There is no territory which does not possess property of its own.

In the colonies, the situation was not always clear and this property was often governed by a host of parallel or overlapping legal regimes.

In legal systems which recognize the concept of the public and private domain of the State, the situation is not always simple. In former French Indo-China, for example, there were no less than eight different kinds of domain: (a) and (b) a “colonial” domain composed of the two domains, public and private, of the French State in Indo-China; (c) and (d) a “general” domain comprising the two domains, public and private, of the former Federation of the States of Indo-China; (e) and (f) “local domains” belonging to each protectorate or colony in the Federation (Tonkin, Annam, Cochin China, Cambodia, Laos) with distinctions between the public and private domain; (g) and (h) public and private domains belonging to the provincial, local and municipal authorities of each protectorate or colony in the Federation.

(6) The reason why writers have neglected this problem of property proper to the territory is, perhaps, that they did not believe such property should be affected by the change of sovereignty.

However, while it seems obvious that this property should not devolve to the successor State and that it remains the property of the territory ceded, it is equally clear that this does not amount to maintenance of the status quo ante. The property does not continue to be governed by the former law or to be subject to the former sovereignty. This, of course, is part of the broader problem of succession of States in respect of legislation. However, the point must be made here that public property owned by the ceded territory in its own rights continues to belong to it but follows the political and judicial destiny of the territory, which passes under another sovereignty. Such property will continue to be owned by the territory but will be governed by the legislation of the successor State. In other words, the public property belonging to the territory is not affected by the change of sovereignty so far as ownership is concerned, but it passes within the juridical order of the successor State.

(7) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: “The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place.” The resolution stated “These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change.”

(8) This plain fact is worth recalling and recording in a rule of the kind suggested by the Special Rapporteur. Although it is so obvious as to be unremarkable in the case of property situated in the territory itself, it becomes most important when a decision has to be taken on the fate of property proper to the territory which is situated outside its geographical boundaries. That specific problem will be dealt with in some of the articles suggested below, in the context of the clear rule expressed here.

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37 The situation was (and probably still is) quite complicated in the former Belgian Congo. For example, the precise legal characterization of the property of the Special Committee for Katanga raised very difficult problems (see J.-P. Paulus, Droit public du Congo belge (Université libre de Bruxelles, Institut de Sociologie Solvay, Etudes coloniales, No. 6, 1959, pp. 120 et seq.). The Treaty of 9 January 1895 between the “Independent State of the Congo” and the Belgian State had ceded to Belgium, under the terms of article 2 “all the immovable and movable assets of the Independent State, and in particular (1) the ownership of all lands belonging to its public or private domain... (2) shares and founder’s shares... (3) all buildings, constructions, installations, plantations and properties whatsoever established or acquired by the Government..., movable property of every kind and livestock..., its ships and boats together with their equipment and its military arms equipment, (4) the ivory, rubber and other African products which are at present the property of the Independent State and the stores and other merchandise belonging to it”.
38 Except in the case of the total disappearance of the predecessor State—in other words, when there is, ex hypothesi, no property of the territory itself distinct from the property of the State which has disappeared. The ceded territory is coextensive with the former territory.
39 Paragraphs 3 and 4 of resolution II of the Institute of International Law adopted at its forty-fifth session, held at Sienna from 17 to 26 April 1952 (Annaire de l’Institut de droit international, 1952, II (Basel), pp. 475-476).
(9) This problem often arises, either because the territory possesses property of its own which may normally be situated outside its geographical boundaries or because such property comes to be situated outside its new boundaries as a result of partition of the territory, cession of part of the territory, frontier adjustments, and so forth.

The Franco-Italian Conciliation Commission established under the Treaty of Peace with Italy of 10 February 1947 had to deal with a problem of this kind. In this case the Commission, bound by the very clear wording of paragraph 1 of annex XIV to the Treaty, which it had to interpret, went further than is suggested here and recognized the devolution to the successor State, in full ownership, of the property proper to the ceded territory. This property does not merely come within the juridical order of the successor State.

(10) The agent of the Italian Government had argued that:

When paragraph 1 states that the successor State shall receive, without payment, State and para-statal property (including the property of local agencies) within territory ceded, it is not—at least in the case of the property of local agencies—referring to succession of the State to the ownership of such property but to the property’s incorporation into the juridical order of the successor State.

(11) The Commission rejected that viewpoint, since the main argument of the Italian Government conflicts with the very clear wording of paragraph 1: it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including biens communaux, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.

III. PROVISIONS COMMON TO ALL TYPES OF SUCCESSION OF STATES

Article 9. General principle of the transfer of all State property

Property necessary for the exercise of sovereignty over the territory affected by the succession of States shall devolve, automatically and without compensation, to the successor State.

COMMENTARY

(1) The Special Rapporteur embodied the general principle of the transfer of all State property in an article entitled “Property appertaining to sovereignty”, which was worded as follows in the third and fourth reports:

1. Property appertaining to sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

(2) The Special Rapporteur noted in his third report that it was difficult to find a satisfactory expression to describe property of a public character, which, being linked to the imperium of the predecessor State over the territory, can obviously not remain the property of that State after the change of sovereignty, or, in other words, after the termination of that imperium. Much, if not all, of this property is referred to in some bodies of legislation as property in the “public domain”. This expression is unknown in many legal systems, however, and its lack of universality makes it unsuitable for use in the draft article.

(3) The distinction between public domain and private domain is unsatisfactory, not only because it does not exist in all legal systems, but also because it does not cover public property in a uniform and identical manner from country to country. Consequently, the mind may well balk at deciding, for instance, that all property in the public domain devolves automatically and without compensation to the successor, even though the kind of property included in that domain and what constitutes it can vary to a very great degree. Even more disconcerting would be an approach whereby the predecessor State, in the view of some writers, would retain its private domain and, in the view of others, would cede it to its successor only against compensation. There does not exist a uniform criterion for dividing property into public domain and private domain. This would mean setting up rules which would not be identically applied in practice and whose scope would vary from country to country.

(4) The Special Rapporteur’s suggestion that the notion of public domain and private domain should be replaced by the notion of “property appertaining to sovereignty” was not, perhaps, much of an improvement and might be open to the same criticisms. This suggestion did not spare us the still difficult task of seeking a definition of such property. Yet, however difficult such a definition may be, it was nevertheless easier to express internationally than a definition which would try to encompass notions that vary and are not accepted by everyone, such as public domain and private domain.

It may be said that property appertaining to sovereignty over the territory represents the patrimonial aspect of the expression of the domestic sovereignty of the State. It is true that this expression may differ from one political system to another, but it has the characteristic of covering everything that the State, in accordance

46 Ibid., pp. 514-515.
47 With regard to “property proper” to the territory, see also fifth report (Yearbook...1973), vol. II, p. 67, document A/CN.4/259, paras. 42-45.
with its own guiding philosophy, regards as a “strategic” activity which cannot be entrusted to a private person.

In order to carry on this activity, the State becomes owner of movable and immovable property. It is this property, which the State uses to manifest and exercise its sovereignty or to perform the general obligations involved in the exercise of its sovereignty (e.g., national defence, security, the promotion of public health and education, and national development), that may be regarded as property appertaining to sovereignty over the territory.

(3) How is one to determine more precisely what constitutes this property?

_It will include first of all “public” property—in other words, property which is defined according to three criteria: the public character which it possesses by reason of its being governed by public law; the fact that it is not owned by a private person and therefore belongs to the State, and the fact that it is for the use, or at the service, of all the population._

_In addition, however, it includes property which, in accordance with the legislation of the predecessor State, helps to fulfil the general interest and through which the public power expresses its sovereignty over the territory. It can, and assuredly will, happen that what constitutes such property varies from State to State and from one political system to another. That is inevitable. One State may feel that it is not expressing its sovereignty and is not fully possessed of all its attributes of public power unless it manages directly and exclusively a given sector of activity, or even all sector of activity. Another State, by contrast, confines its activity to very limited sectors. It may regard certain roads, certain airfields, even some arms factories, as being capable of private ownership. It is the very limited range of property to which it confines its activities that will have to be regarded as property appertaining to its sovereignty. It is, in short, all the property which follows the juridical destiny of the territory and which accordingly is transferable along with it, unlike property that is not closely linked to the territory in question._

The French Minister for war wrote in 1876; 47

...the right and duty to ensure the functioning of public services, to order, for example, major roadworks, waterworks or fortifications, and ownership of or eminent domain over such works which are an appurtenance of the public domain—this entire aggregate of duties and rights is, in the final analysis, an attribute of sovereignty. This inseparable attribute of sovereignty moves with the sovereignty itself...  

(6) It was in order to take account of the fact that neither the writers nor judicial decisions have exhausted discussion on the question whether property in the _private domain_ of the State is transferrable _ipso jure_ on the same grounds as property in its _public domain_ that the Special Rapporteur sought to avoid this distinction, which is, indeed, unknown to some national systems of law. 48

(7) In his third report, the Special Rapporteur dealt at length with international practice relating to the devolution of public property appertaining to sovereignty over the territory. 49 This practice sanctions the principle that territory shall devolve automatically and without compensation, whatever the type of succession. The writers unanimously consider that the principle of the transfer of such property is mandatory, even if some of them, basing their views on the distinction between the "public domain" and the "private domain" of the State, make the transfer of property in the second category dependent on the payment of an indemnity to the predecessor State. The rule of general devolution goes back to the period when the patrimonial conception of the State prevailed in juridical systems where the patrimonial rights of the State were regarded as appurtenances of the territory.

(8) In his fourth report, the Special Rapporteur added some further commentaries on this principle of the transfer of property appertaining to sovereignty, that is, property allocated by the State to a public service or public utility, these two terms being interpreted in a broad sense. 50

There may perhaps be other property which, although not appertaining to sovereignty, belongs to the public domain and as such should also normally be transferred without compensation. If that proves to be the case, the matter could be dealt with in the context of other draft articles.

(9) Reverting to the question in his fifth report, 51 the Special Rapporteur expressed concern lest in its present form the draft article under consideration might pose a problem because of the ambiguity of the term "property appertaining to sovereignty". Contrary to the intention of the Special Rapporteur, that formulation might give the impression that the sovereignty of the successor State would in some way be a continuation of that of the predecessor State, an interpretation which would have very important consequences for public debts and liabilities in general, for the validity of treaties, acquired rights and so forth. The Special Rapporteur has expressed his views on these matters elsewhere. 52

47 In a memorial in support of an appeal to the Conseil d'Etat (France, Conseil d'Etat, 28 April 1876, Ministre de la guerre v. Hallet et Cie., Recueil des arrêts du Conseil d'Etat (Paris, Marchal, Billard, 1876), 2nd series, vol. 46, p. 398, (foot-note)).

48 The report of the Sixth Committee to the twenty-sixth session of the General Assembly (Official Records of the General Assembly, Twenty-sixth Session, Annexes, agenda Item 86, document A/8537) states in paragraph 136 that some representatives, "recalling the principle nemo plus juris transfere potest quam ipse haber", expressed disagreement "with the attempt made by the Special Rapporteur to divide State property into the private domain and the public domain". An error must have occurred, for it is clear, on the contrary, that the Special Rapporteur made every effort to avoid this distinction, which is not universal.


this problem is added another very real one, namely that no hard and fast criterion exists for the determination of "property appertaining to sovereignty".

(10) The Special Rapporteur therefore proposes that reference should be made to the property "necessary for the exercise" of sovereignty rather than to property appertaining to sovereignty. The article would thus read:

Property necessary for the exercise of sovereignty over the territory shall devolve, automatically and without compensation, to the successor State.

Such a formulation no doubt leaves unsolved the problem of (a) what property is necessary for the exercise of sovereignty and (b) what authority has the power to determine such property. There is no precise answer to such questions in contemporary international law. Inevitably, recourse must be had to internal public law inasmuch as it would be difficult to avoid in all cases and at all times applying the public law of the successor State. Indeed, it was for that reason that the proposed article has been drafted in neutral language. There is no indication as to which State, the predecessor or the successor, will be used as a point of reference for the determination of the "property necessary for the exercise of sovereignty" over the territory.

(11) It could be argued that the juridical order of the predecessor State should automatically be used to determine the property necessary for the exercise of sovereignty. If the successor State were to have a broader concept of the exercise of sovereignty, which required that property formerly regarded as unnecessary or non-determinant for this purpose should pass within its patrimony, logic would at least appear to require that the predecessor State should not be made to pay the price for the establishment of a different political or ideological régime or a different institutional model. The successor State should pay that price in order to express its Weltanscchaung—its own "world view"—and to assume ownership, in this instance with the payment of compensation or otherwise, of property other than that which was used for the exercise or the expression of the sovereignty of the predecessor State over the transferred territory.

(12) The concept of "property necessary for the exercise of sovereignty", as defined here, is somewhat similar to that sanctioned by international judicial decision, which concerns the transfer of property belonging to local authorities "necessary for the viability" of the local territorial authority concerned. For example, in a dispute concerning the apportionment of the property of local authorities whose territory had been divided by a new delimitation of the frontier between France and Italy, the Franco-Italian Conciliation Commission set up under the Peace Treaty with Italy of 10 February 1947, noted that:

... the Treaty of Peace did not reflect any distinctions ... between the public domain and the private domain* that might exist in the legislation of Italy or the State to which the territory is ceded. However, the nature of the property and the economic use to which it is put have a certain effect on the apportionment.*

The apportionment must first of all be just and equitable. However, the Treaty of Peace does not confine itself to this reference to justice and equity, but provides a more specific criterion for what is generally the most important category.

The question may be left open whether the ... Treaty] provides for two types of agreement ..., one kind apportioning the property of the public authorities concerned, the other ensuring "the maintenance of the municipal services essential to the inhabitants" * ... But, even if that were so, the criterion of the maintenance of the municipal services necessary to the inhabitants should a fortiori play a decisive role * when these services—as will usually be the case—are provided by property belonging to the municipality which must be apportioned. The apportionment should be carried out according to a principle of utility,* since in this case that principle must have seemed to the drafters of the Treaty the most compatible with justice and equity.53

** Article 10. Rights in respect of the authority to grant concessions

1. For the purposes of the present article, the term "concession" means the act whereby the State confers, within its national jurisdiction, on a private enterprise, a person in private law or another State, the management of a public service or the exploitation of a natural resource.

2. Irrespective of the type of succession of States, the successor State shall replace the predecessor State in its rights of ownership of all public property covered by a concession in the territory affected by the change of sovereignty.

3. The existence of devolution agreements regulating the treatment to be accorded to concessions shall not affect the right of eminent domain of the State over public property and natural resources in its territory.

** COMMENTARY

** A. Definition of a "concession"

(1) The definition suggested above will probably be included in due course in article 3, which defines the terms used. In the meantime, certain simple components of the definition are set out below.

(2) The term "concession" can be interpreted in different ways.

(a) From the standpoint of the beneficiary, it can mean permission to manage a public service or the right to work mineral or mining deposits;

(b) From the standpoint of the conceding State, it can mean an act by which the public authorities grant to a private enterprise or a person in private law the right to undertake work of a public nature and to exploit natural resources or manage a public service.

No attempt will be made in the present article to deal with the complex of problems the successor State faces with regard to concessions granted by its predecessor. One aspect of these problems, which will not be dwelt on here, was taken up by the Special Rapporteur in his

second report, “Economic and financial acquired rights and State succession”.  

In particular, the term “concession” will not be used here in the first sense, as defined above, that is, from the standpoint of the beneficiary of the concession. It is the fate of the rights of the conceding State in cases of State succession which will be analysed in the present articles, which, it should be remembered, relate to public property. Although it is true that, as the jurists Lyon-Caen and Renault have stated, the characteristic feature of a concession is the “juxtaposition of a contract and an act of sovereignty”, for the time being we shall not consider in this study the contractual aspect of the concession, which raises various problems relating to acquired rights. We shall deal solely with the act of sovereignty or, in other words, the rights of the conceding power and the treatment accorded to them in the case of territorial changes.

1. A concession is an act of the public authorities

(3) In the arbitral award of 3 September 1924 rendered in the German reparations case, arbitrator Beichmann recalled in the following words the definition of the term “concession” given by the Reparations Commission: The Reparations Commission stated, in its letter of 7 January 1921, that it had “serious reasons for considering that the word ‘concession’ should be understood as encompassing all rights and privileges of an economic nature granted by the Government or the public authorities pursuant to special legislative or administrative measures taken by virtue of the sovereign executive powers vested in the competent authorities, irrespective of whether that right has been exercised and irrespective of whether its exercise constitutes an enterprise of public utility”.  

Later, arbitrator Beichmann stated:

The Reparations Commission, in a letter dated 27 April 1921, stated “the Commission interprets the word ‘concession’ as meaning a ‘right’ to operate an agricultural, mining, industrial or commercial enterprise or in a general sense as a right of an economic nature granted by the executive authority by a special legislative measure or by decree, by virtue of a power which is in principle discretionary and which consequently does not derive from the simple operation of the general law.”

(4) In its final conclusions, the Reparations Commission requested arbitrator Beichmann to:

State that, according to the law:

(a) The term any “concession”, as used in Article 260, means the working of the concession as well as the title or subjective right to the concession;
(b) The use of this term cannot be limited to concessions granted for the operation of a public utility undertaking;
(c) It does not necessarily entail the granting to the concessionaire of privileges appertaining to the public power;
(d) The granting of a concession does not necessarily depend upon the executive power acting in a discretionary manner;
(e) For a concession in the sense in which that term is used in Article 260 to exist, it suffices that the State or one of its authorities has granted a right to a beneficiary in connexion with matters relating to the public or private domain of the State or its eminent domain;
(f) Any act by which a third party obtains from the public authorities the right:

To use permanently or temporarily part of the public or private domain belonging to the State or its administrative districts;
To undertake public works for the purposes of a public service or a public utility undertaking;
To begin and continue working property of any kind that the State has withdrawn from the régime of free competition or free appropriation and for the attribution of which it has reserved for itself a right of control and decision in the form of the granting of concessions;

shall constitute a concession in the sense in which the term is used in Article 260.

“Consequently to declare that the granting of the right to work the following, and the working thereof itself constitute concessions in the sense in which that term is used in Article 260:

(a) Coal mines, iron mines or other minerals or petroleum deposits in China, Bulgaria and Turkey;
(b) Coal mines, iron mines or other minerals in the territories ceded by Germany, and in the German colonies placed under mandate;
(c) Coal mines, iron mines and other minerals in Austria, Hungary, and the territories ceded by Austria and Hungary, and the petroleum deposits ceded before the promulgation of the Act of 11 May 1884, under the régime established by the Act of 1854;
(d) Common salt mines and deposits, potassium salts as mentioned in the Hungarian Act VII of 1911 and the deposits of mineral oils and gases as mentioned in the Hungarian Act VI of 1911;
(e) Coal mines, iron mines or other minerals in the crown lands, in Russia, and salt mines within the country itself.”

(5) The arbitrator decided that

if the term “concession” is to be correctly used, ... the right ... to work the mine or deposit must have been granted to the beneficiary by an act of the public authority ... That act must be a special act referring to a specific beneficiary. An act, which for example, grants to the owners of the surface in general the right to all or some of the mineral wealth beneath their soil does not constitute a concession. On the other hand, the act need not necessarily be an act of the executive branch ... There is nothing to prevent it being an act of the legislature, provided it is of the special nature indicated above. That is merely a question of constitutional law which should not be accorded any importance in determining the meaning of the term “concession”.  

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57 Ibid., p. 469.  
58 Ibid., p. 470.  
59 Ibid., pp. 473-474.
2. A concession is an act granting permission to manage a public service or exploit a natural resource

(6) The activities relating to management, exploitation or implementation in the domain of the State entrusted to a person in private law by the public authorities are usually temporary, or more precisely of limited duration, even when the concession instrument provides that they are to continue for a long period of time. Furthermore, such activities are usually distinguished by the fact that they exclude all property rights over the soil or subsoil of State territory.

Hence, the Beichmann award mentioned above states that “an act which, for example, grants to the owners of the surface in general the right to all or some of the mineral wealth beneath their soil does not constitute a concession”.

(7) Resolution 530 (VI) of 29 January 1952, in which the General Assembly of the United Nations adopted “Economic and financial provisions relating to Eritrea”, contains an article X defining a concession, which reads as follows:

**Article X**

1. In this article:

(a) “concession” means a grant by the former Italian administration or by the Administering Power or by a municipal authority of the enjoyment in Eritrea of specific rights and assets in exchange for specific obligations undertaken by the concessionaire with regard to the use and improvement of such assets, such grant being made in accordance with the laws, regulations and rules in force in Eritrea at the time of such grant.”

3. The concessionaire is a private person or enterprise or sometimes even a State

(8) In a concession, the recipient and beneficiary of the act of the public power is generally a *person in private law*. But there are cases involving treaty rights enjoyed by certain States in the territory of one or more other States, that is, cases involving *concessions of which a State is the beneficiary*. According to a study by the United Nations Secretariat, these cases involve mainly transit rights, mining rights, in connexion with the construction of international pipelines and water rights.

(9) *Transit rights*, which are granted under bilateral agreements following territorial changes, enable States to use their road or rail routes despite the fact that they cross territories which have become foreign territory as a result of boundary changes.

A number of countries, mainly land-locked countries and countries which cannot, for reasons of climate or topography, make use of their own sea coasts or harbour facilities, enjoy *general transit rights* which constitute “an essential factor of sovereignty over natural resources if that sovereignty is interpreted to include the right freely to dispose of those resources or their derivative products”. For example, the treaties and conventions concerning the dissolution of the Swedish-Norwegian Union in 1905 include a Convention Regarding Transit Traffic, which provides for the transportation of iron ore from northern Sweden to the Norwegian port of Narvik by the Lapland Railway. Similarly, Belgium and Northern Rhodesia respectively enjoyed transit rights through Angola and Mozambique for the exportation of copper ore from Katanga and Rhodesia.

(10) Furthermore, States have often concluded agreements concerning *mining rights* granted by one in the territory of the other for the working of frontier deposits. As to *international pipelines*, there are many bilateral agreements for economic co-operation or defence purposes permitting one State to construct or operate such facilities in the territory of the other. *Water resources* common to two or more States are often the subject of inter-State arrangements covering the exploitation of such resources.

(11) Lastly, States may enjoy, in the territory of one or more other States, treaty rights laid down in multilateral agreements such as those establishing the European Communities, which involve acceptance by States of “restrictions of their sovereignty over certain natural resources in return for the possibility of realizing certain common ends and securing certain common benefits.”

B. “Rights in respect of the authority to grant concessions” and their legal nature

(12) The Special Rapporteur feels it is quite inappropriate to consider the successor State as “subrogated” to the rights of the predecessor State, or as “succeeding” to the latter with regard to its rights in respect of the authority to grant concessions. Similarly, it would be erroneous to consider those rights as being “transferred” to the successor State. The phenomenon under consideration cannot be correctly described as subrogation, succession or transfer. All these legal concepts have the drawback of implying that the successor State exercises the *actual rights* of the predecessor State through subrogation, succession or transfer.

The Special Rapporteur believes, on the contrary, that the successor State exercises its own rights as a new conceding authority, which replaces the former conceding authority. The successor State acquires, by virtue of its...
Succession of States in respect of matters other than treaties

sovereignty, the title of owner of the soil and subsoil of the transferred territory.

(13) In one of his reports, the Secretary-General of the United Nations has stated:

Sovereignty over natural resources is inherent in the quality of statehood and is part and parcel of territorial sovereignty—that is, "the power of a State to exercise supreme authority over all persons and things within its territory". 67, 68

The Special Rapporteur considers that this conception of sovereignty is irrefutable and is bound to exclude any idea of subrogation, succession or transfer in the exercise of rights in respect of the authority to grant concessions. This problem is not made clearer by the formulation of treaty provisions, especially in devolution agreements. 69 It is clear, however, that contracting parties are concerned less with legal propriety than with adapting their respective rights and obligations to their own convenience.

(14) It might be objected that if the successor State possesses rights in respect of the authority to grant concessions not as a successor but as a State, those rights should fall outside the scope of a study of State succession. That is largely true and it seems a priori that the problem of concession should be excluded from the topic of State succession. Except for cases where the concession is granted to a State, the sovereign act authorizing the occupation and working of the public domain falls exclusively within the internal juridical order of the State.

In the Special Rapporteur’s opinion, the question of rights in respect of the authority to grant concessions is not relevant to the study of succession of States in respect of legislation. The fact that the successor State “receives” the internal juridical order of its predecessor should not automatically imply that the concessionary régime is thereby renewed. More precisely, that fact is neither necessary nor sufficient, it is simply irrelevant. For as soon as the successor State is considered to be exercising its own rights in respect of the authority to grant concessions when it “takes over” existing concessions, the renewal or rejection of the legislation of the predecessor State clearly has no effect on the problem. The fact that concessions granted previously are taken into consideration is the result, not of the renewal of the municipal law of the predecessor State, but of the exercise of the rights of the new granting authority, in other words, the expression of the will of a new State.

C. Obligations in respect of concessions, a question to be left pending

(15) In fact, in the context of the present articles, which, it should be remembered, concern public property, the Special Rapporteur cannot take up the problem of concessions in all their aspects (some of which relate to the succession of States in respect of legislation, while others concern the questions of acquired rights and international responsibility). The concession contract gives rise not only to rights but also to obligations, and at a subsequent stage it will be necessary to specify the way in which succession of States influences the fate of those obligations. However, the Special Rapporteur is not concerned with this matter for the time being, and has singled out the aspect of the concession question relating to the rights (and not the obligations) of the conceding authority, which in his view automatically belong to the successor State as essential attributes of its sovereignty.

The article which the Special Rapporteur proposes for consideration by the Commission could have no other purpose, since it is concerned with public property. It simply recognizes the rights of the successor State without indicating, for the time being, how and to what end they should be exercised (maintenance or termination of the concession).

(16) It would be another thing entirely to specify the treatment which should be meted out to the concession as such, for to shift thus from the problem of the rights of the conceding authority to the obligations of the latter, would be to pass from the domain of public property, which is the subject of the present study, to that of contracts or concessions stricte sensu, and to that of acquired rights, which the Special Rapporteur will take up at a subsequent stage of his work. That is why he does not intend to study at the present stage the substantive questions relating to concessions, that is, making the maintenance of concessions dependent upon proof that they benefit the ceded territory, termination of “odious” concessions, termination of concessions granted mala fide and the question of royalties. 70

(17) The Special Rapporteur considers, however, that the approach which has made it possible to define the rights of the conceding authority as not deriving from subrogation, succession or transfer will subsequently provide a basis for resolving the problem of obligations.

If the concession is the expression of a sovereign act of the public power, that is a voluntary commitment to an individual or a State which is the beneficiary of the concession, the International Law Commission knows how to approach this commitment or, in other words, this consent to be bound. No matter how a concession may differ in nature from a treaty (and they do not differ at all when the concession is granted in a treaty), it would be advisable to envisage applying to concessions, mutatis mutandis, the same rules adopted for treaties in the draft articles on succession of States in respect of treaties.

68 A/8058, para. 1.
69 Paragraph 2 of the preamble to the "Declaration of Principles on Co-operation for the Development of the Wealth of the Saharan Subsidiary" signed on 19 March 1962, states that "Algeria shall inherit the rights, prerogatives and obligations of France as a public power granting concessions in the Sahara, for the application of the mining and petroleum legislation..." (Journal officiel de la Republique francaise, Lois et Decrets (Paris), 20 March 1962, 94th Year, No. 67, p. 3026.)
70 However, Charles Rousseau, in particular, studies all these questions in the context of succession to public property. Cf. Rousseau, op. cit., pp. 190-237.
Article 11. Succession to public debt-claims

1. Irrespective of the type of succession of States, public debt-claims which are proper to the territory affected by the change of sovereignty shall remain in the patrimony of that territory.

2. The successor State shall, when the territorial change is effected, become the beneficiary of the public debts of all kinds receivable by the predecessor State by virtue of the exercise of its sovereignty or its activity in the territory concerned.

COMMENTARY

(1) Article 11 concerns one aspect of the question of intangible property and rights. Some general reflections on this category of property will be followed by commentaries relating specifically to article 11.

A. Introduction

(2) Article 11 and the following articles to some extent represent the lex specialis as opposed to the lex generalis laid down in article 9 above.

Bluntschli at one time proclaimed the rule that “the property * of States which have ceased to exist passes, actively or passively, to the successors of such States”.71 In another rule he dealt with the question of “public treasuries”, which he apportioned among several successors in proportion to population because “it is necessary to go back to the fundamental element of the State, i.e. man, in order to find an equitable and reasonable solution”.72 The writer used the term “property” in the broad sense which was given to it at the time and which covered “private property belonging to the Treasury, for example, some industries, some land, and cash”.73

(3) Today, the Treasury, public funds, the currency, State bank deposits, gold reserves of the institution of issue, public debt-claims, tax revenue, State resources, and so on are for the most part property appertaining to sovereignty over the territory and its inhabitants, constituting financial means by which or in respect of which this sovereignty is expressed. The legal character of the right to coin money or the privilege of issue, the right to levy taxes, the power of the public authority to take coercive measures to recover debts to the Treasury, Customs duties or public debt-claims is such that it would be inconceivable for the predecessor State to retain these rights and powers.74

(4) This does not necessarily mean that all such patrimonial rights or property belong to what is known in some systems of law as the “public domain” of the State, or that they alone belong to it. Such intangible rights as debt-claims or income from a commercial activity of the State may come under the “private domain” in countries where this concept exists or, to put it differently, under the jus gestionis as opposed to the jus imperii, which characterizes other State activities directly connected with the exercise of sovereignty.75

Taking this as his starting point, Professor Guggenheim writes, in particular, that

... State revenue... is considered in most countries to belong to the private domain and as such, to be governed by the civil law. The disposal of State revenue is a matter which must * be settled by agreement between the ceding State and the cessionary State.76

In point of fact, State revenue is governed by public law to an increasing extent in most States. The existence of treaty provisions, which are, moreover, extremely rare (see article 256 of the Treaty of Versailles), is hardly sufficient to warrant the conclusion that an obligation exists to determine the disposal of State revenue by agreement. The purpose of this comment is mainly to emphasize, as will be done again later, that a customary rule regarding succession to revenue from taxation exists in the very frequent cases where the matter is not settled by agreement.

(5) According to Professor Guggenheim, an agreement would be particularly useful

where the predecessor State is not incorporated into the successor State and therefore continues to exist... If the State is dismembered, its revenue becomes part of the property to be covered by the settlement. At the time of apportionment, items are usually allocated to the State in which they are situated but are nevertheless charged against its share. Where a State ceases to exist and there is only one successor State, the latter acquires not only the State revenue in the territory of its predecessor but also its revenue in third countries.77

But where a State has ceased to exist, there is generally no agreement on the devolution of revenue, and where there is more than one successor State, the agreement, if any, is concluded among these States.

The writer himself limits the scope of his rule by confining its application to taxes: “Immovable * property nevertheless passes to the successor State... if the latter accepts the charges encumbering that property.” 78

In the opinion of the Special Rapporteur, there is an imperative obligation to devolve all public property


Although the term “going concern” may be reminiscent of business procedures, it is none the less expressive, indicating that the territory has to be transferred with all its financial machinery, as it previously existed (taxes, Customs, currency, Treasury) and operating normally.

72 Ibid., p. 87 (rule 58), commentary to rule 58.
73 Ibid., p. 85, commentary to rule 54.
74 A letter dated 5 September 1952, from Mr. D. L. Busk, British Ambassador to Ethiopia, to the Ethiopian Minister for Foreign Affairs, specified that “transfer of power in Eritrea to the Imperial Ethiopian Government and to the Eritrean Government shall take place on a ‘going concern’ basis, that is to say, the existing British Administration will collect all revenue and pay all expenses of administration (including third-party claims...) up to 15 September, 1952”. (Exchange of notes constituting an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ethiopia regarding
appertaining to sovereignty, more especially resources, debt-claims and public funds.\textsuperscript{79}

B. *Patrimonial rights "defined by law"

(6) The question here is whether all tangible rights, both acquired or potential, pass to the successor State. A number of decisions by national courts, particularly by the Polish courts after the First World War, can be cited which interpret succession to public property and to all rights acquired or to be acquired in the broadest and fullest sense.\textsuperscript{80}

Succession to "rights" and particularly to "interests", a term which, as we have seen, is very vague, implies that it is open to the cessionary State to assert future claims and rights still to be acquired. There are even examples of provisions going beyond succession to rights still to be acquired or to interests. Article 1 of the Convention between the United States and Denmark of 4 August 1916 concerning the cession of the Danish West Indies calls for the cession to the United States of "all territory, dominion and sovereignty, possessed, asserted or claimed\textsuperscript{*}by Denmark." \textsuperscript{81}

Another example is article 1 of the Treaty of Paris (1861) whereby His Most Serene Highness the Prince of Monaco renounced

in perpetuity, on his own behalf and on behalf of his successors, in favour of His Majesty the Emperor of France, all direct or indirect\textsuperscript{*}rights over the communes of Menton and Roquebrune, irrespective of the origin and nature\textsuperscript{*}of his rights thereto.\textsuperscript{82}

(7) Some decisions go so far as to recognize the right of the successor State to demand payments to be made to a third party. In 1866 the Prussian State had concluded an agreement with a city, subsequently ceded to Poland, under which the city was required to contribute towards the upkeep of a secondary school. The Supreme Court of Poland found that the successor State had acquired the rights which the Prussian State derived from the agreement of 1866 even if this were a right to demand payments to be made to a third party, the school having a separate legal personality.\textsuperscript{83}

C. *Observations on article 11

(8) In the opinion of the Special Rapporteur, the rule set out in this article is applicable to all types of succession of States. That is why he has placed this article in the part relating to common provisions. Consequently, he merely draws attention to the commentary in his fourth report.\textsuperscript{84}

IV. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

**INTRODUCTION: TYPES CONSIDERED**

20. As recalled earlier,\textsuperscript{85} the Special Rapporteur, in his third, fourth and fifth reports, submitted articles drafted on the basis of a uniform approach, designed to cover all possible types of succession. He does not know whether he succeeded in that task, but he is well aware of its complexity and of the risks involved.

21. It is likewise in order to facilitate the Commission’s initial consideration of this subject that the Special Rapporteur is reverting to the analytical method, at the risk of undertaking a repetitive and fragmentary task and hence of drawing up a tedious catalogue, only to discover in the final analysis that a number of problems are solved in the same way, irrespective of the type of succession involved. There will always be time, however, to rearrange some of the articles at a later stage of the Commission’s work.

22. There remains the problem of the number of cases of succession to be studied for that purpose. Here again, to facilitate the Commission’s consideration of the draft, the Special Rapporteur intends to adopt, by and large, the distinctions suggested by Sir Humphrey Waldock and approved by the Commission in connexion with its study of the draft articles on succession of States in respect of treaties. As is well known, it was relatively easy (and ultimately more profitable) to base that study on the law of treaties, which is already more developed. It was definitely advantageous to approach the succession of States in respect of treaties through “channels” which were already familiar. \textit{A priori}, one might expect it to be equally advantageous to link the current draft, which has not been codified, to another draft which has. That approach, however, clearly has its limitations.

\textsuperscript{79} D. Bardonnet, \textit{op. cit.}, pp. 573-574, considers that there is "a presumption of succession to public property in general, whether part of the public or private domain, whether immovable or movable... Exceptions to the principle of total transfer must be expressly provided for in the treaties and must be strictly interpreted."

\textsuperscript{80} In a work by one of the authors who has attempted to codify international law (J. Internciosa: \textit{New code of international law} 1st ed. (New York, The International Code Company, 1910, p. 54) we find a rule 310, reading as follows: "A State that inherits must assume the charge of... (3) the money and property of the fisc (\textit{l'argent et les biens du fisc; il denaro e la proprieta del fisco})", and a rule 313 which states: "The money, forests, lands and, in general, all movable and immovable property of the treasury of the extinct State becomes its property." (The reference here is to “loss of the whole territory”.)

\textsuperscript{81} See, for example, Supreme Court of Poland, Polish State Treasury v. Skibniewska (1928), in A. D. McNair and H. Lauterpacht, eds., \textit{Annual Digest of Public International Law Cases}, 1927-1928 (London, 1931), Case No. 48, pp. 73-74, which interprets article 208 of the Treaty of Saint-Germain-en-Laye (providing for the transfer of all "property and possessions" to the successors of Austria-Hungary) as including all claims as well.

\textsuperscript{82} English text in \textit{Supplement to the American Journal of International Law} (New York, 1917), vol. II, p. 55; French text in \textit{Revue GENERALE DE DROIT INTERNATIONAL PUBLIC} (Paris, 1917), t. XXIV, p. 454. With regard to property "claimed" by Denmark, the predecessor State, see the commentary to draft article 2, paragraph 2 (property in irregular possession), in the fourth report (\textit{Yearbook...1971}, vol. II (Part One), pp. 168-169, document A/CN.4/247 and Add.1, Part Two, paras. 9-12 of the commentary to article 2).

\textsuperscript{83} Supreme Court of Poland, Case of the Polish State Treasury v. City of Gniezno (1930), in H. Lauterpacht, ed., \textit{Annual Digest...1929-1930} (London, 1930), Case No. 31, p. 54 (quoted in \textit{Yearbook...1963}, vol. II, p. 133, document A/CN.4/157, para. 336), and other similar cases.

\textsuperscript{84} \textit{Yearbook...1971}, vol. II (Part One), pp. 185 et seq., document A/CN.4/247 and Add.1, commentary to article 9.

\textsuperscript{85} See paras. 10-12 above.
23. In any event, we shall study the cases of succession as defined in connexion with succession of States in respect of treaties, namely "(a) transfers of territory; (b) newly independent States; (c) the uniting of States, the dissolution of a State and the separation of part of a State". Basically, these are the categories which will be studied, even if the nature of the material dealt with leads the Special Rapporteur to define these types of succession in a slightly different way.

24. The difficulty of selecting the right approach obviously derives from the dreadful complexity characteristic of the material relating to succession of States. It must be admitted that it also results from the fact that the same case of State succession can be defined in several different ways: the end of the Habsburg dynasty at the end of the First World War is simultaneously the **exinction** of a State (viewed from the angle of the **disappearance** of the Austro-Hungarian Empire), the **dismemberment** of a State (viewed from the same angle), the **dissolution** of a State or a **separation** of States (Austria and Hungary), and the emergence of new States (the parts of the territory of the Empire other than Hungary and Austria which became States or regained the status of States, such as Czechoslovakia and Poland). This extinction of the Austro-Hungarian Empire can also be regarded as the occasion for the **restoration** or **resurrection** of a State (Poland), or as a partition among existing States and new States (the latter being of two kinds, resuscitated States and territories which became States).

25. Although there are only too many options available when classifying a case of this type, there are other cases, which, on the contrary, cannot possibly be classified in a satisfactory way. The types of succession singled out by the Commission leave no scope for a historical consideration of cases of colonization. Similarly, another case of succession of States, which is likewise not an isolated one, will serve to demonstrate the limitations of the options available, despite the Commission's genuine effort to cover all cases. This is the handing over of the French Establishments in India to the Indian Union in 1954. This was not a partial transfer of territory from one State to another. Such an operation would imply that the territory was detached from one State and attached to another. However, the United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), specifies that the territory of an entity which is still dependent has a status separate and distinct from the territory of the colonial Power. It cannot be argued that the Declaration is not applicable to the case because it was adopted after the events of 1954. Furthermore, this case does not concern a newly independent State, since the Establishments in question did not constitute a State. Similarly, one can obviously not refer to this event as a uniting of States or the dissolution of a union, since that would imply that the French Establishments in India had previously been States. Since they had not been States, they cannot be said to have been completely absorbed by another State, namely India. Lastly, this case cannot be classified as secession by the separation of part of the territory of a State, since it does not involve the detachment of territory or the creation of a new State.

26. Our task is complicated by a certain inconsistency in the definition of phenomena when they are approached for this purpose not from one angle (for example, from the angle of the transformation of the territorial composition of a State), but from two angles indiscriminately and with a tendency to shift from one to the other without prior warning or limitation. It is doubtless this fact which prompted our former colleague, Professor Herbert Briggs, to say in 1963 that no two jurists described a case of succession in the same terms.

27. Which classification of the various types of State succession should we adopt? **88**

88 Some examples of the classifications adopted by various writers are given below: Bluntschli (Le droit international codifié, translated from German by M. C. Lardy, 4th ed. (Paris, Calliaumin, 1874), pp. 76-84) considers four types: (a) the disappearance of States; (b) the cession of territory; (c) annexations and (d) the replacement of one State by others. The Dictionnaire de la terminologie du droit international (Paris Sirey, 1960, p. 587) defines 'succession of States' by referring to four types of succession: (a) complete incorporation; (b) partial annexation; (c) partition and (d) creation of a new State. A. Bondé (Traité élémentaire de droit international public (Paris, Dalloz, 1926), pp. 114-138) considers (a) the transformation of the territorial composition of a State through dismemberment or annexation and (b) the disappearance of States through dispersion, destruction of their territory, annexation to another State or incorporation. P. Fiore (Il diritto internazionale codificato e la sua sanzione giuridica, 5th ed., enl. (Turin, Unione tipografico-Editrice torinese, 1915), pp. 151 et seq.) considers (a) separation from an established State; (b) restoration; (c) the State formed by the uniting of several other States; (d) complete annexation and (e) partial cession of territory. A. S. de Bustamante y Sirven (Droit international public, French translation by M. Goulou, 1934-1939, (Paris, Sirey, vol. III, 1936), pp. 273-342) draws a distinction between "cases in which the affected State survives" (through (a) independence; (b) dismemberment and (c) partial annexation) and "succession proper, entailing the disappearance and extinction of the State", (through (a) absorption by another State, (b) disintegration or partition and (c) merger and union). F. Despagnet (Cours de droit international public, 3rd ed. (Paris, Larose et Tenin, 1905), pp. 96-118) draws a distinction between the extinction of States and cases involving changes in States, i.e. complete or partial annexation and the formation of a new State by separation. L. Cavaré (Le droit international public positif, 3rd ed. (Paris, Pedone, 1967), vol. I, pp. 367-416) uses the following classification: (a) new States formed by detachment from another State; (b) changes in the territorial composition of the State as a result of enlargement or diminution (cession, annexation); (c) changes in the international legal constitution or international form of the State (diminution) of its personality when it becomes a member of a federation, a union of States or a real union, or becomes a protected State, and expansion of its personality in cases involving secession from a federation or confederation, the acquisition of unitary form by a federal State, and the disappearance of a protectorate). Charles G. Fenwick (International Law, 3rd ed. (New York, Appleton-Century-Crofts, 1948) draws a distinction between universal succession (absorption by annexation, absorption by incorporation into a federal union and division of one State into a number of separate States) and partial succession (partial annexation, independence of a State which was previously a protectorate or a member of a confederation). Max Särensen...
28. An attempt to clarify the matter would certainly be welcome. Hans Kelsen rightly tried to reduce the whole problem of classifying the succession of States to the acquisition of a territory by the successor State and the loss of that territory by the predecessor State. This phenomenon of “acquisition-loss” may or may not be accompanied by the creation of a State or the disappearance of the predecessor State. In other words, according to Kelsen it involves:

1. The acquisition of a territory, i.e. a territory becomes the territory of a given State, either by being added to the territory of an existing State which thus becomes larger, or by becoming the territory of a State which did not previously exist and thus comes into being; and
2. The loss of a territory, i.e. a territory ceases to be part of the territory of a given State, either because the territorial domain of the latter has been reduced or, in cases involving the loss of all the territory of the State, because the latter has completely disappeared.**

In view of the foregoing, he formulates the following classification:

1. Part of the territory of one State becomes part of the territory of another State,
2. Or becomes a new State,
3. The whole territory of one State becomes part of another State,
4. Or is partitioned among several existing States,
5. Or becomes the territories of several new States,
6. Or becomes the territory of one new State.†

29. By following as closely as possible the classification adopted by the Commission, one could probably envisage,

(Manual of Public International Law, London, MacMillan, 1968) employs the following classification: (a) total absorption by complete annexation; (b) the disintegration of a State; (c) secession through rebellion; (d) cession of... territory and (e) the formation of federations or unions of States. D. P. O'Connell International Law, 2nd ed. (Stevens, London, 1970), vol. I, p. 365) considers that territory can be transferred from one State to another in at least five ways (cession, annexation, emancipation or independence, union, federation). In these five cases one sovereignty replaces another, either wholly (complete annexation) or only partially. Oppenheim (International Law: A Treatise, 7th ed. [Lauterpacht], London, Longmans, Green, 1948), vol. I) draws a distinction between (a) universal succession (absorption, dismemberment) and (b) partial succession (independence, cession of territory, establishment of a federal State, accession of a protectorate to full sovereignty). K. Strupp “Les règles générales du droit de la paix”, Recueil des cours... 1934-1 (Paris, Sirey, 1934), pp. 255-595) distinguishes between: (a) secession-independence; (b) complete annexation; (c) entrance of a State into a federal union or its absorption into another State and (d) dismemberment, in which a whole series of States are established on the territory of another, which has disappeared as a result of revolutionary or other action (p. 473). He reduces all these phenomena to two categories, i.e. (a) complete extinction of a State and (b) partial changes (p. 474). Acquoy (Traité de droit international public, French translation by Paul Goulet (Paris, Sirey, 1940), vol. I, pp. 190-200) uses the following classification; (a) absorption or annexation of all or part of the territory of a State; (b) division or dismemberment of a State; (c) complete or partial extinction of a State (p. 191). He then goes on to consider the effects of each case, and classifies them as follows: (a) complete annexation; (b) merger; (c) partial annexation and (d) separation or dismemberment.

** Obviously, this problem does not concern cases of succession of Governments.


†† Ibid., pp. 315-316.

30. We shall now study each of these types separately.

A. Succession without the creation or disappearance of a State (case of partial transfer of territory)

31. The Commission considered “transfer of territory” in the draft on succession in respect of treaties. This involves cases of partial secession or annexation, the rectification of boundaries, the attachment of territory, and generally speaking the cases defined by the Commission as those “when territory under the sovereignty or administration of a State becomes part of another State” (article 10 of the Commission's draft). The commentary on that article states that the latter covers cases where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article thus concerns cases which do not involve a union of States or merger of one State in another, and equally do not involve the emergence of a newly-independent State.

32. The Special Rapporteur therefore finds it convenient to use this definition and the commentaries thereon, except that he prefers to describe the transfer of territory as “partial” in order to distinguish it from cases involving a complete transfer of territory, which implies the disappearance of the predecessor State. Here, on the contrary, we are concerned exclusively with the partial transfer of territory, i.e. succession without the creation or disappearance of a State.

B. Succession by creation of a State not entailing the disappearance of the predecessor State (case of newly-independent States)

33. This type of succession was likewise singled out by the Commission; it involves the cases of so-called “accession to independence” or “decolonization”. In fact, succession by the creation of a State not entailing the disappearance of the predecessor State covers a broader range of cases than those just mentioned, including secession, or separation through the detachment...
of part of the territory of the State, whether unitary or not, and its emergence as a separate State.\footnote{This was also the view taken by Sir Humphrey Waldock in his third report (Yearbook...1970, vol. II, p. 27, document A/CN.4/234 and Add.1, para. 9) when he defined the term “new State” by referring to “a succession where a territory which previously formed part of an existing State has become an independent State”.}

34. However, in order to follow as closely as possible the pattern laid down in the work already done by the Commission, and also in order to highlight the cases involving decolonization and to evaluate, in accordance with the repeated requests of the General Assembly, their contribution to the theory of State succession, the Special Rapporteur will consider under this heading only the cases of “newly-independent States”, a term which he will continue to use.\footnote{There is, of course, another reason for drawing a distinction between accession to independence and decolonization. The case of Belgium, which seceded from the Netherlands in 1830, should not be treated in the same way as the liberation of a colony. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States already cited (see para. 25 above) indicates that the sovereignty of the metropolitan State does not extend to colonial territories (Cf. Yearbook...1971, vol. II (Part One), p. 166, document A/CN.4/247 and Add.1, Part Two, paras 20 and 31 of the Commentary to article 1, and in particular note 33, which states that owing to the “otherness” of the colonial territory, “a proclaimed independence can no longer be analysed in terms of the secession or partial cession of a territory, since both of these presuppose a territorial oneness of the colony and the metropolitan country, and there is no longer any legal basis for this”.}

Consequently, he will use the definitions adopted in this connexion by the Commission in its draft on succession in respect of treaties. The term “newly-independent States” will have two meanings.

35. First, according to article 2, paragraph 1 (f) (entitled “Use of terms”) of the Commission’s draft, it “means a State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible”.

Similarly, it can also be used in the sense in which it is employed in the commentary on the same sub-paragraph of article 2, which states that “the definition includes any case of emergence to independence of a former dependent territory whatever its particular type may be” (colonies, trust territories, mandates, protectorates and so on).\footnote{Yearbook...1972, vol. II, p. 231, document A/8710/Rev. 1, chap. II, C, para. 6 of the commentary to article 2.}

36. The Special Rapporteur fears, however, that he cannot subscribe to that part of the commentary which states that the expression “newly-independent State” signifies a State which has arisen from a succession of States in a territory...”. The argument that the newly independent State arises from a succession is not flawless from the legal point of view. It is precisely the opposite which is correct—that is, the problems of succession arise from the creation of a newly-independent State.

37. Secondly, in accordance with article 25 of the Commission’s draft on succession in respect of treaties, the definition also covers the case of a newly-independent State “formed from two or more territories, not already States when the succession occurred”.

38. The Commission seems to have considered in this context cases involving decolonization. However, the creation of a State without the disappearance of the predecessor State, which we are considering here, should naturally include, for example, the creation of Poland at the end of the First World War, from territories detached from Russia, Austria-Hungary and Germany. That, too, is a case involving the creation of a State which has, according to the aforementioned definition adopted by the Commission, been “formed from two or more territories, not already States when the succession occurred”. The approach adopted by the Commission reduces the problem to cases of decolonization alone, and furthermore covers only the formation of a new State from territories which were themselves under the sovereignty of a single predecessor State, the former metropolitan country. The case of Poland shows that these territories may have been detached from several predecessor States. Following the Commission in this respect also, the Special Rapporteur will set this category aside for the time being and will merely touch upon it lightly.

C. Succession by creation of a State and disappearance of the predecessor State or States (cases of uniting of States, dissolution of unions, merger and creation of “composite” States)

39. This is the third category adopted in 1972 by the Commission in its draft articles on succession in respect of treaties. Here two or more successor States emerge from one predecessor State through the dissolution of a union, or, in vice versa, two or more predecessor States become a single successor State through the uniting of States.

40. For the purposes of these articles, the Special Rapporteur will take for granted the definition of the uniting of States, which according to article 26 of the 1972 draft covers the “uniting of two or more States in one State”. The commentary on that article states that it “deals with a succession of States arising from the uniting in one State of two or more States, which had separate international personalities at the date of the succession”,\footnote{Ibid., p. 282.} which “involves therefore the disappearance of two or more sovereign States and, through their uniting, the creation of a new State”.\footnote{Ibid., para. 2 of the commentary to article 26.}

41. Similarly, the Special Rapporteur will retain the definition given in article 27 of the same draft, according
to which *dissolution* occurs “when a State is dissolved and parts of its territory become individual States” or “where parts of its territory become separate independent States and the original State ceases to exist”.

42. There is, however, one point which needs clarification: in this definition the Commission seems to be referring literally to the dissolution of a *State* and not to the disappearance of a union, thus running the risk of reducing the problem under consideration to that of the complete *dismemberment* of a unitary State which splits up and is replaced by new States established in each part of its territory. But the examples studied at length in the commentary indicate clearly that the article refers in fact to the dissolution of unions. Moreover, “the Commission recognized that almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States”.

43. As to the *composite State*, which according to the International Law Association is “formed out of several previously separate *States or territories***”, is it clearer to draw a distinction between the State composed of two or more previously separate territories, which belongs in the category of newly-independent States examined under B above, and the State formed out of two or more previously separate States, which belongs in the category of uniting of States, which is the subject of this section.

D. Succession without the creation of a State but entailing the disappearance of the predecessor

44. This category covers the case in which the predecessor State disappears, to the benefit of a pre-existing successor State (complete *absorption*, or *extinction* or *integration*) or of two or more pre-existing States (partition of one State among two or more others).

45. The difference between this category and those examined under C above is obvious. The case in which the State disappears completely through *dismemberment* and *attachment* of each of its parts to pre-existing States must be carefully distinguished from that in which it disappears to the benefit of a new State, by merger or uniting, or to the benefit of two or more new States, by the establishment of such States in the various parts of its territory.

46. The Special Rapporteur for his part considers the cases envisaged in this hypothesis as being basically invalid in the light of contemporary international law, which prohibits the annexation, the partition or the absorption of a State by one or more others, even though cases of this sort do occur in practice, particularly in the course of armed conflicts.

47. The Commission will remember that in his fourth report the Special Rapporteur had already proposed a draft article 1 under which

Territorial changes which occur by force or through a violation of international law or of the Charter of the United Nations shall be without legal effect, and

The State which commits an act of conquest or annexation shall not be deemed to be a successor State...

In the present report, he has recalled these comments by submitting a draft article 2 relating to the need to consider only cases of succession of States “occurring in conformity with international law and in particular, the principles of international law embodied in the Charter of the United Nations”.

48. It will be for the Commission to decide whether this type of “succession without the creation of a State but entailing the disappearance of the predecessor”, which the Special Rapporteur has included here solely with a view to complete coverage of the four types of succession logically conceivable, is to be finally retained.

E. Special case of separation of part of a State (secession)

49. In order to conform as closely as possible to the previous decisions and general approach of the Commission, the Special Rapporteur will deal separately with the case of separation of part of a State (secession). The Commission dealt separately with this case, for it did not want to confuse it with that of *newly-independent States*, and therefore made it the subject of a special article (article 28) in the 1972 draft.

50. The Special Rapporteur will adopt the approach approved by the Commission in defining “separation of part of a State” or “secession”: draft article 28 states that this occurs “if part of the territory of a State separates from it and becomes an individual State”. The commentary on article 28 states that it is concerned “with the case where a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues...”
its existence unchanged except for its diminished territory”.108

51. The classification used for the present study, which is given below, will therefore be based as closely as possible on that approved by the Commission. It covers the following categories:

(a) Partial transfers of territory;

(b) Newly independent States;

(c) The uniting of States and the dissolution of unions
   [These three categories were retained by the Commission];

(d) Disappearance of a State benefiting one or more
   pre-existing States;

[Category which the Special Rapporteur hopes will be
   abandoned by the Commission as being no longer in
   conformity with international law];

(e) Separation of part of a State (or of various parts
   of different States);

[Category dealt with separately by the Commission in
   a special article].

SECTION 1. PARTIAL TRANSFER OF TERRITORY

Article 12. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the transferred territory.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds circulating or stored in the territory shall pass to the successor State.

3. The assets of the central institution of issue in the predecessor State, including those allocated for the backing of issues for the transferred territory, shall be apportioned in proportion to the volume of currency circulating or held in the territory in question.

COMMENTARY

A. Introduction

(1) In all cases of succession of States, the problem of the currency can be reduced to that of redefining or equitably liquidating the juridical-financial relations between the holders of paper currency, successor States and predecessor States. State interventionism has long posed this problem in terms of the relations between the predecessor State and the successor State, but has not thereby eliminated the great technical complexities involved, with which, in the Special Rapporteur's opinion, the Commission need not concern itself in any detail. Even when considered in complete isolation from its financial aspects and strictly within the context of State succession, this question gives rise to problems in so far as it relates both to succession to public property and succession to public debts.

(2) Instruments of payment generally consist of three kinds of monetary tokens: first, the metal currency in the strict sense, made up of the small coinage in circulation, second the bullion or gold reserves providing the backing, and thirdly, the paper money or fiduciary currency, whose issue is generally entrusted to a State banking institution. The first two categories of monetary token pose the problem of a change of sovereignty in terms of succession to public property, while the third, poses the problem in terms of succession to public debts. Paper money, generally guaranteed by a gold backing, theoretically constitutes a debt owed by the institution of issue to the bearer of the fiduciary currency.

(3) The successor State may very well conserve the former currency. Its discretionary power can be expressed equally well by exercising its privilege of issue or by not exercising it. It may content itself with symbolic formal modifications (over-stamping, surcharges, new images) or with a change in the name of the former unit of currency, which is left in circulation. On the other hand, it may introduce a new currency in the transferred territory; this is usually the currency of the successor State itself in the case of a partial transfer of territory, or a new currency in cases involving the creation of a successor State. When the new currency is introduced, the successor State indicates the rate of exchange between that currency and the old currency.

(4) In order to illustrate the “public debt” aspect of the currency question, Max Huber once wrote:

Since State bank-notes as a whole constitute a debt, the regular rules concerning the transfer of obligations are applicable. The bank-notes shall represent a claim against the same debtor, who retains all the backing. The situation with respect to bank-notes is the same as that of any holder of private paper payable to the bearer.109

Hence, it is not illogical to conclude that in so far as the new successor State replaces the former State in the transferred territory, taking over the obligations deriving from the circulation or holding of paper currency in the territory concerned, it is entitled to claim a corresponding portion of the assets and of the backing in gold or foreign exchange which guaranteed the fiduciary currency.

It should be noted that in the older types of succession metal currency was the main source of concern, while little attention was paid to the question of bank-notes, which were considered merely as commercial paper which would be liquidated without any intervention by the new sovereign.

108 Yearbook...1972, vol. II, p. 296, document A/8710/Rev.1, chap. II, C, paragraph 1 of the commentary to article 28. (Secession of Belgium, which separated from the Netherlands in 1830), of Cuba, (which separated from Spain in 1898), of Panama, which separated from Colombia in 1903; of Finland, which separated from Russia after the First World War; creation of Czechoslovakia and Poland from the remains of the Austro-Hungarian Empire; secession of the Irish Free State in 1922; “partition” of Pakistan in 1947 (the Anglo-Indian agreements considered India as the existing State and Pakistan as the new State); secession of Bangladesh (which separated from Pakistan in 1972) and so on.

B. The privilege of issue

(5) Paragraph 1 of the proposed article does not call for lengthy comment, since it is obvious that the privilege of issue, which is an attribute of public authority, can belong only to the new sovereign in the transferred territory.

(6) As drafted, the paragraph does not mean that the privilege of issue is the subject of a succession or a transfer. The predecessor State loses its privilege of issue in the transferred territory and the successor State exercises its own privilege of issue, which it derives from its sovereignty. Just as the successor does not derive its sovereignty from the predecessor, so also it does not receive from the predecessor an attribute of sovereignty such as the privilege of issue. The paragraph simply states that the privilege of issue “belongs” to the new sovereign throughout the territory affected by the change. It is not inherited.

(7) As in the case of any right, however, a distinction must be drawn between the possession and the exercise of this privilege. The fact that the successor State may by treaty allow others to exercise or continue to exercise this privilege is evidence that it is in full possession of the privilege, inasmuch as it has the power thus to dispose of it. Article 3 of the Convention between the United States of America and Denmark providing for the cession of the Danish West Indies reads as follows:

It is especially agreed, however, that:

... 

(4) The United States will maintain...

(b) Concession of June 20th, 1904, for the establishment of a Danish West-Indian bank of issue. This bank has for a period of 30 years acquired the monopoly to issue bank-notes in the Danish West-India islands against the payment to the Danish Treasury of a tax amounting to ten per cent of its annual profits.

The United States was, of course, subrogated to Denmark, the ceding State, with regard to collection of the 10 per cent tax. However, practices of this kind, which were never very widespread, are dying out, and the successor State itself is exercising its power to coin money and issue notes.

(8) The successor’s sovereign exercise of the privilege of issue has sometimes been limited by treaty. When Genoa was ceded to the King of Sardinia in 1814, it was decided that “the gold and silver currency of the ancient State of Genoa”, as they then existed, would be accepted by the public treasury concurrently with the currency of Piedmont. Article 77 of the treaty of peace with Turkey, signed at Sèvres on 10 August 1920, provided, in connexion with the cession of Smyrna to Greece, for the maintenance of the Turkish currency for five years. The treaty was, however, never brought into force.

(9) Yugoslavia exercised its privilege of issue in zone B of the Territory of Trieste by introducing first, in November 1945, a special currency, the “Yugolira”, and later the Yugoslav national currency, the dinar.

C. Currency

(10) When Transjordan became Jordan, it succeeded to a share of the surplus of the Palestine Currency Board, estimated at £1 million, but had to pay an equivalent amount to the United Kingdom for other reasons.

(11) The French Government withdrew its monetary tokens from the French Establishments in India but agreed to pay compensation. Article XXIII of the Franco-Indian Agreement of 21 October 1954 stated: “The Government of France shall reimburse to the Government of India within a period of one year from the date of the de facto transfer the equivalent value at par in £ sterling or in Indian rupees of the currency withdrawn from circulation from the Establishments after the de facto transfer.”

D. Case of partial transfers of territory to various pre-existing successor States

(12) This case involves a number of successor States, as a result of the transfer of several territories. The predecessor State may continue to exist, surrendering only part of its territory to be divided between two or more States.

By virtue of its own sovereignty, each successor State possesses its privilege of issue, of which it may dispose at its discretion; no special difficulty arises here. The question which concerns us is how the successors divide the gold holdings, foreign exchange reserves, money in circulation, and so forth. The disposal of this public property is generally governed by an apportionment agreement. It does not seem possible to enunciate a rule for apportionment that would take into account all the factors involved (the size of the territory’s population, the comparative wealth of the territory, its past contribution to the formation of the central reserves, the percentage of paper money in circulation in the territory, etc.).

(13) It must be borne in mind in this connexion that the transfer of this paper money to the new sovereign mainly represents succession to a debt, whereas the transfer of the bullion reserves represent a succession to public property. Thus the successor State usually tries to withdraw the old notes from circulation, both because they...


111 For reference, see note 81 above.


114 See the Agreement of 1 May 1951 between the United Kingdom and Jordan for the settlement of financial matters outstanding as a result of the termination of the mandate for Palestine (United Nations, Treaty Series, vol. 117, p. 19).

represent a debt and because this operation provides an
opportunity to manifest its new sovereign power of issue.

With the disappearance of the old Tsarist empire after
the First World War, some of its territories passed to
Estonia, Latvia, Lithuania and Poland. Under the
peace treaties concluded, the new Soviet régime became
fully responsible for the debt represented by the paper
money issued by the Russian State Bank in these four
countries. The provisions of some of these instruments
indicated that Russia released the States concerned from
the relevant portion of the debt, as if this was a deroga-
tion by treaty from a principle of automatic succession to
that debt. Other provisions even gave the reason for such
debtor, namely the devastation suffered by those
countries during the war.

(14) At the same time and in these same treaties part of
the bullion reserves of the Russian State Bank was
transferred to each of these States. The ground given in
the case of Poland is of some interest: the 30 million gold
roubles paid by Russia under this head corresponded to
the “active participation” of the Polish territory in the
economic life of the former Russian Empire.

**Article 13. Treasury and public funds**

1. Public funds, liquid or invested, belonging to the
predecessor State and situated in the transferred territory
shall pass into the patrimony of the successor State.

2. Irrespective of where they are situated, public funds,
liquid or invested, which are proper to the transferred
territory shall continue to be allocated and to belong to
the transferred territory.

3. Upon closure of the public accounts relating to
Treasury operations in the transferred territory, the
successor State shall receive the assets of the Treasury
and shall assume responsibility for costs relating thereto
and for budgetary and Treasury deficits. It shall also
assume the liabilities on such terms and in accordance with
such rules as apply to succession to the public debt.

**COMMENTARY**

A. Public funds

1. **State public funds**

(2) State public funds in the transferred territory must
be understood to mean cash, stocks and shares which,
although they form part of the over-all assets of the
State, are situated in the territory or have a relationship
to it by virtue of the State’s sovereignty over or activity
in that region. The principle of total transfer of all the
assets of the predecessor State requires that these funds
should pass to the successor State.

State public funds may be liquid or invested; they
include stocks and shares of all kinds. Thus, the acquisition
of “all property and possessions” of the German
States in the territories ceded to Poland included also,
according to the Supreme Court of Poland, the transfer
to the successor of a share in the capital of an associ-
ation.

(3) Slovakia succeeded to Czechoslovakia’s holdings
under an agreement with the Third Reich dated 13 April
1940. All the funds of public establishments, “whether
or not possessing juridical personality”, became Slovak,
automatically and without payment, provided that they were situated in the territory of Slovakia.

Hungary, under the agreement of 21 May 1940 with
the Reich, succeeded ipso jure to the property of estab-
lishments “controlled” by Czechoslovakia in the territory
taken over by Hungary.

(4) As part of the “transfer without payment of the right
of ownership over State property”, the USSR received
public funds situated in the Sub-Carpathian Ukraine,
which, within the boundaries specified in the Treaty of
Saint-Germain-en-Laye of 10 September 1919, was ceded
by Czechoslovakia in accordance with the Treaty of
29 June 1945.

(5) The Free Territory of Trieste succeeded to all Italy’s
movable assets, including public funds, under the 1947
Treaty of Peace.

2. **Funds proper to the transferred territory**

(6) Public funds “proper” to the transferred territory
include, first of all, the funds belonging to the territory
as a separate administrative and financial authority.
These funds never belonged to the predecessor State
at any time when it was still exercising its jurisdiction
over the territory; still less can they belong to it after it
loses sovereignty over the territory.

(7) The utilization and ownership of funds proper to the
transferred territory clearly cannot be affected by the
change of sovereignty. The successor State undoubtedly
has the power to terminate the application of the financial
or other legislation of the predecessor State in the trans-
ferred territory and to replace it by its own regulations or
any other regulations it may wish to draw up especially

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119 No reference is made here to the cases of Finland, which
already enjoyed monetary autonomy under the former Russian
regime, Bessarabia, which was incorporated by the great Powers
into Romania, or Turkey.

117 See the following treaties: with Estonia of 2 February 1920,
article 12; with Latvia of 11 August 1920, article 16; with Lithuania
of 12 July 1920, article 12; and with Poland of 18 March 1921,
article 19 (League of Nations, Treaty Series, vol. XI, p. 51; vol. II,

118 See B. Nolde, “La monnaie en droit international public”,
Recueil des cours...1929-II (Paris, Hachette, 1930), vol. 27, p. 295.
for that territory. But any changes in the status of this public property would be the result of an act by the successor State acting in its capacity as a sovereign State, and would not be justified by the succession of States itself. This rule would seem to apply whatever the legal status or geographical location of this property, provided that the latter is proper to the transferred territory. The property may be situated in the territory itself, in the territory of the predecessor State or in that of a third State.

B. Treasury

(8) The public accounts are usually closed as at the date of transfer, and the transfer takes place ipso facto. Transfer of the Treasury is always difficult, however, because of the complexity of Treasury operations. The assets, composed of public funds, stocks and securities, budgetary revenues, miscellaneous Treasury income and the movable and immovable installations used by Treasury departments, should normally be transferred to the successor State. In return, the latter assumes the liabilities, comprising miscellaneous and administrative costs of the Treasury, the public debt proper and any deficits.

(9) The successor State also assumes, in respect of the transferred territory, any sums that may be due to the predecessor State if it has a debt-claim against the local Treasury or has granted it advances. However, all these matters must be studied in connexion with the public debt; the means of liquidating this debt will be considered by the International Law Commission at a later stage. The costs which pass to the successor State, consist, in particular, of the departmental expenses of the Treasury. Budgetary and Treasury deficits must be carefully distinguished from the liabilities represented by the public debt. The latter is represented by various debt-claims against the Treasury by individuals or bodies corporate. The budgetary or administrative deficit is not necessarily of the same nature or the same origin.

(10) The Special Rapporteur has suggested a draft article which would oblige the successor State to assume responsibility for costs incumbent on the Treasury which is being transferred by the predecessor State. It should be noted, however, that there have been cases where responsibility for such costs remained with the ceding State. For example, article XII of the Treaty of Peace concluded at Bucharest on 7 May 1918 between the Central Powers and Romania stipulates that the State property (Staatsvermögen) of the ceded Romanian territories shall pass to the acquiring States free and clear of any compensation or costs. Many more examples of this kind could easily be found.

Article 14. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the transferred territory, and public libraries of that territory, shall, irrespective of where they are situated, follow the transferred territory.

2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

COMMENTARY

(1) The Special Rapporteur has nothing to add to the comment given in his third report.

A. Definition of items affected by the transfer

(2) Draft article 14 refers to "archives and public documents of every kind".

There does not exist—at least in French—any generic term capable of covering the great wealth of written, photographic or graphic material which the expression used is intended to suggest. It must be understood as a comprehensive expression referring to the ownership, type, character, category and nature of the items, and the article as finally formulated will have to be accompanied by a detailed commentary to provide the necessary explanations.

(3) The phase "archives and... documents" is used here in the broadest sense, due regard being had to diplomatic practice, which is extremely consistent.

It is understood that the words "of every kind" refer in the first place to the ownership of the archives; it is immaterial whether they are the property of the State, of an intermediate authority or of a local public body, the essential point being that they consist of public documents. Whatever public law corporations and administrative divisions exist in a State, their archives are what is meant.

The expression "of every kind" also refers to the type of archives, whether diplomatic, political or administrative, military, civil or ecclesiastical, historical or geographical, legislative or regulative, judicial, financial or other.

The character of the items, whether public or secret, is likewise immaterial.

The question of the nature or category of the archives relates not only to the fact that they may consist of written material, whether in manuscript or in print, or of photographs, graphic material, and so forth, or that they may be originals or copies, but also to the substance of which they are made, such as paper, parchment, fabric, leather, etc.

Lastly, the expression used is intended to cover all varieties of documents. It seemed to the Special Rapporteur unnecessary and pointless to enumerate all these varieties in a list which would necessarily be incomplete and would certainly be tedious. Examples of the wordings used in diplomatic instruments are "archives, registers, plans, title-deeds and documents of every kind";

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124 This expression appears in several clauses of the Treaty of Versailles of 28 June 1919; part III, sect. I, article 38, concerning Germany and Belgium; sect. V, article 52, concerning Germany and France in respect of Alsace-Lorraine, British and Foreign State Papers, 1919, vol. 112 (op. cit.), pp. 29-30 and 42.
"archives, documents and registers concerning the civil, military and judicial administration of the ceded territories",125 "all title-deeds, plans, cadastral and other registers and papers";126 "any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded";127 "all archives having a general historic interest" as opposed to "archives which are of interest to the local administration";128 "all documents exclusively referring to the sovereignty relinquished or ceded... the official archives and records, executive as well as judicial";129 documents, deeds and archives... registers of births, marriages and deaths, land registers, cadastral documents..." 130 and so forth.

B. The principle of the transfer of archives to the successor State

(4) The principle of the transfer of archives to the successor State seems to be unquestioned. This is demonstrated by diplomatic practice.

1. Archives of every kind

(5) Archives of every kind are generally handed over to the successor State immediately or within a very short time-limit. The Franco-German Treaty of 1871 providing for transfer required the French Government to hand over to the German Government the archives relating to the ceded territories.131 The Additional Agreement to that Treaty imposed on the two States the obligation to return to each other all the title-deeds, registers, and so forth, for municipalities on either side bounded by the new frontier line between the two countries.132 After the First World War, the territories ceded in 1871 having changed hands again, the archives were dealt with in the same way and the Treaty of Versailles required the German Government to hand over without delay to the French Government the items relating to those territories.133 Under the terms of an identically worded provision of the same Treaty, the German Government contracted the same obligation towards Belgium.134

2. Archives as an instrument of evidence

(6) In old treaties, archives were handed over to the successor State primarily as instruments of evidence and as titles to property.

The writings of past years seem to retain the impress of this concern for "evidence". "Archives", wrote Fauchille, "and titles to the property acquired by the annexing State *, which form... part of the public domain, must also be handed over to it".135 The Convention whereby the islands constituting the Danish West Indies were sold to the United States by Denmark in 1916 provided as follows: "In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property * of the inhabitants of the islands ceded...".136 When Spain, by the Treaty of Paris of 10 December 1898, ceded to the United States the property in the public domain of Cuba, Puerto Rico, the island of Guam and the Philippine archipelago, it was stated that the cession included "all documents exclusively referring to the sovereignty relinquished or ceded... and such rights * as the Crown of Spain and its authorities possess in respect of the official archives...".137

However, the treaties in question do not seem to have implied by this that the ceding State had a right to retain other categories of archives.

3. Archives as an instrument of administration

(7) The simple idea has prevailed that, when territory is transferred, concern for handing over as viable a territory as possible should induce the predecessor State to relinquish to the successor all such instruments as will enable breakdowns in administration to be kept to a minimum and help to ensure that the territory is properly and easily governable. Hence the custom of leaving to the territory all the written, graphic and photographic material needed for the continuance of the proper administrative functioning of the territory.

(8) One effect of this "practice" which is encountered in some treaties of annexation, especially in Europe, was that in a few rare cases the predecessor State considered itself entitled to hand over only archives of an administrative character 138 and to retain those which had a

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125 Article 3 of the Treaty of Peace between the German Empire and France, signed at Frankfurt on 10 May 1871 (G. F. de Martens, ed., Nouveau Recueil général de traités (Göttingen, Dieterich, 1874), vol. XIX, p. 689).
126 Article 8 of the Additional Agreement to the Treaty of Peace, signed at Frankfurt on 11 December 1871 (ibid., (1875), vol. XX, p. 854).
127 Article 1, para. 3 of the Convention between the United States of America and Denmark providing for the Cession of the Danish West Indies [for reference, see note 81 above].
131 Article 3 of the Treaty of Peace signed at Frankfurt on 10 May 1871 (see note 125 above).
132 Article 8 of the Additional Agreement signed on 11 December 1871 (see note 126 above).
had not yet drawn attention to it. For instance, France, isolated ones.

"relating...directly or belonging to the territory". The archives relating to it must be taken into account. At the time but also, a century later, to obtain from Italy (9) The suggested text enunciates the principle of the transfer of archives of every kind to the successor State.

However, the draft article makes another specification which requires commentary. It refers to archives "relating...or belonging to the territory".

C. The archives-territory link

(9) The suggested text enunciates the principle of the handing over to the successor State of archives "relating directly or belonging to the territory". It should be made clear what is meant by these words.

Obviously, the successor State cannot claim simply any archives, but only those which belong to the territory. This must be appraised from two standpoints.

(10) First, there are archives which were acquired before the change of sovereignty by or on behalf of the territory, against payment of free of cost, and with funds of the territory or otherwise. From this first standpoint, such archives "belong" to the territory and must follow its destiny in the change of sovereignty. In order to do so, it is not necessary that the archives should relate to the territory, since it is quite conceivable that the territory may have acquired, free of cost or against payment, historical, cultural or other documents concerning other parts of the world.

(11) Secondly, the organic link between the territory and the archives relating to it must be taken into account. However, a difficulty arises when the strength of this link has to be appraised by category of archives. Writers agree that, where the documents in question "relate to the predecessor State as such and refer only incidentally to the ceded territory", they "remain the property of the ceding State, [but] it is generally accepted that copies will be supplied to the annexing State at its request". The "archives-territory" link was specifically taken into account in the Rome Agreement of 23 December 1950 between Yugoslavia and Italy concerning archives.

Attention may be drawn at this point to the decision of the Franco-Italian Conciliation Commission in which the Commission held that archives and historical documents, even if they belonged to a municipality whose territory was divided by the new frontier drawn up in the Treaty of Peace with Italy, must be assigned in their entirety to France whenever they related to the territory ceded.

(12) After the Franco-German war of 1870, the archives of Alsace-Lorraine were handed over to the new German authority in the territory. However, the problem of the archives of the Strasbourg educational district and of its schools was amicably settled by means of a special convention. In this case, however, the criterion of the "archives-territory" link was applied only in the case of documents considered to be "of secondary interest to the German Government".

(13) Another problem which is touched on by the draft articles as submitted and which has caused some difficulties concerns archives which, for one reason or another, are situated outside the territory affected by the change of sovereignty.

D. Archives situated outside the territory

(14) The text suggested by the Special Rapporteur is of a general nature. According to the wording submitted for discussion, the successor State has the right to claim its archives, wherever they may be situated. In fact, the formulation of such a rule seems to follow inevitably

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139 This seems especially significant, in that Italy was itself the successor to the Sardinian Government.

140 See para. 21 below.


143 Article 6 of the Agreement (United Nations, Treaty Series, vol. 171, p. 291) provides that Archives which are indivisible or of common interest to both parties "shall be assigned to that Party which, in the Commission’s judgement, is more interested in the possession of the documents in question, according to the extent of the territory or the number of persons, institutions or companies to which these documents relate". In this case, the other Party shall receive a copy of such documents, which shall be handed over to it by the Party holding the original.

144 Decision No. 163 rendered on 9 October 1953 (United Nations, Reports of International Arbitral Awards, vol. XIII, (op. cit.), pp. 503-549). This decision includes the following passage: "Communal property which shall be so apportioned pursuant to paragraph 18 [of annex XIV to the Treaty of Peace with Italy] should be deemed not to include, all relevant archives and documents of an administrative character or historical value; such archives and documents, even if they belong to a municipality whose territory is divided by a frontier established under the terms of the Treaty, pass to what is termed the successor State if they concern the territory ceded or relate to property transferred (annex XIV, para. 1); if these conditions are not fulfilled, they are not liable either to transfer under paragraph 1 or to apportionment under paragraph 18, but remain the property of the Italian municipality. What is decisive, in the case of property in a special category of this kind, is the notion link with other property or with a territory" (ibid., pp. 516-517).

from a consideration of practice, some examples of which will be given below.

A distinction may be drawn between two cases: that of archives removed from the territory concerned, and that of archives established outside the territory but relating directly to it. (There is a third case which will not be considered in this study, namely that of documents belonging or relating to the territory which are situated outside the geographical boundaries of both the predecessor State and the successor State.)

1. Archives which have been removed

(15) Current practice seems to acknowledge that archives which have been removed by the predecessor State, either immediately before the transfer of sovereignty or even at a much earlier period, should be returned to the successor State.

There is a striking similarity in the wording of the instruments which terminated the wars of 1870 and 1914. Article 3 of the Treaty of Peace between France and Germany signed at Frankfurt on 10 May 1871 provided as follows: “If any of these items [archives, documents, registers, etc.] have been removed, they will be restored by the French Government on the demand of the German Government”. This statement of the principle that archives which have been removed must be returned was later incorporated, in the same wording, in article 52 of the Treaty of Versailles, the only difference being that in that treaty it was Germany that was compelled to obey the law of which it had heartily approved when it was the victor.147

(16) Similar considerations prevailed in the relations between Italy and Yugoslavia. Italy was to restore to the latter administrative archives relating to the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924 which had been removed by Italy between 4 November 1918 and 2 March 1924 as the result of the Italian occupation, and also deeds, documents, registers and the like belonging to those territories which had been removed by the Italian Armistice Mission operating in Vienna after the First World War. The agreement between Italy and Yugoslavia of 23 December 1950 is even more specific: article 1 provides for the delivery to Yugoslavia of all archives “which are in the possession, or which will come into the possession” of the Italian State, of local authorities, of public institutions and publicly-owned companies and associations” and adds that “should the material referred to not be in Italy, the Italian Government shall endeavour to recover and deliver it to the Yugoslav Government”.148

(17) However, some French writers of an earlier era seemed for a time to accept a contrary rule. Referring to partial annexation, which in those days was the most common type of State succession, owing to the frequent changes in the political map of Europe, Despagnet wrote: “The dismembered State retains... archives relating to the ceded territory which are preserved in a repository situated outside that territory”.149 Fauchille did not go so far as to support this contrary rule, but implied that distinctions could be drawn: if the archives are outside the territory affected by the change of sovereignty, exactly which of them must the dismembered State give up? As Fauchille put it: “Should it hand over only those documents that will provide the annexing Power with a means of administering the region, or should it also hand over documents of a purely historical nature?”150

(18) The fact is that these writers hesitated to support the generally accepted rule, and even went so far as to formulate a contrary rule, because they accorded excessive weight to a court decision which was not only an isolated instance but bore the stamp of the political circumstances of the time. This was a judgement rendered by the Court of Nancy on 16 May 1896, after Germany had annexed Alsace-Lorraine, ruling that “the French State, which prior to 1871 had an imprescriptible and inalienable right of ownership over all these archives, was in no way divested of that right by the change of nationality imposed on a part of its territory”.151 It should be noted that the main purpose in this case was not to deny Germany (which was not a party to the proceedings) a right to the archives belonging to the territories under its control at that time, but to deprive an individual of public archives which were improperly in his possession.152 Hence the scope of this isolated decision, which appeared to leave to France the right to claim from individuals archives which should or which might fall to Germany, seems to be somewhat limited.

(19) The Special Rapporteur has nevertheless mentioned this isolated school of thought because it seemed to prevail, at least for some time and in some cases, in French diplomatic practice. If we are to give credence to one interpretation of the texts at least, this practice seems to indicate that only administrative archives should be returned to the territory affected by the change of sovereignty, while historical documents relating to that territory which are situated outside or are removed from it remain the property of the predecessor State. For example, the Treaty of Zurich of 10 November 1859 between France and Austria provided that archives containing titles to property and documents concerning administration and civil justice relating to the territory ceded by Austria to the Emperor of the French “which may be in the archives of the Austrian Empire”, including those at Vienna, should be handed over to the commis-

146 See note 125 above.
147 See note 124 above.
152 Judgement of the Court of Nancy of 16 May 1896, Dufresne v. the State (M. Dailoz et al., Recueil périodique (Paris, Bureau de jurisprudence générale, 1896), part 1, pp. 411-412.
153 The decision concerned 16 cartons of archives which a private individual had deposited with the archivist of Meurthe-et-Moselle. They related both to the ceded territories and to territories which remained French, and this provided a ground for the Court's decision.
sioners of the new Government of Lombardy.\textsuperscript{154} If there is justification for interpreting in a very strict and narrow way the expressions used, which apparently refer only to items relating to current administration, it may be concluded that the historical part of the imperial archives at Vienna relating to the ceded territories was not affected.\textsuperscript{155}

Article 2 of the Treaty of the same date between France and Sardinia\textsuperscript{156} refers to the aforementioned provisions of the Treaty of Zurich, while article 15 of the Treaty concluded between Austria, France and Sardinia on the same date reproduces them word for word.\textsuperscript{157}

Similarly, a Convention between France and Sardinia, signed on 23 August 1860 pursuant to the Treaty of Turin of 24 March 1860 confirming the cession of Savoy and the County of Nice to France by Sardinia, includes an article 10 which is cast in the same mould as the articles cited above when it states:

Any archives containing titles to property and any administrative, religious and civil justice documents relating to Savoy and the administrative district of Nice which may be in the possession of the Sardinian Government shall be handed over to the French Government.\textsuperscript{158}

(20) Here again, the Special Rapporteur is somewhat hesitant to conclude that these texts contradict the existence of a rule permitting the successor State to claim all archives, including historical archives, relating to the territory affected by the change of sovereignty which are situated outside that territory. Would it, after all, be very rash to interpret the words "titles to property" in the formula "titles to property, administrative, religious and judicial documents", which is used in all these treaties, as alluding to historical documents (and not only administrative documents) that prove the ownership of the territory? The fact is that in those days, in the Europe of old, the territory itself was the property of the sovereign, so that all titles tracing the history of the region concerned and providing evidence regarding its ownership, were claimed by the successor.\textsuperscript{159} If this view is correct, the texts mentioned above, no matter how isolated, do not contradict the rule concerning the general transfer of archives, including historical archives, situated outside the territory concerned. If the titles to property meant only titles to public property, they would be covered by the words "administrative and judicial documents". Such an interpretation would seem to be supported by the fact that these treaties usually include a clause which appears to create an exception to the transfer of all historical documents, in that private documents relating to the reigning house, such as marriage contracts, wills, family mementoes, and so forth, are excluded from the transfer.\textsuperscript{160}

(21) What really clinches the argument, however, is the fact that these few cases which occurred in French practice were deprived of all significance when France, some 90 years later, claimed and actually obtained the remainder of the Sardinian archives, both historical and administrative, relating to the cession of Savoy and the administrative district of Nice, which were preserved in the Turin repository. The agreements of 1860 relating to that cession were supplemented by the provisions of the Treaty of Peace with Italy of 10 February 1947, article 7 of which provided that the Italian Government should hand over to the French Government "all archives, historical and administrative, prior to 1860, which concern the territory ceded to France under the Treaty of March 24 1860, and the Convention of August 23, 1860".\textsuperscript{161}

(22) Consequently, there seems to be ample justification for accepting as a rule which adequately reflects State practice the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty, even if those archives have been removed or are situated outside that territory.

2. Archives established outside the territory

(23) This section concerns archives consisting of items and documents which relate to the territory affected by the change of sovereignty but which were established and have always been kept outside the territory. Many treaties include this category among the archives which must revert to the successor State.

As noted above,\textsuperscript{162} France was able to obtain, through the Treaty of Peace with Italy of 10 February 1947, archives relating to Savoy and Nice established by the City of Turin.

Under the agreement signed at Craiova on 7 September 1940 concerning the cession of Southern Dobruja by Romania to Bulgaria, the latter obtained not only the


\textsuperscript{156} Article 2 of the Treaty between France and Sardinia concerning the cession of Lombardy, signed at Zurich on 10 November 1859 (France, Archives diplomatiques (op. cit.), p. 16; and M. de Clercq, op. cit., p. 652).

\textsuperscript{157} Article 15 of the Treaty between Austria, France and Sardinia, signed at Zurich on 10 November 1859 (France, Archives diplomatiques (op. cit.), pp. 22-23; and M. de Clercq, op. cit., pp. 661-662).


\textsuperscript{159} As the Special Rapporteur noted above, historical documents were often claimed by the successor State as instruments of evidence (see para. 6).

\textsuperscript{160} Article 10 of the Convention of 23 August 1860 between France and Sardinia (see note 158 above) provided that France was to return to the Sardinian Government "titles and documents relating to the royal family", which implies that France had already taken possession of them together with the other historical archives. This clause relating to private papers, which is based on the dictates of courtesy, is also included, for example, in the Treaty of 28 August 1736 between France and Austria concerning the cession of Lorraine, article 16 of which left to the Duke of Lorraine family papers such as "marriage contracts, wills and other papers".


\textsuperscript{162} See para. 21 above.
archives situated in the ceded territory but also certified true copies of the documents at Bucharest relating to the region which had become Bulgarian.

(24) What if the archives relating to the territory affected by the change of sovereignty are situated neither within the territory itself nor in the predecessor State? Article 1 of the Agreement of 23 December 1950 between Italy and Yugoslavia provided that “should the material referred to not be in Italy, the Italian Government shall endeavour * to recover and deliver it to the Yugoslav Government”. In other words, to use terms dear to experts in French civil law, the former is a rigorous obligation concerning the result, while the latter is a simple obligation concerning the means.

E. Problem or the “ownership” of archives

(25) The Special Rapporteur has been careful to specify in the suggested article that the archives “follow the transferred territory”. In this way, he sought to avoid having to take a stand regarding the ownership of the archives. The article merely states that the archives cannot remain in the patrimony of the predecessor State. They “follow the territory”, that is, they may become the property of the successor State or of the transferred territory, depending on circumstances and the nature of the archives (archives proper to the territory or archives relating to but situated outside the territory). The question will be settled at the discretion of the successor State, the essential point being that these items cannot remain in the patrimony of the predecessor State.

F. Special obligations of the successor State

(26) The proposed draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Changes of sovereignty over a territory are often accompanied by population movements (establishment of new frontier lines which divide the inhabitants on the basis of a right of choice, annexations leaving the population a choice of nationality, etc.). Clearly, the population in question cannot be governed without, at least, administrative archives. For that reason the second paragraph of the draft article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need. Of course, this must be done at the expense of the requesting State.

It seemed useful to extend this possibility even to third States, since such States may have nationals returning from the territory affected by the change of sovereignty, where they may have constituted a relatively large minority.

(27) Clearly, however, the successor State is only obliged to hand over copies of administrative documents and other documents used for current administration. Furthermore, the handing over of these documents must not jeopardize the security or sovereignty of the successor State. For example, if the predecessor State claims the purely technical file for a military base it has constructed in the purely technical file for a military base or the judicial record of one of its nationals who has left the ceded territory, the successor State can refuse to hand over copies of either. Such cases involve elements of discretion and expediency of which the successor State, like any other State, may not be deprived.

(28) The successor State is sometimes obliged, by treaty, to preserve carefully certain archives which may be of interest to the predecessor State in the future.

The Agreement of 21 October 1954 between France and India concerning the French Establishments in India is interesting, because it specifies the period of time for which the archives are to be preserved, and states that copies of the archives shall be handed over to the predecessor State whenever they exist.

In some cases, the successor State has handed over copies or microfilms not only of administrative archives but also of historical documents and papers.

G. Time-limits for handing over the archives

(29) The Special Rapporteur considered it unnecessary to suggest the fixing of a time-limit for the transfer or return of archives to the successor State, although diplomatic practice often sanctions the existence of specific provisions along those lines.

Furthermore, in most countries public archives are not only inalienable but may also be claimed at any time because they are imprescriptible. The Special Rapporteur has cited various cases in this commentary.

H. Transfer and return free of cost

(30) The Special Rapporteur felt that there would be no point in spelling out something which goes without saying, namely that archives must be handed over to the...
successor State free of cost and free of any tax or duty. The problem has already been settled in principle in draft article 9, which states that property necessary for the exercise of sovereignty over the territory shall devolve automatically and without compensation. This property includes archives. Furthermore, this usage is firmly established in practice.

The Special Rapporteur has nevertheless included the principle of transfer free of cost implicitly and a contrario in the draft under consideration, which provides that copies of archives shall be made at the expense of the requesting State.

**Article 15. Property situated outside the transferred territory**

1. Subject to the application of the rules relating to recognition, public property proper to the transferred territory which is situated outside that territory shall pass within the juridical order of the successor State.

2. The ownership of property belonging to the predecessor State which is situated in a third State shall devolve to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

**COMMENTARY**

**A. Introduction**

(1) Professor O'Connell writes:

It would seem that in the case of partial succession, property of the predecessor State not actually located in the territory does not change its ownership. It has not come within the sovereign jurisdiction of the successor State, and the latter can claim only so much of it as it can seize or as is ceded to it. In the case of total succession, however, the predecessor loses its competence to own property. Such of its assets, therefore, as are situated in foreign countries must either become property of the successor State or cease to have any owner. There is no reason to adopt the latter alternative. A successor State in the case of total succession acquires all the rights of its predecessor that appertain to sovereign jurisdiction. Such jurisdiction embraces the capacity to possess assets located in foreign countries. It is reasonable to conclude, therefore, that the claims of the successor State to be the owner of the assets of its predecessor located in other States must be recognized by the States concerned.

He also cites a number of writers who admit succession to property abroad in cases of total succession.

(2) Professor Rousseau likewise takes the view that "it is generally agreed that property abroad of a State which is dismembered or which ceases to exist should also be transferred to the successor States . . . . There is little difference of opinion among writers on this point".

Like O'Connell, however, he cites Professor Hall, who, along with a very few other writers, maintains that in the case of land situated outside the territory the successor State has at the most a right to its value. An obligation to sell would be imposed on it, since the right of actual possession might prove more or less impracticable for some reason arising out of the fact that the property is now in foreign territory.

(3) In the case of a partial transfer of territory, the point is not—at least in the view of the Special Rapporteur—what becomes of "public property of the predecessor State which is not situated in the ceded territory." Obviously—subject to a reservation which will be discussed below—such property remains under the ownership of that State and cannot be transferred to the successor. What is at issue is the exact opposite, namely, the fate of public property of the ceded territory situated outside the boundaries of the territory, and in particular in the territory of the predecessor State.

(4) In the case of partial succession, however, writers do not always consider—or do not consider clearly—what happens to property of the ceded territory which is situated either in the now foreign territory of the predecessor State or in the territory of a third State. Rousseau, for instance, does not consider this at all because he is only dealing with the case of total succession or, in other words, of "a State which is dismembered or which ceases to exist".

(5) As has been noted previously, the territory transferred may have, and is necessarily the owner of, property of its own distinct from that the ownership of which was in the hands of the predecessor State when the territory was an integral part of that State, and such property of the ceded territory may, for one reason or another, be situated outside its own geographical area, either in the territory remaining to the predecessor State or in a third State. These are the two cases which will have to be considered separately in discussing the problem of property of the territory itself situated abroad.

(6) There remains the property concerning which a reservation was expressed. This is property situated abroad which belonged to the predecessor State before the change of sovereignty. The problem is whether the successor State would be entitled to claim a share of such property with the argument that the territory now added to it may have contributed to the creation of the property in question when that territory was an integral part of the predecessor State. This is another case that has to be considered separately. It is covered by paragraph 2 of the proposed article.

Let us consider each of these cases:

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166 D. P. O'Connell, *State Succession... (op. cit.),* vol. I, p. 207.
168 Ch. Rousseau, *op. cit.,* p. 143.
B. Property proper to the transferred territory which is situated outside that territory

(7) The Special Rapporteur previously noted the lack of attention generally given by writers to public property proper to the transferred territory. The reason why they appear to have neglected this problem, despite its importance, is, perhaps, that they tacitly believed such property should not be affected by the fact of transfer of the territory. While continuing to belong to the latter, the public property in question follows its political and juridical destiny.

(8) A resolution of the Institute of International Law laid down the same principle, stating that local corporate bodies retained the right of ownership over their property after territorial changes: "The territorial changes leave intact those patrimonial rights which were duly acquired before the change took place." The resolution specified "These rules also apply to the patrimonial rights of municipalities or other corporate bodies belonging to the State which is affected by the territorial change *."

This plain fact is worth recalling and recording in a rule of the kind suggested by the Special Rapporteur; for, although it is so obvious as to be unremarkable in the case of property situated in the territory itself, it becomes most important when a decision has to be taken on the fate of property of the territory itself which is situated outside its geographical boundaries.

(9) Clarity demands that a distinction should be made between cases where such property is situated in the predecessor State and cases where it is in a third State.

1. Property proper to the territory which is situated in the predecessor State

(10) This is a clear case: it concerns property belonging as of right to the territory appended to a pre-existing State but situated in the rest of the territory retained by the predecessor State. In this case, one can discern two principles, namely, the principle of non-transferability of ownership of property of this kind and the principle of modification of the legal régime governing it.

Non-transferability of ownership of property of this kind

(11) The occurrence of State succession does not transfer the right of ownership of property of this kind. The property remains within the patrimony of the ceded territory. It cannot suddenly, merely because of the succession, become the property of the predecessor State, even if it is situated in the territory remaining to that State after curtailment. Since the predecessor State did not own this property before succession, it cannot, as a result of the succession, create new rights for itself. Nor does property of this kind pass to the successor State merely because of the succession. There appears to be no valid reason for stripping the ceded territory of its own property.

Modification of the legal régime governing property of this kind

(12) If property of this kind should never pass to the predecessor State—and it generally does not pass to the successor State except as otherwise provided—it can only remain the property of the ceded territory. Although the right of ownership is thus non-transferable, there is a change in the rules governing the exercise and enjoyment of this right. The change is twofold:

Firstly, the predecessor State, in which the property is situated, will now treat it as foreign public property, with all that this implies as regards restrictive or protective legislation. This right of ownership, which is otherwise unchanged as regards the entity in which it is vested, is thus exercised in a new setting and it is the laws, if any, relating to foreign property that will now be applied to it by the predecessor State.

Secondly, the ceded territory has passed within a new juridical order, that of the successor State. As a result, property which belongs to that territory and which naturally follows the destiny of its owner can only be placed under the protection of this new juridical order. While it is true that the successor State is not given the ownership of this property, it nevertheless becomes the subject of international law responsible for the property. As the property belongs to a territory which belongs to that State, it falls within its juridical order. For example, it is the successor State that will ensure the international protection of the property against the predecessor State in which it is situated or against any third State.

It is this idea which, in a tentative and probably not entirely suitable formulation, the Special Rapporteur has tried to express in the suggested rule stating that "public property proper to the transferred territory which is situated outside that territory shall pass within the juridical order of the successor State *".

2. Property proper to the transferred territory which is situated in a third State

(13) Property of this kind unquestionably passes under the protection of the juridical order of the successor State.

C. Property of the predecessor State which is situated outside the territory retained by that State

(14) Property of the predecessor State falls into four categories, according to where it is situated:

(a) Being owned by the predecessor State, it may be in the part of the territory retained by that State, in which case it of course remains, in all circumstances, under its sole ownership;

(b) It may be situated in the part of the territory ceded to the successor State. In this case, the principle of the transfer of State property situated in the territory affected by the change of sovereignty, which has already been
discussed, is fully applicable and the property concerned is acquired by the successor State;

(c) There remain the two cases in which the property of the predecessor State is either in the territory of the successor State or in that of a third State. It would certainly appear at first sight that only the status quo would be fair and acceptable. However, there may have been instances where claims have been advanced by the successor State.

(15) It is with these cases in mind that the Special Rapporteur has suggested, not without considerable misgivings, a paragraph 2 under which public property of the predecessor State, in so far as it is situated outside the transferred territory and outside the territory of the predecessor State, will be divided between the successor and the predecessor on the basis of the past contribution of the transferred territory to the creation of such property. The Commission will say whether it is both correct and useful to establish a provision of the kind suggested.

SECTION 2. NEWLY INDEPENDENT STATES

Article 16. Currency and the privilege of issue

1. The privilege of issue shall belong to the new sovereign throughout the newly independent territory.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the territory concerned shall pass to the successor State.

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

COMMENTARY

(1) The comments that were made earlier on the subject of the privilege of issue, as an attribute of sovereignty, naturally apply also in the case of accession to independence. There have been cases where agreements between the former metropolitan country and the ex-colony allowed the predecessor State to continue temporarily to exercise the privilege of issue in the territory which had become independent.

It is nevertheless a firm principle that the privilege of issue belongs to the successor State, the existence of such agreements being a manifestation of the power of free disposal which the newly independent State has in this field pending transfer.

(2) The agreements concluded by the French-speaking African States and France are instructive in this connexion. The newly independent State is recognized as sole possessor of the privilege of issue, which it nevertheless entrusts to a French or Community body. Article 1 of the quadripartite Agreement on monetary co-operation between France and the States of Equatorial Africa reads as follows:

The French Republic recognizes that the accession to international sovereignty* of the States of Equatorial Africa confers on them the right to introduce a national currency and to establish their own bank of issue*.

Once the possession of the right has thus been recognized, the exercise of it is temporarily left to a Community body supervised by the French Republic. Article 2 of the Agreement is accordingly worded as follows:

The States of Equatorial Africa confirm their adherence to the Monetary Union of which they are members within the franc area. The franc CFA issued by the Banque centrale des Etats d'Afrique équatoriale... shall remain the lawful currency being legal tender throughout their territories.

(3) Under this Franco-African system, monetary policy was in principle decided multilaterally within a franc area comprising, in addition to the Banque de France, four banks of issue closely linked to the French Treasury. The West African Monetary Union (UMOA), composed of the Ivory Coast, Senegal, Upper Volta, Niger, Dahomey and Togo, has a common currency, the franc CFA (Communauté financière africaine), issued by the Banque Centrale des Etats de l'Afrique de l'Ouest (BCEAO), whose head office is in Paris. The Banque Centrale des Etats de l'Afrique équatoriale et du Cameroun, which following the recent agreements concluded at Brazzaville in December 1972 and at Fort-Lamy in February 1973 has become the Banque d'Etat de l'Afrique centrale (BEAC), comprises Cameroon, the People's Republic of the Congo, Gabon, Chad and the Central African Republic and also has its head office in Paris. Mali and the Malagasy Republic each have their own banks of issue.

(4) The peculiarity of these four banks (which issue a franc CFA that has no "international personality" and has an absolutely fixed rate of exchange with the French franc),

177 See above, paras. 5 et seq. of the commentary to article 12.
is that each of them has an "operations account" opened in its name with the French Treasury in Paris. This account is credited with all earnings by the French-speaking African State or group of States from their trade with other countries and debited with the amounts of their expenditure abroad.

In return, the French Treasury gives these four banks of issue its guarantee—in principle unlimited—by undertaking to supply them with francs and foreign exchange to balance their operations accounts.179

(5) The fact that these monetary agreements are at present being revised testifies both to their eminently evolutive character and to the newly independent State's right of free disposal with respect to its privilege of issue, the exercise of which it can at any time reclaim and the possession of which, indeed, it never legally lost.

(6) When the independence of the various Latin American colonies was proclaimed at the beginning of the nineteenth century, the Spanish currency was generally not withdrawn. The various republics confined themselves to substituting the seal, arms or inscriptions of the new State for the image and name of His Most Catholic Majesty on the coins in circulation,180 or to giving some other name to the Spanish peso without changing its value or the structure of the currency.181

(7) In the proceedings of the Hague Round-Table Conference, there was one instance of a restriction on the exercise of the privilege of issue. The new Indonesian Republic was required, as long as it had liabilities towards the Netherlands, to consult the Netherlands before establishing a new institution of issue and a new currency. However, this restriction did not last for long.

(8) Ethiopia and Libya apparently did not succeed to the monetary reserves, judging by the more clearly established fact that they did not succeed to the obligations derived from the issue of Italian currency. However, both countries made use of their right of issue to carry out monetary reforms when they became independent.

(9) In pursuance of the decisions taken at the Conference on Indochina held at Pau from 30 June to 27 November 1950, a bank for Indochina was to begin operations on 1 January 1952 with authority to issue piastre notes, which would be individualized for each of the three Associated States of Indochina but would circulate as legal tender throughout those States.

(10) Paragraph 2 of the proposed article covers the problems of monetary tokens "proper" to the territory transferred.

This paragraph, like paragraph 1 of the article under discussion, may be regarded as simply a descriptive provision having nothing, strictly speaking, to do with State succession. Many dependent territories had their own institution of issue and their own currency. The privilege of issue in the territory was exercised by a private bank, a government body of the metropolitan country or a public body of the territory. So far as assets are concerned, the monetary tokens in circulation may have been a mixture of the issues of two or more institutions of the kinds mentioned above. Paragraph 2 of the proposed article simply makes it clear that whatever portion of those monetary tokens was owned by the territory that is being transferred should normally revert to it, without there being any problem of State succession, or, if one prefers, should pass under the control of the successor State.

(11) In the case of India, various agreements were concluded between the United Kingdom and its two former Dominions and also between the two Dominions. The first point to be noted is that India had an entirely separate monetary system before the colonial Power withdrew and the country was partitioned. The only problem which would arise in the normal course of events was the apportionment of reserves and currency between India and Pakistan. As soon after 30 September 1948 as practicable, the Reserve Bank of India was to transfer to Pakistan assets equal to the volume of money actually in circulation at that time in the latter State. Before that date, Indian rupee notes issued by the Reserve Bank of India would still be legal tender in Pakistan. The apportionment of the cash balances of the Reserve Bank of India, which amounted to about 400 crores of rupees, was determined by the agreements of December 1947 between India and Pakistan182 and by the Pakistan (Monetary System and Reserve Bank) Order, 1947. Pakistan received 75 crores of rupees and also obtained part of the Bank's sterling assets. The ratio of the note circulation in Pakistan and in India to the total volume of money in circulation had been taken into account for the purpose of this apportionment. Pakistan's actual share came to 17.5 per cent.

(12) India succeeded to the sterling assets of the Reserve Bank of India, estimated at £ 1,160 millions.183 However, these assets could not be utilized freely, but only progressively. A sum of £65 million was credited to a free account and the remainder—i.e., the greater part of the assets—was placed in a blocked account. Certain sums had to be transferred to the United Kingdom by India as working
balances and were credited to an account opened by the Bank of England in the name of Pakistan. The conditions governing the operation of that account were specified in 1948 and 1949 in various agreements concluded by the United Kingdom with India and Pakistan.184

Article 17. Public funds and Treasury

1. Public funds, liquid or invested, which are proper to the territory that has become independent shall remain the property of that territory, irrespective of where they are situated.

2. Public funds of the predecessor State, liquid or invested, which are situated in the territory that has become independent shall pass into the patrimony of that territory.

3. The rights of the Treasury of the territory that has become independent shall not be affected by the change of sovereignty, vis-à-vis the predecessor State or otherwise.

4. The obligations of the Treasury of the territory that has become independent shall be assumed by that territory on such terms and in accordance with such rules as apply to succession to the public debt.

COMMENTARY

A. Public funds

1. Funds proper to the territory

(1) Paragraph 1 does not appear to raise any complicated question, at least so far as the statement of the principle is concerned, although the actual application of the principle may indeed pose problems, especially when it comes to a practical definition of "public funds which are proper to the territory".

(2) As a corporation under internal public law, the territory will usually have had, prior to independence, a system of public finances consisting of machinery, institutions and a Treasury distinct from those of the colonial Power. Public funds which accordingly belonged to the territory prior to independence, being the product of duties, taxes and fees of all kinds, debt-claims and the like, connected with activities in the territory, can only remain among the financial assets of the territory once it has become independent. Logically, their status cannot be affected in any way by the fact of their being in the territory itself or in the territory of the predecessor State or of any other third State, since it is well established that they belonged to the territory that has become independent.

2. State funds

(3) State funds which belong to the colonial Power but are in the territory should, whether liquid or invested, pass into the patrimony of the successor State pursuant to the general principle of the transfer of public property of the State.

(4) It appears, however, that the public funds of the British Mandatory Government in Palestine were withdrawn by the United Kingdom. Yet this example does not invalidate the general principle inasmuch as a Mandate which was conceived as an international public service assumed by a State on behalf of the international community, in no way deprives the Mandatory Power of the authority to withdraw its own property when such property is clearly separable and detachable from that of the mandated country.

B. Treasury

(5) Treasury relations are very complicated. Reduced to simple terms, they comprise two aspects. In the first place, there is no reason why the rights of the Treasury of the territory that has become independent should, paradoxically, cease to exist simply because of the territory’s accession to independence. In the second place, the obligations, whether or not corresponding, previously incurred by the Treasury of the territory to private persons or to the predecessor State or any other State are assumed, in the absence of special treaty provisions, on such terms and in accordance with such rules as apply to succession to the public debt. It does not seem possible to say more than this on the subject without running the risk of foundering on the technical complexity of these problems.

(6) On termination of the French Mandate, Syria and Lebanon succeeded jointly to the "common interests" assets, including "common interests" Treasury funds and the profits derived by the two States from various concessions. The two countries succeeded to the assets of the Banque de Syrie et du Liban. However, most of these assets were blocked and were released only progressively over a period extending to 1958.185

(7) In the case of the advances which the United Kingdom had made in the past towards Burma’s budgetary deficits, the United Kingdom waived repayment of £15 million and allowed Burma a period of 20 years to repay the remainder, free of interest, starting on 1 April 1952. The former colonial Power also waived repayment of the costs it had incurred for the civil administration of Burma after 1945 during the period of reconstruction.186

Article 18. Archives and public libraries

1. Archives and public documents of every kind relating directly or belonging to the territory that has become independent, and public libraries of that territory, shall, irrespective of where they are situated, be transferred to the newly independent State.

184 For details, see I. Paenson, op. cit., passim and in particular pp. 65-66 and 84.
186 The United Kingdom also reimbursed Burma for the cost of supplies to the British Army incurred by that territory during the 1942 campaign and for certain costs relating to demobilization,
2. The newly independent State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the newly independent State.

COMMENTARY

(1) The Special Rapporteur will not revert to the question of the importance of archives or to the definition of the items affected by the transfer. These are archives and public documents of every kind, i.e. items irrespective of (a) their ownership (by the State, by an intermediate authority, by a public body, etc.), (b) their type (diplomatic, political, administrative, military, economic, judicial, historical, geographical, legislative, regulative, ecclesiastical, etc.), (c) their character (public or secret archives), (d) their nature (manuscript or printed, graphic material or photographs), (e) their substance (paper, parchment, fabric, leather, etc.), (f) their variety (plans, registers, scrolls, title-deeds, documents, etc.). It is also known that the term “archives of every kind” covers items which are instruments of evidence as well as those which are instruments of administration.

(2) Article 33 of the Agreement of 21 October 1954 between France and India, concerning the French Establishments in India, states that

The French Government shall keep in their custody the records having an historical interest, they shall leave in the hands of the Indian Government the records required for the administration of the territory.

Although this case of decolonization does not come within the scope of the present study on “newly independent States”, the Special Rapporteur has thought fit to refer to it in order to draw attention to the fact that the rare example of this kind limiting the transfer of archives to a particular category of archives express the freedom of States on the Treaty plane but in no way reflect a rule or custom, inasmuch as nothing can dispense the predecessor State from the obligation of handing over all archives which have a link with the territory.

A. The archives-territory link

(3) Obviously, the successor State cannot claim simply any archives but only those “belonging to the territory”. The Special Rapporteur refers readers to a previous commentary for an elucidation of this expression. This fact of the archives belonging to the territory must be appraised from two standpoints. First, there are archives acquired by or on behalf of the territory and, secondly, there are items concerning the territory because of the organic link which attaches them to it.

B. Archives situated outside the territory that has become independent

1. Archives which have been removed

(4) There seems to be ample justification for accepting as a rule the fact that the successor State should receive all the archives, historical or other, relating to the territory affected by the change of sovereignty. Even if these archives have been removed by the predecessor State. The application of such a principle would considerably help new States to acquire greater mastery of their internal and external problems. A better knowledge of these problems can be gained only through the possession of retired or current archives, which should be left with or returned to the States concerned. For obvious reasons, however, the former colonial Power cannot be expected to agree to hand over all archives, especially those linked to its imperium over the territory concerned. Many considerations relating to politics and expediency prevent such Powers from leaving to the new sovereign revealing documents on colonial administration. For that reason, the principle of the transfer of such archives—which the former metropolitan country is careful to remove before independence—is rarely applied in practice.

At this point a distinction must be drawn between the various categories of archives which the former metropolitan country is tempted to evacuate before the termination of its sovereignty. A distinction should be made between (a) historical archives proper, which antedate the beginning of colonization of the territory, (b) archives of the colonial period, relating to the imperium and dominium of the metropolitan country and to its colonial policy generally in the territory, and (c) purely administrative and technical archives relating to the current administration of the territory.

(5) The information collected by the Special Rapporteur, which although voluminous is not sufficiently complete to permit the formation of a definitive judgement, seems to show that the problem of returning the archives removed by the former metropolitan country to the new independent State has not yet been solved satisfactorily. It may even be said that, no matter how sound and well-founded the principle of the transfer of archives may be, it would be unreasonable to expect the immediate return of all the archives referred to under (b) above. Indeed, in the interest of good relations between the predecessor State and the successor State, it may be unrealistic and undesirable for the new independent State to claim them and to start a dispute over them which is bound to be difficult.

(6) However, in the case of the archives mentioned under (a) above, which may have been removed by the former metropolitan country, the principle of transfer should be firmly and immediately applied. These archives
antedate colonization, they are the product of the land and spring from its soil; they are bound up with the land where they came into existence and they contain its history and its cultural heritage.

(7) Similarly, the removal of administrative documents of all kinds mentioned under (c) above, which may have occurred in some cases, is bound to be a source of considerable inconvenience, confusion and maladministration for the young independent State, which already faces considerable difficulties owing to its inexperience and lack of trained personnel. Except in the rare cases where independence resulted from a sharp and sudden rupture of the links between the metropolitan country and the territory, which, compounded by misunderstandings or rancour, led to the malicious destruction or removal of administrative documents, the removal of these archives, which are instruments of administration, has reflected primarily the metropolitan country's desire to retain documents and titles which might concern the minority composed of its own nationals. However, reproduction techniques are now so highly developed that it would be unreasonable and unjustified to retain such administrative or technical archives, as this would entail depriving a majority in order to meet the needs of a minority, which could, moreover, be satisfied in another way.

(8) Generally speaking, it is to be hoped that the formulation of the rule of transfer will lead to better relations between States and open the way for appropriate cooperation in the field of archives. This would enable the new sovereignty to recover the items which express its history, its traditions, its heritage and its national genius and provide it with a means of improving the daily life of its inhabitants, and would also enable the former sovereignty to ease its own difficulties, intangible and material, which inevitably accompany its withdrawal from the territory.

(9) Professor Rousseau, discussing a case of decolonization, writes:

The problem is posed at present in the relations between France and Cambodia, but so far no final settlement seems to have been reached. The logical solution would be the return of all items concerning the history of Cambodia during the period in which France assumed international responsibility for its affairs (1863-1953).\(^{194}\)

In the case of Algeria, historical archives concerning the pre-colonial period, which had been carefully catalogued by the colonial administration, were removed by the latter immediately before independence.\(^{195}\) The negotiations between the two Governments have so far resulted in the return of some of the documents from the Turkish collection and microfilms of part of the Spanish collection.\(^{196}\)

(10) The Special Rapporteur has not found any specific information concerning this field and this type of succession. However, the problem of the ownership of the India Office library furnishes an example of an "unresolved" case. It will be recalled that in 1801 the British East India Company established a library which now contains about 280,000 volumes and some 20,000 unpublished manuscripts, constituting the finest treasury of Hinduism in the world. In 1858 this library was transferred to the India Office in Whitehall. After the partition in 1948, the Commonwealth Relations Office assumed responsibility for the library. On 16 May 1955 the two successor States, India and Pakistan, asked the United Kingdom Government to allow them to divide the library on the basis of the percentages (82.5 per cent for India, 17.5 per cent for Pakistan) used in 1947 for deciding all assets between the two Dominions.

The problem would assuredly be quite difficult to solve, since the Government of India Act of 1935 allocated the contents of the Library to the Crown. Since the Commonwealth Relations Office could not find a solution, the case was referred in June 1961 to arbitration by three Commonwealth jurists, who were members of the Judicial Committee of the Privy Council.

C. Special obligations of the newly independent State

(11) The draft article puts the successor State under an essential obligation which is the natural counterpart of the obligation of the predecessor State to transfer all archives to the successor. Decolonization has sometimes been accompanied by repatriation to the former metropolitan country of populations which cannot be governed without archives. For that reason paragraph 2 of the article provides that the successor State shall not refuse to hand over to the predecessor State, upon its request, copies of any archives which it may need.

In some cases, the newly independent State has handed over copies or microfilms not only of administrative archives but also of historical documents and papers.\(^{197}\)

\textit{Article 19. Property situated outside the territory of the newly independent State}

\begin{enumerate}
\item Public property proper to the territory that has become independent which is situated outside that territory shall remain its property upon its accession to independence.
\item Public property belonging to the predecessor State which is situated in a third State shall be apportioned between the predecessor State and the newly independent State proportionately to the latter's contribution to the creation of such property.
\end{enumerate}

\(^{197}\) After France had restored to Algeria certain items from the "Turkish collection", which forms part of the historical archives removed immediately before independence (see para. 9 and note 195 above), Algeria offered France microfilms of some documents from that collection following their return. It had previously allowed all the registers of births, marriages and deaths held by Algerian record offices to be microfilmed.
COMMENTARY

A. Property proper to the territory that has become independent

(1) The territory acceding to independence may leave, particularly in the former metropolitan country, property bought with its own funds. It may also own property in other countries. State succession cannot have the paradoxical effect of conferring on the predecessor State a right of ownership which it did not possess over such property prior to the territory's independence. The fact that the property in question is situated outside the newly independent territory cannot, on its own, constitute grounds for making an exception to that obvious principle. Ownership of such property cannot depend on geographical location.

(2) However, unlike the case of the partial transfer of a territory from one State to another pre-existing State, which was examined above, in the case of decolonization the transferred territory and the territory of the successor State are geographically coextensive, so that the property of one is also the property of the other. In this type of succession, the successor State itself enjoys the ownership of this property and does not simply receive the property into the new juridical order it has created.

(3) The usual distinction should be drawn between property of the territory which is situated in the former metropolitan country and property which is situated in the territory of a third State.

1. Property which is situated in the former metropolitan country

(4) The occurrence of State succession does not transfer the right of ownership of public property of this kind and the successor State—in other words, the formerly dependent territory—retains ownership of such property.

Diplomatic practice, however, is not consistent and the Special Rapporteur found it difficult to characterize. While the principle of the transfer of such property to the newly independent State is not called in question, it often proves difficult to put into practice because the former metropolitan country disputes not the principle but the fact of the right of ownership, because the territory which has seceded finds it difficult to know exactly how much property, and of what kind, it could rightfully claim, or because of other political or non-political considerations. For example, various colonial offices of an administrative or industrial and commercial nature, rest and recreation facilities for officials of the colonial territory and their families, administrative premises or residences may have been constructed or purchased in the metropolitan country by the detached territory, using its own funds or those of public agencies under its jurisdiction (e.g., family allowance or social security funds).

(5) The former colony of the Congo had in its patrimony a portfolio of Belgian shares situated in Belgium which in 1959, according to Professor D. P. O'Connell, were valued at $750 million. The independent Congo does not appear to have recovered all these shares.\footnote{D. P. O'Connell, State Succession (op. cit.), vol. I, p. 228.}

On the eve of independence, during the Belgian-Congolese Conference at Brussels in May 1960, the Congolese negotiators had requested that the liquid assets, securities and property rights of the Special Committee for Katanga and of the Union minière should be divided in proportion to the assets of the Congo and its provinces, on the one hand, and of private interests, on the other hand, so that the new State could succeed to the sizable portfolio of stocks and shares situated outside its territory. Numerous complications ensued, in the course of which the Belgian Government, without the knowledge of the prospective Congolese Government, pronounced the premature dissolution of the Special Committee for Katanga so that its assets could be shared out and the capital of the Union minière could be reapportioned. This was all designed to ensure that the Congo no longer had a majority holding in these entities.\footnote{For an account of all these problems, see R. Kovar, "La 'conglolisation' de l'Union minière du Haut-Katanga", Annaire français de droit international, 1967 (Paris) vol. XIII, pp. 742-781.}

This first dissolution of the Special Committee, which was the principal shareholder in the Union and in which the State held a two thirds majority while the rest belonged to the Compagnie du Katanga, was decided on 24 June 1960 under an agreement signed by the representatives of the Belgian Congo and of the Compagnie du Katanga.\footnote{Moniteur congolais, 19 September 1960, No. 38, p. 2053.}

The agreement was approved by Decree of the King of the Belgians on 27 June 1960.\footnote{Ibid.}

As a reaction against this first dissolution by the Belgian authorities, the constitutional authorities of the independent Congo pronounced a second dissolution of the Special Committee by Decree of 29 November 1964.

(6) Eventually, the Belgian-Congolese agreements of 6 February 1965\footnote{United Nations, Treaty Series, vol. 540, p. 227.} put an end to these unilateral measures by both parties. These agreements are partly concerned with the assets situated in Belgium—in other words, public property situated outside the territory involved in the change of sovereignty. In exchange for the cession to the Congo of the net assets administered by the Special Committee in that territory, the Congolese party recognized the devolution to the Compagnie du Katanga of the net assets situated in Belgium. Various compensations and mutual retrocessions took place in order to unravel the tangled skein of respective rights. On 8 February 1965, in an official ceremony at Brussels, Mr. Tshombé accepted the first part of the portfolio of the Congo on behalf of his Government.

This was not, however, the end of the affair. After General Mobutu had taken office, and after various upheavals, the Union minière du Haut-Katanga was nationalized on 23 December 1966 because it had refused to transfer its headquarters from Brussels to Kinshasa, believing that the transfer would have the effect of placing under Congolese jurisdiction all the assets of the company.
situated outside the Congo. A compromise was finally reached on 15 February 1967.

(7) On the occasion of the disannexation of Ethiopia, articles 37 and 75 of the Treaty of Peace of 10 February 1947 required Italy to restore objects of historical value to Ethiopia, and the Agreement of 5 March 1956 between the two countries contained various annexes listing the objects concerned. Annex C allowed the return to Ethiopia of the large Aksum obelisk, which Italy was obliged to dismount and remove from a square in Rome and transport to Naples at its expense for shipment to Ethiopia.

(8) Some treaty provisions are restrictive, authorizing succession to public property only if it is situated in the territory, and not if it is located elsewhere.

This was so, for example, in the case of the resolutions of the United Nations General Assembly on economic and financial provisions relating to Libya and Eritrea.

In fact, however, such provisions do not conflict with the suggested rule, because they cover a different situation from the one with which we are concerned here. They involve public property of the ceding State—for example, the property of Italy in Libya or in Eritrea—whereas what is under discussion here is the exact opposite, namely, property of (formerly Italian) Libya or Eritrea themselves which is outside their geographical boundaries.

(9) There now remains to be discussed the case of property of the newly independent territory itself which is in a third State.

2. Property which is situated in a third State

(10) The case in itself does not give rise to any specific problems. The territory that has become independent retains full ownership over public property it possesses in a third country (for example, buildings or premises situated in a neighbouring country or territory or, more frequently, the continuation of a railway line). Sometimes the problems are stated partly in terms of succession of governments. The case of Algerian funds deposited in Switzerland during the liberation war is a good example of this.

(11) From 1954 to 1962, the Algerian National Liberation Front (NLF) had collected funds to cover the cost of the armed struggle in Algeria. On 19 September 1958, a Provisional Government of the Algerian Republic (GPRA) was established at Cairo; it was recognized de facto or de jure by some 30 countries. The National Liberation Front, which was the only liberation party during the war and also the only governing party after independence, stated in its statutes, adopted in 1959, that its resources did not belong to it as a movement but were "national property" in law and in fact (article 39, paragraph 2). At the end of the war, the unexpended balance of the funds intended for use in the struggle amounted to some 80 million Swiss francs; these funds were in various bank accounts in the Middle East in the name of the GPRA and in Europe in the name of the NLF. In 1962, all these funds were deposited together in a Swiss bank, in the name of Mr. Mohammed Khider, General Secretary of the NLF, acting in his official capacity.

Political differences arose between the Algerian governmental authorities and Mr. Khider, who was removed from office as General Secretary of the single party in power but refused to hand over the remaining funds which were in his possession at Geneva.

(12) To this day, various civil as well as criminal proceedings, including sequestration of the bank account, have still not enabled the Algerian State and the NLF to recover these sums. The problem was not really dealt with from the standpoint of succession of States or Governments; it involved criminal matters, because the bank with which the funds were deposited had improperly allowed Mr. Khider to withdraw them quickly, although he had just been dismissed from office and no longer had authority to administer the funds. Consequently, the funds were fraudulently transferred to a destination and for a purpose still unknown to this day.

If this case is considered, from the civil viewpoint, as a problem of succession of governments, it has obvious similarities with the case of the Irish funds considered later. The Algerian liberation movement and its Provisional Government of the day left property to which independent Algeria should normally succeed through its single ruling party and its new Government. From the outset, this property had the status of "national property," according to the statutes of the NLF.

(13) On 16 July 1964, the Algerian authorities, represented by the leader of the NLF and the Head of the Government, brought a suit before the Swiss courts, which, however, were induced by the defence to evaluate the legitimacy of the NLF, although they were judicial bodies and, moreover, foreign ones. This was because the defendant had stated that he would hand over the funds only to the "legitimate" NLF. Which NLF? According to the defendant, the one that would emerge from a new national Congress of the party. A Congress had in fact been held, but the defendant had not considered it "legitimate." There is no doubt that, from the strictly juridical point of view, this notion of legitimacy should have been ruled out of the proceedings. The funds had, from the outset, been "Algerian national property," and upon the attainment of independence should certainly have been returned to the Algerian public authorities, the party and the Government.

It is all the more necessary to bring this case—which has its own special characteristics, although in some respects it resembles the case of the Irish funds—to a

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203 The Special Rapporteur realizes that the case should not really be considered under "Newly independent States". (See above, the second paragraph of note 96.)

204 For reference, see note 148 above.


208 See below, paras. 1 and 2 of the commentary to article 31.
logical conclusion because Mr. Khider died at Madrid on 4 January 1967, and if the funds are not assigned to the Algerian authorities, to whom they belong, they may become "ownerless property".

B. Property belonging to the predecessor State which is situated in a third State

(14) In the draft article under consideration, the Special Rapporteur had suggested a paragraph 2 whereby property which is situated in a third country and to the creation of which the formerly dependent territory contributed would be apportioned between the predecessor State and the successor State.

(15) One writer notes that "countries coming into existence through decolonization do not seem to have claimed any part of the subscriptions of the States which were responsible for their international relations" 209 including, in particular, their representation in international or regional financial institutions. But the fact that these newly independent countries—and particularly those which were deemed in law to form an integral part of the colonial Power—did not think of claiming some of these assets, or were unable to do so, cannot logically be used to cast any doubt on the validity of the principle that has been enunciated in paragraph 2 of the draft article under consideration.

(16) This seems to be confirmed by the fact that participation in various intergovernmental bodies of a technical nature is open to dependent territories and that problems of the type described above may arise in this area. No doubt such questions will be examined by the Commission when it undertakes the study of succession of States and international organizations.

SECTION 3. UNIFICATION OF STATES AND DISSOLUTION OF UNIONS

Article 20. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State throughout the territory of the union or of each State in the event of dissolution of the union.

2. In the event of dissolution of the union, the assets of the joint institution of issue shall be shared pro parte between the successor States, which in consideration of the foregoing shall assume responsibility for the obligations relating to the substitution of new currencies for the former currency.

COMMENTARY

The possession and exercise of the privilege of issue are generally regulated in the instruments establishing the union of States. The privilege of issue is granted to the successor State, that is to say the union. In the event of dissolution of the union, each State possesses its privilege of issue, but the practical aspects of resolving the problems are extremely complex. The peace treaties of Saint-Germain-en-Laye and Trianon which sanctioned the dismemberment of the Austro-Hungarian monarchy had to take account of the wish of the successor States to exercise their privilege of issue, and to cease accepting the Austro-Hungarian paper money that the Bank of the Austro-Hungarian Empire had continued to issue for a short period. This bank was liquidated, and for the most part the successor States over stamped the old paper money during an initial period as outward evidence of their power to issue currency. 210

Article 21. Public funds and Treasury

1. The union shall receive as its patrimony the public funds and Treasuries of each of its constituent States except where the degree of their integration in the union or treaty provisions allows each State to retain all or part of such property.

2. In the event of dissolution of the union, the public funds and Treasury of the union shall be apportioned equitably between its constituent States.

COMMENTARY

(1) Generally both international treaty instruments and instruments of internal law (such as a referendum) define and effect the uniting of States, stating the degree of integration. It is on the basis of these various expressions of will that the financial system of the union, and in particular the treatment of the public funds and Treasuries of each predecessor State, is established.

Since no precise information on this point is provided in unification agreements that have been concluded, the Special Rapporteur felt he should suggest in paragraph 1 of the article under consideration a simple and logical rule for complete succession of the union to its constituent States.

(2) Paragraph 2 of the article, dealing with cases of dissolution of the union, simply states a rule of equitable apportionment of the joint public funds and Treasury between the successor States.

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210 For the details, somewhat complicated, of the measures taken in respect of currency, see the two long articles 189 of the Treaty of Trianon and 206 of the Treaty of Saint-Germain-en-Laye in British and Foreign State Papers, 1920, vol. 113 (op. cit.), pp. 561-564 and ibid., 1919, vol. 112 (op. cit.), pp. 410-412. Article 206 of the Treaty of Saint-Germain and article 189 of the Treaty of Trianon resolved the problem as follows: (a) "Each one of the States to which territory of the former Austro-Hungarian monarchy is transferred and each one of the States arising from the dismemberment of that monarchy, including Austria and Hungary" were given two months to over stamp the currency notes issued in their respective territories by the former Austro-Hungarian institution. (b) The same States were given 12 months to replace the over stamped notes with their own currency or with a new currency under conditions to be determined by them. (c) These same States were either to over stamp the currency notes which they had already withdrawn from circulation or to hold them at the disposal of the Reparation Commission. These very long articles contain other provisions and set up a very complex system for liquidating the Austro-Hungarian Bank. (See Monès del Pujol, "La solution d'un grand problème monétaire; la liquidation de la Banque d'émission de l'ancienne monarchie austro-hongroise", Revue des sciences politiques (Paris), vol. XLVI, April-June 1923, pp. 161-195.)
International practice has sanctioned this formula of liquidation in accordance with the principles of equity. The Special Rapporteur has accordingly not deemed it necessary to complicate the text of the article with a painstaking description of the criteria of equity in a question which is extremely technical and which he is far from being competent to judge. While he believes that the principle of equity should and must be fully applied, he also believes that any apportionment, if it is to be equitable, must take into account a great many factual data which vary from country to country and situation to situation and which defy codification. In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelled out in individual agreements.

(3) The dissolution of the short-lived Federation of Mali was regulated, so far as public funds and debt-claims are concerned, by a Senegalese-Malian Resolution No. 11, which allowed each State to take over assets according to their geographical location. The proportion in which movable assets were divided between the two States was set (as in the case of immovable assets) at 62 per cent for Senegal and 38 per cent for Mali. The State which received a larger portion of assets than was due to it was subject to an equalization payment, charged against its share in the Reserve Fund. 211

Article 22. Archives and public libraries

1. Except where otherwise specified in treaty provisions aimed at the establishment of a collection of common central archives, archives and public documents of every kind belonging to a State which unites with one or more other States and its public libraries, shall remain its property.

2. In the event of dissolution, the central archives of the union and its libraries shall be placed in the charge of the successor State to which they relate most closely or apportioned between the successor States in accordance with any other criteria of equity.

COMMENTARY

(1) The Special Rapporteur will not revert to the importance or to the definition of archives and public documents. 212 It will merely be recalled that “archives” should be understood in the broadest sense of the term, as it is used in diplomatic instruments relating to such cases of dissolution of unions, and accordingly covering “archives, registers, plans, title-deeds and documents of every kind”. 213

(2) Article 22 is at the same time similar to and different from the preceding article. As in article 21, treaty stipulations are allowed to regulate the fate of the archives of States in a union. On the other hand, where there are no treaty provisions the suggested article 22 allows the predecessor State to dispose of its archives, whereas article 21 allowed the union, namely the successor State, freely to dispose of public funds and treasuries.

(3) This distinction obviously had to be made. If the archives of the predecessor State are historical in character, they are of interest to it alone and of relatively little concern to the union (unless it is decided by treaty for reasons of prestige or other reasons to transfer them to the seat of the union or to declare them to be its property). Any change of status or application, particularly a transfer to the union of other categories of archives needed for the direct administration of each State, would be not only unnecessary for the union but highly prejudicial for the administration of the States forming it.

It is a different matter for public funds and treasuries, the transfer of which to the union must be presumed, unless there are treaty provisions to the contrary, since there is no question that they must be the subject and the necessary instruments of a unified policy within the union.

(4) Paragraph 2 of the article refers to the case of dissolution. Each of the successor States receives the archives and public documents of every kind belonging or rather relating to its territory, on condition that it hands over copies of them to the other successor States, upon the request and at the expense of the latter. The central archives of the union are apportioned between the successors if they are divisible or placed in the charge of the successor State they concern most directly if they are indivisible, on condition that in both cases the beneficiary will make or authorize copies for the other States upon their request and at their expense.

(5) In general, it is the link between the archives and the territory which is the determining factor. For example, following the dissolution in 1944 of the Union between Denmark and Iceland, the High Court of Justice of Denmark ruled, in a decision of 17 November 1966, 214 that some 1,600 priceless parchments and manuscripts containing old Icelandic legends should be restored to Iceland. It should be noted that these parchments were not public archives, since they did not really concern the history of the Icelandic public authorities and administration, and were not the property of Iceland since they had been put into a collection constituted in Denmark by an Icelander who was Professor of History at the University of Copenhagen. He had saved them from destruction in Iceland, where they were said to have been used on occasion to block up holes in the doors and windows in the houses of Icelandic fishermen. These parchments, whose value has been estimated by experts at 600 million Swiss francs, had been bequeathed in perpetuity by their owner to a university foundation in Denmark.


212 See above, commentary to article 14.


(6) The Special Rapporteur is obliged to his colleague in the International Law Commission, Professor Tammes, for providing information concerning these archives.

Among the 1,600 fragments and sheets which constitute the so-called Magnisson collection was a two-volume manuscript (the Flatey Book) written in the fourteenth century by two monks on the Island of Flatey, an integral part of Iceland, which traces the history of the kingdoms of Norway.

The agreement reached ended a long and bitter controversy between the Danes and the Icelanders, who both felt strongly about this collection which is of the greatest cultural and historical value to them. On 21 April 1971 the Danish authorities returned the Flatey Book and other documents; over the next 25 years the entire collection of documents will join the collection of Icelandic manuscripts at the Reykjavik Institute.

At the time of the official handing-over ceremony, when the first documents left the Royal Library at Copenhagen, the Library flew the flag at half-mast.215

Article 23. Property situated outside the territory of the union

1. Property situated outside the territory of the union and belonging to the constituent States shall, unless otherwise stipulated by treaty, become the property of the union.

2. Property of the union situated outside its territory shall, in the event of dissolution, be apportioned equitably between the successor States.

COMMENTARY

(1) The Special Rapporteur admits that he had considerable doubts about suggesting in paragraph 1 of article 23 a rule assigning all property of the constituent States to the union, when such property is situated abroad. Perhaps the general structure of the draft articles as a whole would suggest that a rule to the contrary should be inserted here, allowing the constituent States to retain ownership of their property situated abroad. The Special Rapporteur leaves the question open for discussion.

(2) The rule set out in paragraph 2 of this article seems sounder. In the event of a dissolution, the property owned by the union abroad can only be shared “equitably” among the successor States. There again, the Special Rapporteur has not tried to seek rigid criteria governing equitable apportionment, since questions of that kind are bound to be conditioned by circumstances.

(3) A marginal case will be mentioned here purely as a reminder. It is difficult to place in the typology of succession and, moreover, it concerns an unsuccessful attempt to dissolve a union. This is the McRae case, which arose in connexion with the American War of Secession.

After the failure of the secession of the Southern states of the United States, the Federal Government claimed from a Southern agent who had settled in England funds which he had deposited there on the instructions of the secessionist authorities. The agent in question refused to hand over these funds to the Federal Government, arguing that he himself had various claims against the erstwhile Southern government.

(4) The judgement rendered by the Court of Equity of England in 1869 recalled the principle that the property of an insurrectionary government must, if that government is defeated, revert to the legal government as the successor. Since, however, the successor State could not have more rights than the entity in which the rights were formally vested, the counter-claim of the agent McRae must be allowed and the amount of his claims, if they were justified, must be deducted from the funds claimed.

The judgement of the Court therefore confirmed the principle of the transfer to the successor State of public property situated abroad; it stated that it is:

the clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property... and to all rights in respect of the public property of the displaced power.216

(5) According to some writers, this is a case of succession of States and not of succession of governments, since the Southern Confederate Government, which represented a number of states, had been recognized, at least as a belligerent, by various foreign States because it had exercised an effective administration for a lengthy period of time over a clearly defined territory.

Section 4. Disappearance of a State through partition or absorption

Article 24. Currency and the privilege of issue

1. The privilege of issue shall belong to the successor State in the territory absorbed or the portion of territory allocated to it in the partition.

2. The successor State or States shall take over the assets of the institution of issue and shall assume its liabilities in proportion to the volume of currency in circulation or held in the territory in question.

COMMENTARY

(1) The observations formulated in the preceding articles 217 regarding the fate of the privilege of issue, which is an attribute of sovereignty, are obviously also valid in cases where a State ceases to exist as a result of partition or absorption, with the slight difference, due to the radical nature of the situation concerned, that the privilege of issue can naturally in any event be exercised only by the successor State by reason of the complete disappearance of the predecessor State.

215 D. P. O'Connell, State Succession... (op. cit.), p. 208.
217 See above, paras. 5-7 of the commentary to article 12; paras. 1 and 3 of the commentary to article 16; and the commentary to article 20.
Succession of States in respect of matters other than treaties

(2) At the time of the Anschluss of Austria, Nazi Germany caused the National Bank of Austria to be absorbed entirely by the Reichsbank. It did likewise in the case of the invasion of the Sudetenland and the disappearance of Czechoslovakia. It had originally been agreed between Prague and Berlin that the Bank of Czechoslovakia would hand over to Germany about one sixth of its bullion reserve—390 million crowns, or just over 12 tons of gold. However, the German invasion and the dismemberment of Czechoslovakia upset these original arrangements, although the German armies did not find in Prague all the gold coveted by Berlin. However, those were cases of forced and unlawful territorial transfers.

Article 25. Public funds and Treasury

1. The successor State shall receive the public funds and the Treasury belonging to the absorbed State in their entirety, irrespective of where the assets in question are situated. It shall assume responsibility for the obligations relating thereto in so far as the rules applying to succession to the public debt permit.

2. In the event of partition of a State among two or more pre-existing States, each of them shall succeed to a portion, which shall be determined by treaty, of the public funds and the Treasury.

COMMENTARY

(1) Paragraph 1 of article 25 is perfectly logical. Since the absorbed State no longer exists, its public funds and Treasury in their entirety can only pass to the State which benefited from its extinction. After the Anschluss of 1938—to take an example of forced disappearance of a State—all Austria’s assets, of whatever kind, passed to the Third Reich.

Furthermore, the paragraph could only refer to the rules concerning succession in respect of the public debt for guidance on problems connected with obligations involved in succession to public funds and the Treasury.

(2) In the event that the predecessor State is totally dismembered, with each of its parts being joined to various pre-existing States, the rule suggested in paragraph 2 of this article very prudently refers to agreements concluded among the successor States involved in the partition. All that can be said is that each State succeeds to a portion of the public funds and Treasury of the former State.

Article 26. Archives and public libraries

1. Ownership of archives and public documents of every kind, and public libraries, belonging to the absorbed State shall be transferred to the successor State, irrespective of where such property is situated.

2. Archives and public documents of every kind, and public libraries, belonging to the State partitioned among two or more others shall be apportioned between the successor States with particular regard to the link existing between such property and the territory transferred to each State.

COMMENTARY

(1) Paragraph 1 of article 26, states a simple rule. The extinction of the absorbed State leaves the successor State full freedom to increase its patrimony by the addition of all public property, including archives and documents, irrespective of where such property is situated. In annexing Ethiopia in 1936, or Albania in 1939, Italy had succeeded to all the public property of these two countries.

(2) The problem of time-limits for handing over archives does not arise in the same way as in other types of succession; since the predecessor State no longer exists, it remains only for the successor State to take possession of the archives, except for those which are situated in a third State. Similarly, the question of the non-compensatory nature of the transfer is no longer relevant because of the disappearance of the predecessor State.

(3) Draft article 26, paragraph 2, covers the case of a State’s extinction because of its partition among two or more others. In that event, the archives must normally be apportioned with due regard to the link existing between them and the part of territory received by each State. Paragraph 2 is conceived in the same spirit as its counterparts in the two preceding articles.

Article 27. Property situated outside the absorbed or partitioned territory

1. Subject to the application of the rules relating to recognition, ownership of all public property of the State that has disappeared which is situated outside its territory shall devolve to the successor State.

2. In the event of total dismemberment of a State in favour of two or more other pre-existing States, property situated outside the State that has disappeared shall be shared equitably among the successor States.

COMMENTARY

(1) Writers take the view that the absorbed or partitioned State no longer has the legal capacity to own property and that its property abroad would become ownerless if it were not transferred to the successor State. Consequently, some writers feel that there would be no reason for refusing to assign such property to the successor State.

(2) This reasoning is not wholly satisfactory. Abandonment of the property is not the reason for the right to succeed; at the most, it is the occasion for it. After all, ownerless property may be appropriated by anyone, and not necessarily by the successor. Indeed, if abandonment were the only consideration, it might seem more natural, or at least more expeditious, to assign the property to the third State in whose territory it is situated.

In fact, State succession sets off a process of transfers of rights which must definitely be effected in favour of the successor State, and not at all in favour of the predecessor State or the third State.
(3) Judicial decisions sometimes seem not to have followed the rule of devolution to the successor State of all the patrimony of the State that has disappeared, because a problem of recognition arose.

The foreign State in whose territory the property claimed by the successor State is situated usually allows the claim only if it has recognized the successor State. This can be seen from a judgement of the Court of Appeal of England after the annexation of Ethiopia by Italy in 1936. Emperor Haile Selassie claimed from a judgement of the Court of Appeal of England, judgement of 6 December 1938, that the de facto recognition of the annexation was not sufficient to effect the transfer to Italy of the property situated in England, and the case was taken to the Court of Appeal. However, on 16 November 1938, before the appeal was considered on its merits, the United Kingdom finally recognized the King of Italy as the de jure Emperor of Ethiopia. The Court of Appeal, in its judgements of 6 December 1938, that the right to sue had itself become vested in the successor State since the de facto recognition of 21 December 1936 and that the title to the property situated in England had accordingly passed to the new sovereign. The principle of succession to public property situated abroad was thus sanctioned even in the case of de facto recognition.

(4) In the Chancery Division, where the case had been tried, the main issue had been the effect of the United Kingdom's de facto recognition, on 21 December 1936, of Italy's annexation of Ethiopia, of which the Emperor was still recognized by the United Kingdom to be the de jure sovereign. The trial court had ruled, in a decision of 27 July 1938, that the de facto recognition of the annexation was not sufficient to effect the transfer to Italy of the property situated in England, and the case was taken to the Court of Appeal. However, on 16 November 1938, before the appeal was considered on its merits, the United Kingdom finally recognized the King of Italy as the de jure Emperor of Ethiopia. The Court of Appeal, in its judgements of 6 December 1938, that the right to sue had itself become vested in the successor State since the de facto recognition of 21 December 1936 and that the title to the property situated in England had accordingly passed to the new sovereign. The principle of succession to public property situated abroad was thus sanctioned even in the case of de facto recognition.

(5) Emperor Haile Selassie was equally unsuccessful in the French courts on another occasion. In his sovereign capacity, he was the holder of 8,000 shares of the Franco-Ethiopian Djibouti-Addis Ababa Railway Company, registered in the name of the Ethiopian Government; he wanted to convert the shares into bearer securities and to cash the coupons which had matured. The Italian Government lodged an objection with the Company's head office in Paris, requesting that the Emperor should be prohibited from selling, transferring or ceding the securities, which it claimed should revert to the successor State. The juge des référés of the Tribunal de la Seine, to whom the displaced sovereign applied for an order barrering the objection of the Italian Government, declared that he had no jurisdiction in the case of an act of sovereignty by Italy. The practical effect of this decision was to leave the Italian Government in ownership of the securities, which reverted to it despite an appeal by the Emperor Haile Selassie. The original decision was confirmed on appeal and, although the ruling again dealt solely with the question of jurisdiction, the result was to leave the successor State the ownership of public property of the predecessor State situated abroad. Thus, the two decisions had the indirect effect of sanctioning the principle of the transfer of public property.

(6) However, in all these situations of total dismemberment, absorption, incorporation and partition, the main problem—over and above questions of recognition—undoubtedly remains that of situations not in conformity "with international law and, in particular, the principles of international law embodied in the Charter of the United Nations".

(7) The position taken by certain Powers in the case of the annexation of Ethiopia may be compared to that taken by them in the matter of the incorporation of the Baltic States in the USSR. That incorporation was not recognized by some countries, including the United Kingdom and the United States, which refused to accept the Soviet Socialist Republics as the successors to those States in the case of property situated abroad. The Western countries which did not recognize the incorporation continued for a number of years to accept the credentials of the former representatives of those States, whom they recognized as possessing the right of ownership, or at least of management, of property situated outside the frontiers of the Baltic Republics. For a long time, premises of legations and consulates, and Baltic ships, were not recognized as being the property of the successors. The situation was normalized later.


Appeals Court of Paris, Haile Selassie v. Italian State, 1 February 1939; Gazette des tribunaux, 18 March 1939; Gazette du Palais, 11 April 1939; Revue générale de droit international public (Paris), 3rd series, vol. XVIII, 1947, p. 248. In addition to its own statement of reasons, the Court repeated word for word the statement of reasons given by the juge des référés (quoted in preceding foot-note).

See article 2 above.


Eleven ships flying the flag of the Baltic nations remained in United States ports for a long time as "refugees". See H. W. Briggs, "Non-recognition in the Courts: the Ships of the Baltic Republics", American Journal of International Law (Washington, D.C.), vol. 37, No. 4 (October 1943), pp. 585-596. The United Kingdom had requisitioned 34 Baltic ships during the Second World War, but entered into negotiations on the subject with the USSR, which it finally recognized as the owner of the ships.

Switzerland, Rapport du Conseil fédéral à l'Assemblée fédérale sur sa gestion en 1946, No. 5231, 1 April 1947, p. 119.
placing under the trusteeship of the Confederation the public property of the Baltic States, as well as the archives of their former diplomatic missions in Switzerland, those missions having ceased to be recognized as from 1 January 1941.\footnote{225} (8) In drafting paragraph 2 of the article under consideration, the Special Rapporteur took into consideration situations such as arose following the various partitions of Poland among several neighbouring States. He will supply later some specific information regarding the devolution of public property situated outside the territory of partitioned Poland.

**Section 5. Secession or separation of one or more parts of one or more States**

**Article 28. Currency and the privilege of issue**

1. The privilege of issue shall belong to the successor State throughout the detached territory or territories.

2. Currency, gold and foreign exchange reserves, and, in general, monetary tokens of all kinds which are proper to the detached State shall pass to the successor State.

3. In consideration of the foregoing, the successor State shall assume responsibility for the exchange of the former monetary instruments, with all the legal consequences which this substitution of currency entails.

**COMMENTARY**

(1) Article 28 is similar to article 16, which deals with currency and the privilege of issue in the case of the emergence of a "newly-independent State". That should not be surprising, as cases of secession or separation have been treated separately from cases of decolonization for purely methodological reasons.\footnote{226} Accordingly, for the sake of convenience the Special Rapporteur refers the reader to his commentary on article 16, at least as regards considerations of a general nature, which apply equally to that article and to article 28.

(2) When Czechoslovakia was established after the First World War as a result of the detachment of several territories of the former Austro-Hungarian empire, the currency of Czechoslovakia was created in 1919 simply by overprinting the Austrian notes in circulation in the territory of the new Republic and reducing their value by 50 per cent.

(3) The Polish State, reconstituted after the First World War from territories recovered from Germany, Austria, Hungary and Russia, introduced the złoty, a new national currency, without initially prohibiting the circulation of the currencies formerly in use. Accordingly, for a time four different currencies were in circulation simultaneously in Poland. Subsequently, various legislative measures required the exchange of German marks, Russian roubles and Austro-Hungarian crowns\footnote{227} or declared that those currencies had lost their value as legal tender.\footnote{228}

**Article 29. Public funds and Treasury**

1. Irrespective of their geographical location, public funds and Treasury which are proper to the detached territory shall not be affected by the change of sovereignty.

2. The State fortune—its public funds and Treasury assets—shall be apportioned between the predecessor State and the successor State, due regard being had to the criteria of viability of each of the States.

**COMMENTARY**

(1) Paragraph 1 of article 29 states a rule which is followed in nearly all cases of State succession. There is no apparent reason why the public property of the detached territory, in particular its assets, its Treasury and its own funds, should not remain its property. Paragraph 2, on the other hand, deals with the fortune. The part of the territory transferred may be fairly substantial and there is no reason why the remaining territory alone should retain the public funds and the Treasury in their entirety. It therefore seemed appropriate to provide for this property to be apportioned between the predecessor State and the secessionist State. That is also why the Special Rapporteur considered that the viability of each of the States must be the basic criterion.

(2) The most recent case of secession is that of Bangladesh. However, it has not yet been possible to obtain much information regarding the practice followed in this case.

**Article 30. Archives and public libraries**

1. Archives and public documents of every kind relating directly or belonging to a territory which has become detached in order to form a separate State, and public libraries of that State, shall, irrespective of where they are situated, be transferred to the latter State.

2. The successor State shall not refuse to hand over copies of such items to the predecessor State or to any third State concerned, upon the request and at the expense of the latter State, save where they affect the security or sovereignty of the successor State.

**COMMENTARY**

(1) This article is identical with articles 14 and 18 suggested above to cover cases of partial transfer of territory and emergence of a newly independent State, respectively. Accordingly, the Special Rapporteur refers the reader to the commentaries on these articles, as the situation in all these cases is basically the same, at least in so far as concerns archives and public libraries.

(2) The territories which were detached from the Austro-Hungarian empire to form new States—such as Czechoslovakia, Hungary, and Austria—have often been placed under the trusteeship of the League of Nations, the mandates of which are similar to the trusteeship of the Confederation.
slovakia—after the First World War arranged for the archives concerning them to be handed over to them.\textsuperscript{239} Yugoslavia and Czechoslovakia subsequently obtained from Hungary, after the Second World War, by the Treaty of Peace of 1947, all historical archives which had come into being under the Austro-Hungarian monarchy between 1848 and 1919 in those territories. Under the same Treaty, Yugoslavia was also to receive from Hungary the archives concerning Illyria, which dated from the eighteenth century.\textsuperscript{240}

(3) Article 11, paragraph 1, of the same Treaty specifically states that the detached territory which had formed a State, such as Czechoslovakia, was entitled to the objects “constituting [its] cultural heritage . . . which originated in those territories”\textsuperscript{*}; thus, the article was based on the link existing between the archives and the territory, which explains the expression “archives relating directly to a territory” suggested by the Special Rapporteur in the draft article under consideration.

(4) In the same case, moreover, paragraph 2 of the same article rightly stipulates that Czechoslovakia would not be entitled to archives or objects “acquired by purchase, gift or legacy and original works of Hungarians”, which implies \textit{a contrario} that objects acquired by the Czechoslovak territory should revert to it. That explains the expression “archives belonging to a territory” which the Special Rapporteur has used in his draft. This property was in fact returned to Czechoslovakia.\textsuperscript{251}

(5) The aforementioned article 11 of the Treaty of Peace with Hungary of 10 February 1947 is one of the most specific with regard to time-limits for the handing over of archives: it establishes a veritable time-table within a maximum time-limit of 18 months.

\textit{Article 31. Property situated outside the detached territory}

1. Where a State comes into being as a result of the detachment of a part of the territory of one or more States, the ownership of public property belonging to the said constituent territory or territories which is situated outside their frontiers shall not be affected by such change or changes of sovereignty.

2. Public property belonging to the predecessor State which is situated in a third State shall become the property of the successor State in proportion to the contribution of the detached territory to the creation of such property.

COMMENTARY

(1) Article 31, paragraph 1, states a rule which does not appear to give rise to any doubts, although the courts

\textsuperscript{239} Article 93 of the Treaty of Saint-Germain-en-Laye (British and Foreign State Papers, 1919, vol. 112 (op. cit.), p. 361) and article 77 of the Treaty of Trianon (ibid., 1922, vol. 113, (op. cit.), p. 518).


\textsuperscript{241} The same provisions were applied in the case of Yugoslavia in article 12 of the Treaty of 10 February 1947 already referred to (see note 148 above).

left room for some uncertainty in a case known as the case of Irish funds deposited in the United States of America.\textsuperscript{248}

Irish revolutionary agents of the Sinn Fein movement had deposited in the United States funds collected by a republican political organization, the Dáil Eireann, which had been established at the end of the First World War with the aim of forcibly overthrowing the British authorities in Ireland and proclaiming the independence of the country. During the Irish uprising of 1920-1921, these movements brought forth a revolutionary republican \textit{de facto} Government, headed by Eamon De Valera.

When a Government of the “Irish Free State” was constituted by the Treaty of 6 December 1921, between Great Britain and Ireland, this new authority claimed the funds from the United States, as the successor of the insurrectionary \textit{de facto} Government.

An Irish court upheld this claim, ruling that the Government of the Irish Free State was “absolutely entitled to all the property and assets of the [de facto] Revolutionary Government upon which as a foundation it had been established”.\textsuperscript{233}

(2) However, an American court dismissed the claim. The two judgements to this effect rendered by the Supreme Court of New York (New York County)\textsuperscript{234} stated that, although the case involved a problem of succession of State or government, the Court considered that the Irish Free State was the successor of the British State and that consequently the Government of the Free State was not the successor of the “insurrectionary government”, which was only a political organization and not a government recognized as such by the British authorities or by any foreign State.

The Supreme Court of New York therefore held that only Great Britain could be entitled to claim the funds. Although the case does not concern a succession of States, it is interesting to note that it could be deduced from the reasons stated by the Court that, if the funds had been paid over to Great Britain, the Irish Free State would in turn have been able to claim them from Great Britain as the successor State of that country.

(3) The reader will recall the \textit{McRae case} mentioned earlier,\textsuperscript{235} which, although it related to the dissolution of unions, can also be considered from the standpoint


\textsuperscript{233} Supreme Court of the Irish Free State, Fogarty and others v. O'Donoghue and others 17 December 1925. See A. D. McNair and H. Lauterpacht, \textit{Annual Digest of Public International Law Cases, 1925-1926} (London, Longmans, Green, 1929), case No. 76, pp. 98-100.


\textsuperscript{235} See above, paras. 3 and 5 of the commentary to article 23.
of secession. It was, however, an attempt at separation which failed.

(4) The diplomatic practice followed by Poland when it was reconstituted as a State upon recovering territories from Russia, Austria-Hungary and Germany was, as is known, to claim ownership, both within its boundaries and abroad, of property which had belonged to the territories which it recovered.

(5) Paragraph 2 of the article would apply to cases of property belonging to the predecessor State or States part or parts of whose territory had been detached to form the new State. Where the constituent territory or territories contributed to the constitution of property situated in a third State, they are entitled to claim their share of that property, which would be determined on the basis of their contribution.

(6) However, this rule apparently has not always been followed in diplomatic practice. In considering the case of the dismemberment of the territories of the Habsburg dynasty, there is observable, inter alia, a type of secession, in that Czechoslovakia, for example, was formed from certain territories which were detached from the Empire.

(7) An arbitral award was in fact delivered at Czechoslovakia's request in a case involving the cession of vessels and tugs for navigation on the Danube.\(^{236}\)

In the course of the proceedings, Czechoslovakia had submitted a claim to ownership of a part of the property of certain shipping companies which had belonged to the Hungarian monarchy and to the Austrian Empire or received a subvention from them, on the ground that these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, were to the same proportionate extent the owners of the property.\(^{237}\)

(8) The position of Austria and Hungary was that, in the first place, the property was not public property, which alone could pass to the successor States, and, in the second place, even admitting that it did have such status because of the varying degree of financial participation by the public authorities, "the Treaties themselves do not give Czechoslovakia the right to State property except to such property situated in Czechoslovakia".\(^{238}\)

The arbitrator did not settle the question, on the ground that the treaty clauses did not give him jurisdiction to take cognizance of it. There is no contradiction between this decision and the principle of succession to public property situated abroad. It is obviously within the discretion of States to conclude treaties making exceptions to a principle.

V. PROVISIONS RELATING TO PUBLIC ESTABLISHMENTS

Article 32. Definition of public establishments

For the purposes of the present articles, "public establishments" means those bodies or enterprises which engage in an economic activity or provide a public service and which are of a public or public utility character.

COMMENTARY

(1) As the domestic legislation of many States is relatively vague in its definition of "public establishments" or equivalent bodies, it would seem preferable to define such institutions less by their designation in domestic legislative texts than by the objective nature of their functions.

Public establishments exist in almost all sectors of human activity: educational sector (universities, colleges, secondary schools, research institutions, museums, theatres, libraries); social sector (hospitals, social welfare and assistance agencies); financial sector (institutions of issue, banks, savings banks, Treasuries); communications sector (railways, post establishments, airports); etc.\(^{239}\)

The activities of these bodies vary in scope according to the country. However, they all have the characteristic either of providing or assuring a public service or of engaging in a public activity within the framework of the national economy.

A. The public establishment administers a public service

(2) The public establishment, which is set up to administer a public service, is for that purpose provided with a statute determining its structure and mode of operation. Its creation, like its abolition, is closely bound up with that of the public service in question. The establishment's patrimony is made up of property which may belong to the State in whole or in part; in the latter case, the remainder of the property belongs to various territorial authorities (municipalities, départements, districts, arrondissements, etc.) or to the public establishment itself. The public establishment is in fact a body corporate. Its public character derives from the fact that it provides a


\(^{237}\) Ibid., p. 120.

\(^{238}\) Ibid., pp. 120-121. The reference was to article 208 of the Treaty of Saint-Germain-en-Laye (British and Foreign State Papers, 1919, vol. 112 (op. cit.), pp. 412-414), and article 91 of the Treaty of Trianon (ibid., 1922, vol. 113 (op. cit.), pp. 564-565).

\(^{239}\) Like French administrative law, German law makes a distinction between public establishment ("öffentliche Anstalt") and public enterprise ("öffentliche Unternehmung"). Anglo-Saxon law hardly seems to make any distinction between "public corporation", "enterprise", "undertaking" and "public undertaking" or "public utility undertaking". Spain has "institutos públicos", Italy has "enti pubblici" and "imprese pubbliche", Latin America has "autarquias" and Portugal has "estabelecimentos públicos" or "fiscalias". See W. Friedmann, The Public Corporation: A Comparative Symposium (University of Toronto School of Law, Comparative Law Series, vol. 1, London, Stevens, 1954).
public service to a particular population or a segment of that population.

B. The public establishment may engage in an economic activity

(3) The public establishment of an industrial or commercial character, which takes a variety of forms and appellations according to its origins and purpose, generally has a different legal régime from that of the first type of public establishment. It enjoys a greater measure of independence in relation to the Government than does the first type, basing its organization and administration on private law procedures. The establishment’s patrimony is made up of property which may belong to the State, to local authorities, to the establishment itself and on occasion, in the case of mixed companies, to private individuals. In any event, the public establishment in question clearly has a public character in these cases too.

C. The establishment of public utility or general interest

(4) An establishment in this particular category does not administer a public service but engages in an activity which is sufficiently important for the population to be regarded as being “of general interest” or “of public utility”. A public establishment in this category, which is set up by private initiative, may be of two kinds: it may engage in activities substantially similar to those of a public service where the latter does not hold a complete monopoly on activities of that type; it may provide a special service to a group where the Government feels that it is unnecessary to set up a public service to cater for the needs of such a small group, although it intervenes to recognize the public utility character of the establishment which caters for such needs.

(5) The Government extends help or assistance to the private public utility establishment in a variety of forms (subsidies, preferential customs or tax treatment, special pricing system, monopoly status, public authority privileges such as an expropriation or the levying of taxes). In return for such assistance, the Government is accorded supervisory authority over the establishment.

D. The public or public utility character

(6) Despite the variety of the legal régimes to which they are subject, the three categories of establishment mentioned above have one feature in common: their public or public utility character. The existence of this characteristic can be determined by the link the establishment and the territory—in other words, according to the relationship between the body and the population and to the link between the establishment and the economy of the territory.

1. Link with the population

(7) The establishment is intended to meet public needs in a particular sector. In the case relating to the interpretation of article 260 of the Treaty of Versailles submitted to arbitrator Beichmann, the Reparation Commission took the view that the link between the establishment and the population was of paramount importance for the purpose of attributing to an undertaking the character of a public utility. Such an undertaking should “... serve the great majority of consumers* in a fairly sizable expanse of territory” 240 and “satisfy an essential need of a community by collective means of distribution”* 241 or, again, provide “in a fairly extensive territorial area, in order to satisfy a collective need, a service considered to be of general utility in all modern civilized communities” 242

Arbitrator Beichmann also emphasized this link by concluding that public establishments “express the idea of a special utility for the general public and sometimes also of direct use by the public”. 243

2. Link with the economy of the territory

(8) By its activities, the establishment may “supply industrial and commercial undertakings scattered throughout the territory and furnish them with raw materials”. 244

(9) The dual link with the economy and the population of the territory highlights the importance in the establishment or undertaking of the objective element constituted by their public utility character in general and conveniently relegates to a secondary position the excessive variety of criteria for a definition which may be derived from the municipal law of each State. Arbitrator Beichmann did in fact draw attention to a number of differences 245 in the designation of the body in question between one municipal juridical order and another. 246

E. Criteria for a definition

(10) For these reasons, a tendency can be observed for international judicial decisions to reject criteria for a definition which are derived from municipal law in the event of a change of sovereignty affecting a territory. Three examples of this approach may be cited.

1. Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles

(11) In this case, the parties to the Treaty of Versailles held conflicting views concerning the true meaning of the expression “public utility undertaking” used in article 260 of the Treaty, each of the parties attempting

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240 Case of German reparations: Arbitral award concerning the interpretation of article 260 of the Treaty of Versailles [arbitrator F. W. N. Beichmann], publication de la Commission des réparations, annex 2145a (Paris, 1924), and United Nations, Reports of International Arbitral Awards, vol. I (op. cit.), p. 455.
241 Ibid., p. 456.
242 Ibid., p. 455. The Commission added that “utilization by the public is an important element” in a definition (Ibid., p. 462).
243 Ibid., p. 468.
244 Ibid., p. 455.
245 Ibid., p. 460 and foot-note.
246 Even where the body is recognized as having a public character, its real nature is often the subject of learned disputes between jurists of various schools of thought within a particular juridical order (public establishment, public undertaking, public establishment of an industrial or commercial nature, public service, public body, public utility undertaking, etc.).
to win acceptance for the more or less broad interpretation, given to these terms in its own administrative law. After analysing the various arguments advanced, Arbitrator Beichmann expressed the view that the expressions “entreprise d’utilité publique” and “public utility undertaking” contained in the article applicable to the calculation of German reperations “could not be regarded as having been taken from English or French legal vocabulary or as being related to any expression used in the administrative law of either country”.

He also took the view that the expression “public utility undertaking” could not necessarily be linked to the concept of “devolution of public authority or [to] other criteria of a juridical nature such as those contained in the definition in the German Government’s conclusions”.

(12) After rejecting all interpretations of the disputed expression contained in municipal law, the arbitrator concluded by expressing the opinion that its meaning, and hence its definition, should accord with the meaning which it had in everyday language.

2. Decision of the United Nations Tribunal in Libya

(13) The Tribunal, which was set up by United Nations General Assembly resolution 388 (V) of 15 December 1950, had to decide, in connexion with the transfer to Libya of property belonging to the Italian State, whether a number of institutions formerly governed by Italian law could be deemed to be “public establishments” within the meaning of article I of annex XIV to the Peace Treaty of 10 February 1947. The agent of the Italian Government had contended that the Tribunal’s decisions must relate to the character of an “ente pubblico” in the strict sense of the term and in conformity with the meaning of that term in Italian legislation.

(14) The Tribunal rejected this view, stating that it was “not bound by Italian legislation and case law.” The Tribunal will therefore consider this question by freely appraising the various factors in each individual case”. In the opinion of the Tribunal, the parties “purposely chose a term with a general meaning, broader than the term ‘ente pubblico’ in Italian law”.

3. Decision of the P.C.I.J. in a case relating to a Hungarian public university establishment

(15) It will be recalled that, in the case of property belonging to the Peter Pázmány University of Budapest and situated in territory ceded by Hungary to Czechoslovakia, the Permanent Court of International Justice decided that it “has [had] no need to rely upon this interpretation of Hungarian law.” It is content to observe that the distinction between public and private property, in the sense of the Czechoslovak Government’s argument, is neither recognized nor applied by the Treaty of Trianon.

(16) Thus, international judicial tribunals do not regard themselves as bound by municipal law; the status of a particular public establishment should be appraised on the basis of its various individual features or the wish expressed by the contracting parties.

F. Determination by treaty

(17) Doubtless because the definition or “public establishments or bodies” is a difficult question, the predecessor State and the successor State sometimes prefer to list such establishments or bodies in treaty form in the devolution agreements which they conclude. This procedure is followed frequently in the case of all types of succession but has become common practice in cases of decolonization.

In particular, France concluded with the French-speaking African States many agreements regulating the future status of “French public bodies” and certain “French administrative entities” situated in those countries. However, no attempt should be made to find in these treaty provisions elements for a strict definition of public establishments or for determining their property or the legal nature of their rights over such property, or reasons of principle justifying the maintenance of such establishments within the patrimony of the predecessor State.

“The concept of the French public body”, writes Mr. Daniel Bardonnet, “is quite unspecific from the legal standpoint. It seldom involves . . . more than the existence of body corporate status and financial independence. In practice, it is merely a convenient tag to cover a rather motley assortment of public and semi-public bodies and bodies of public interest . . .”.

Article 33. Public establishments of the transferred territory

Public establishments which belong entirely to the transferred territory shall not be affected by the mere fact of the change of sovereignty.

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248 Ibid.


250 Ibid.

COMMENTARY

(1) The legal status of public bodies or corporations or of public enterprises and establishments which are proper to the territory affected by the change of sovereignty cannot be affected by the succession of States as such. Irrespective of the type of succession, the patrimony of the territory retains the status which it had prior to the change.

(2) The situation is clear for the cases of (a) partial transfer of territory, (b) a newly independent State and (c) secession or separation of part of the territory of a State. In the event of (d), the uniting of States, the rule seems to be as fully applicable as in the other cases: the public establishments of each of the uniting States will remain the property of those States, save where treaty provisions state the contrary. In the event of dissolution of the union, if each State constituting the union owned public establishments in its territory, it is evident that, a fortiori, it cannot be divested of ownership of such establishments when the union is dissolved.

The only remaining possibility is the absorption of a State or its partition among several others: this is a case in which the totality of the transferred territory is coextensive with that of the predecessor State. In other words, “public establishments which belong entirely to the transferred territory”, that is to say, bodies owned by the territory itself, are in this case nothing but establishments belonging to the absorbed or partitioned State, and we must therefore refer to the case considered in article 34, relating to State property in public establishments.

(3) There is no lack of examples for each type of succession; however, to avoid making unduly long comments on an article which is self-evident in any case, we shall confine ourselves here to considering the case of decolonization alone, and, within decolonization, to the sole case of North Africa.

(4) For example, the French-Moroccan protocol concerning the distribution of public services between Morocco and France, signed at Rabat on 11 February 1956, specified clearly, even in its title, that during the protectorate the French Résidence générale had possessed in Morocco only “management powers” over certain public establishments, the Moroccan ownership of which was thus recognized. Radio-Maroc, the State Printing Office and the educational services were consequently taken over once more by the Sherifian Government. In this connexion the French Secretary of State for Tunisian and Moroccan Affairs subsequently informed a member of the French Parliament who inquired about the restoration of the educational services that “All of those services have always been Sherifian at the administrative and budgetary levels”.

Later he added that “In Morocco the buildings and equipment of Radio-Tunis. ‘the installations’ belonged to the Sherifian State” but that the same was not true of “the installations” of Radio-Tunis.

(5) In fact, the French-Tunisian Agreement concerning Broadcasting of 29 August 1956 provided that beginning on 31 March 1957, “all of the land, buildings, premises and installations belong to Radiodiffusion française in Tunisia shall be transferred with full rights of ownership to the Tunisian State through the latter’s purchasing them within the framework of property negotiations between the two countries”. The Agreement would enable the Tunisian Government to carry on for itself as from 31 March 1957 “the management, operation and equipping of Radiotélévision tunisienne”.

(6) Public establishments which were the property of Algeria were retained by the latter on its accession to independence.

The Declaration of Principles concerning Economic and Financial Co-operation, dated 19 March 1962, stated in article 18 that “Algeria shall assume the obligations and enjoy the rights contracted on behalf of itself or of Algerian public establishments by the competent French authorities. But Algeria provisionally left to France the use of certain services for the needs of technical and cultural co-operation between the two countries, as happened also between France and the other countries of the Maghreb or the African and Malagasy States.

Article 34. Property of the State in public establishments

The successor State shall be automatically and fully subrogated to the patrimonial rights which the predecessor State possesses in public establishments situated in the transferred territory.

COMMENTARY

(1) The rule suggested above is simple, clear and logical, but it must be admitted—that it has been applied only intermittently. The Special Rapporteur ventures, however, to submit it to the Commission, leaving the latter to judge whether the uncertainty of the use of the rule in practice appears to have the effect of annulling it or of requiring that it be amended. A study of State practice provides us with equally numerous examples of (a) automatic and complete succession of the successor State to

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255 Reply by the Secretary of State, Office of the Prime Minister, to an oral question from Mr. Michel Debré (ibid., 16 January 1957, year 1957, No. 1 C. R., p. 7).
257 Article 2 of the Declaration of Principles concerning Cultural Co-operation stated in this connexion that “France will retain a certain number of educational establishments in Algeria” (ibid., p. 77). In pursuance of that article, the French-Algerian Protocol of 7 September 1962 concerning the Distribution of Educational Establishments provided for “a provisional distribution” of those establishments and included an annex entitled “List of establishments retained by France”. Under another protocol, of 11 June 1963, France was to “retain” certain Algerian establishments, while Algeria was to “temporarily entrust the management of certain establishments” to a Joint Scientific Research Council (article 1 of the Protocol).
Succession of States in respect of matters other than treaties

the property of the State in public establishments, 
(b) automatic but limited succession to the property of establishments situated in the territory affected by the change of sovereignty, (c) succession on condition of purchase, and (d) temporary retention of such property by the predecessor State.

(2) It would seem, however, that this indicates, not that the principle of succession is set aside, but merely that its practical application is subject to certain restrictions in treaties. Even when two States decide to deviate from

its existence: the High Contracting Parties "agree to replace the property settlement based on the nature of the appurtenances * by a global settlement based on equity and satisfying their respective needs".258

A. Automatic and complete succession

(3) In 1871, Germany took over the rights and property belonging to France in respect of the part of the railway network of the Compagnie de l’Est situated in Alsace-Lorraine.259 Bismarck had in fact decided, after the conclusion of the Treaty of Peace of Frankfurt dated 10 May 1871,260 to retain the lines in Alsace-Lorraine as property of the State. Since France protested against that decision, Germany consented to pay compensation, but the completely fictitious nature of the latter leads to the conclusion that this was a concealed case of automatic and complete succession. Furthermore, it was the company and not France that had been compensated. France had repurchased its rights from the company in order to give them to Germany.

(4) The Treaty of Frankfurt contained in fact three additional articles, two of which related to the lines of the Compagnie de l’Est. The German Empire required France to repurchase the concessions granted to the company in Alsace-Lorraine, and was required in exchange to pay France a lump sum which it merely deducted from the war reparations that it had exacted from France (325 million out of 5,000 million gold francs).

(5) When France regained Alsace-Lorraine from Germany after the First World War, there was an automatic and complete succession, considered to be restitution exclusive of any compensation. France regained not only the railway network in the East, but also all the rolling-stock after its representative had declared at the Peace Conference that the question was purely a question relating to a territorial cession and in no way a question of compensation. France reclaims the rolling-stock belonging to the network in Alsace-Lorraine as an accessory of the soil of Alsace-Lorraine, a kind of rolling public domain belonging to the soil by virtue of a kind of right of succession *.261

(6) Under the Treaty of Peace with Italy of 10 February 1947 (annex X, para. 1), "the Free Territory of Trieste [received], without payment, Italian State and para-statal property * within the Free Territory".262 The following were considered as State or para-statal property: "movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations".263

(7) The Treaty of Peace between the USSR and Finland dated 12 March 1940, which provided for reciprocal territorial cessions between those two countries, included an annexed protocol under which various kinds of property of economic and military importance (including manufacturing enterprises, telegraph and electric power stations, aerodromes and warehouses), were required to be handed over intact by each party to the other.264

(8) After its restoration in 1918, Poland expected to regain all the Russian, German and Austro-Hungarian property situated in the territories in which it had been re-established. This is a case which goes beyond automatic succession without payment to the property of the State in public enterprises or enterprises of public


259 "Mr. Armitage Smith (British Empire) : ... The peace preliminaries would stipulate that Germany's public domain should be ceded without payment. The allies would then consider whether the value of that domain should be deducted from the compensation to be made to the cessionary State.

"Mr. Sergent (France) : ... If the cessionary State allowed the value of this domain to be deducted from its claim against Germany, its claim will be diminished. In the case of Alsace-Lorraine, since Germany had seized French public property without compensation in 1871, the proposed method would mean that France was made to pay for State property which had been taken from it by force.

"Mr. Montague (British Empire) Suggested specifying that the German public domain would be transferred without payment to the cessionary State and that the Allies would decide later how allowance should be made for this.

"Mr. Sergent (France) said that France could not pay the Allies for something it received without payment from Germany." (Ibid., (6) Financial Commission, First Sub-Commission, meeting of 21 March 1919, extract from the records, No. 4, pp. 130-131.

260 See also reasons given for the judgement by the French Court of Cassation in Compagnie des chemins de fer d'Alsace et de Lorraine v. Ducreux (Cours de Cassation française, Chambre civile, judgement of 11 July 1928 (Dallos, Recueil hebdomadaire de jurisprudence, année 1928 (Paris, Dallos), p. 512).

261 See also reasons given for the judgement by the French Court of Cassation in Compagnie des chemins de fer d'Alsace et de Lorraine v. Ducreux (Cours de Cassation française, Chambre civile, judgement of 11 July 1928 (Dallos, Recueil hebdomadaire de jurisprudence, année 1928 (Paris, Dallos), p. 512).


263 See also reasons given for the judgement by the French Court of Cassation in Compagnie des chemins de fer d'Alsace et de Lorraine v. Ducreux (Cours de Cassation française, Chambre civile, judgement of 11 July 1928 (Dallos, Recueil hebdomadaire de jurisprudence, année 1928 (Paris, Dallos), p. 512).

264 See also reasons given for the judgement by the French Court of Cassation in Compagnie des chemins de fer d'Alsace et de Lorraine v. Ducreux (Cours de Cassation française, Chambre civile, judgement of 11 July 1928 (Dallos, Recueil hebdomadaire de jurisprudence, année 1928 (Paris, Dallos), p. 512).

utility, since Poland expected to recover even private property.\(^{266}\)

(9) The Treaty of Peace signed at Bucharest on 7 May 1918 between the Central Powers and Romania,\(^{267}\) stipulates in article 12 that all State property (\textit{Staatsvermögen}) of the ceded Romanian territories shall pass to the successor States free and clear of any compensation or costs.

(10) Under United Nations General Assembly resolution 388 (V) of 15 December 1950 concerning the economic and financial provisions relating to Libya, that country was to receive, “without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya”. Article 1, paragraph 2, of that resolution provided for the transfer, immediately and without payment, of the public property of the State (“demanio pubblico”), the inalienable property of the State (“patrimonio indissolubile”), as well as the property of the Fascist organizations. Paragraph 3 of the same article provided, in addition, that the following shall be transferred on conditions to be established by special agreement between Italy and Libya: (a) the alienable property (\textit{patrimonio disponibile}) of the State in Libya and the property in Libya belonging to the autonomous agencies (\textit{aziende autonome}) of the State; (b) the rights of the State in the capital and the property of institutions, companies and associations of a public character located in Libya.*

It is known that the United Nations Tribunal had to settle this problem of the transfer of public property to the successor State, particularly State property in organizations of a public or semi-public character.

(11) By and large the same provisions were applied in the case of Eritrea which, under General Assembly resolution 530 (VI), succeeded, automatically and without payment, to the property of the “demanio pubblico”, the “patrimonio disponibile” and “indissolubile”, of the Fascist Party and its organizations, and the following “\textit{aziende autonome}” : the railway of Eritrea (“Ferrovie dell’Eritrea”), the “Azienda Speciale Approvvigionamenti”, “the Azienda Miniere Africa Orientale” (AMAO), and the “Azienda Autonoma Strade Statali” (AASS), as well as to the “rights of the Italian State in the form of shares and similar rights in the capital of institutions, companies and associations of a public character*”\(^{268}\) (which have their head offices in Eritrea).

(12) Algeria was to succeed to the property of the French State in the public bodies in Algeria: “Public establishments of the [French] State or companies belonging to the [French] State and responsible for the administration of Algerian public services, will be transferred to Algeria.”\(^{269}\) In fact, the application of the principle has given rise to various difficulties.\(^{270}\)

B. Succession limited to the property of public establishments situated in the territory

(13) The examples cited above concerning automatic succession, without payment, to all the property of the State that might be included in the patrimony of public establishments, or their equivalent, include some instances in which the succession has been expressly limited to the case where such property is situated in the territory affected by the change of sovereignty.

(14) Thus, neither Libya nor Eritrea were able to succeed to the property of the Italian State in public establishments when such property was situated—or the operations relating to it were carried on—outside Eritrea or Libya.

As stated in General Assembly resolution 388 (V), where the operations of such institutions, companies and associations extend to Italy or to countries other than Libya, Libya shall receive only those rights of the Italian State or the Italian administration which appertain to the operations in Libya.* In cases where the Italian State or the Italian administration of Libya exercised only managerial control over such institutions, companies and associations, Libya shall have no claim to any rights in those institutions, companies or associations.\(^{271}\)

(15) Similar or parallel provisions are found in devolution agreements. Article 19, of the Declaration of Principles concerning Economic and Financial Co-operation between Algeria and France provides that the transfer of public establishments of the French State “will cover the assets applied in Algeria* to the management of these public services”.

C. Succession on condition of purchase

(16) When the French Establishments in India were taken over by the Indian Union, it was decided that “the French Government will place a power station at the disposal

\(^{266}\) See third report (\textit{Yearbook...1970}, vol. II, p. 131, document A/CN.4/226), and the abundant decisions of the Polish Supreme Court. According to a judgement of that Court (\textit{Co-operative farmers in Tarnów v. Polish Treasury}, 1923), the Polish State had taken over the Austrian State Railways by taking over supreme power in the territory in question, that is, by an act of public law (see \textit{Yearbook...1963}, vol. II, p. 143, document A/CN.4/157, para. 434).


\(^{268}\) General Assembly resolution 530 (VI) of 29 January 1952, “Economic and financial provisions relating to Eritrea”, article I. This resolution is much more detailed than resolution 388 (V) relating to Libya.

\(^{269}\) Article 19 of the “Declaration of Principles concerning Economic and Financial Co-operation” (for reference, see above note 256), of 19 March 1962. The fact that this article, even though it refers to a future agreement, makes no reference to whether this transfer was to be made against payment, should be interpreted as excluding any compensation or repurchase.

\(^{270}\) See G. Fouilloux, “\textit{La succession des Etats de l'Afrique du Nord aux biens publics français}”, \textit{Annuaire de l'Afrique du Nord, 1966} (Paris), vol. V, 1967, pp. 51-79. Following the occupation on 18 October 1962 by the French Army of the administrative district of Rocher Noir, constructed on land acquired by a public establishment, the CEDA (Caisse d’équipement et de développement de l’Algérie), the Algerian side replied by stepping up its take-over of various public establishments, including Radio Algiers. The transfer to Algeria of the patrimonial aspects of the various public bodies took place progressively, following long, complex negotiations and often on condition of purchase or against compensation.

\(^{271}\) Article I, para. 4, of resolution 388 (V). This paragraph was reproduced in full in article I, paragraph 2 (f) of resolution 530 (VI) quoted earlier in the case of Eritrea.
of the Government of India. The conditions of the purchase shall be examined by the competent authorities."

(17) When France withdrew from Lebanon, the latter purchased from the former, on a lump-sum basis, property of the French State in public establishments in Lebanon, such as the telephone system, the Beirut broadcasting station and the flying control radio stations and meteorological stations.273

(18) The protocol of 24 September 1962 concerning technical co-operation between France and Algeria in the field of public works, transport and tourism 274 provides for the transfer of State property forming part of the patrimony of various public establishments. In particular, article 1 of the protocol provides that, "As from 1 July 1962, Algeria shall supersede France in respect of the rights and obligations attaching to the general property of the railway system" while France undertakes to "transfer" to Algeria the shares it held in the Société nationale des chemins de fer algériens (SNCF). That was effected against payment, as in the case of other public bodies, such as Electricité et Gaz d'Algérie (EGA), Air Algérie, and Caisse d'équipement et de développement de l'Algérie (CEDA), the property of which was to be transferred to the equivalent new Algerian body, the Caisse algérienne de développement (CAD), etc.275

(19) It would appear that the few examples mentioned briefly above should not be used as the basis for the formulation of rules, since that was not their purpose. Despite their relatively frequent occurrence, these examples are the product of varying circumstances of time and place, and this makes it hazardous to attempt to formulate any rule based on them.

It might in addition be pointed out that the transfer against payment was justified at times by the fact that, in the context of co-operation, the successor State and the predecessor State each undertook an evaluation of the property which it abandoned to the other. Reciprocal cessions had to be calculated for the purposes of compensation.

It should also be noted that, at least as far as decolonization is concerned, the purchase is sometimes more theoretical than real. "Payment for the succession to property", writes Mr. Gérard Fouilloux,

272 Article XXII of the Franco-Indian Agreement of 21 October 1954 (for reference, see above, note 115). The compensation for the purchase of this power station was fixed by a joint commission at 21,65 lakhs.


Such a dispute is a clear indication of the argument against the merits of a possible rule stating that transfers must be made against payment.

Finally, it is worth while pointing out that the payment of compensation or lump sums stipulated by various agreements relating to territorial cessions in Europe in the eighteenth and nineteenth centuries was sometimes intended, according to one writer,276 to replace "in a way the system which would impose on the acquiring State the obligation to assume responsibility for part of the public debt relating to those territories".

D. Temporary use of property by the predecessor State

(20) It has happened that a predecessor State has been authorized to retain temporarily the use of public property, particularly for the purpose of establishing or administering services to implement a policy of technical or cultural co-operation with the successor State. Obviously, the fact that such property remains temporarily at the disposal of the predecessor State cannot constitute grounds for formulating a rule contrary to that suggested by the Special Rapporteur. It is mainly in the context of cultural co-operation that a number of public educational, research and cultural establishments have thus been retained provisionally by the predecessor State with the express agreement of the successor State. Furthermore, the very existence of such an agreement clearly proves that the successor State has a right to succeed to such property, without which it would have no capacity to assign the property referred to in the agreement.

(21) On the basis of these commentaries, it would seem possible to accept the rule suggested by the Special Rapporteur in draft article 34. It should be applicable without difficulty in the cases of partial transfer of territory, the newly independent State, and the separation or secession of territory. It is clearly not in doubt in the case of the disappearance of the predecessor State by absorption or partition. In that case, the rule applies by reason of the sheer impossibility of leaving a patrimony to a State that no longer exists. There remain the cases of the unifying of States and the dissolution of a union of States. For the purposes of the latter case it might appear necessary or useful for the Commission to effect some slight change or introduce some special provision in the proposed article. It may in fact be considered normal for a predecessor State to retain the property that it possesses in a public establishment in the case of a unifying of States. There again, however, it is all a question of the nature and degree of integration of the States in the union, and hence of treaty provisions.

Article 35. Case of two or more successor States

Where there are two or more successor States, the patrimonial rights of the predecessor State in public

276 G. Fouilloux, loc. cit., p. 78.

establishments situated in the transferred territories shall be apportioned between the successor States in accordance with the criteria of geographical location, origin of the property and the viability of the said establishments, and subject, where necessary, to equalization payments and offset.

COMMENTARY

(1) When Algeria became independent, there arose the problem of disposal of the property of the Mediterranean-Niger Railway, in which several countries were involved. In a Franco-Algerian Protocol it was decided provisionally at that time that “subject to the changes affecting the public domain as a consequence of the transfer of sovereignty, the Mediterranean-Niger Railway shall continue to be operated as a French public establishment* until 31 December 1962". Subsequently this establishment was dissolved.

(2) It would seem inadvisable to go further than the provisions of article 35 in defining the way in which the patrimonial rights which the predecessor State possesses in public establishments should be apportioned between two or more successor States. The proposed criteria for apportionment are such as to cover every eventuality. However, contrary to the possible implications of the case of the Mediterranean-Niger Railway, it is not for the predecessor State to apportion the State property between the various successor States. As Max Huber writes in a book already quoted, under public law, as opposed to civil law, the successor itself gives effect to the succession by taking possession of the property involved. It is for the successor States to settle the question among themselves.

(3) The future of public establishments and bodies can give rise to insuperable problems when there are two or more successor States if the criteria referred to above and the interests of each party are not carefully taken into account. The apportionment of property may well deprive the establishment of what is fundamental to its existence, and must therefore also take into account the criterion of viability of the establishment.

(4) As an appendix to these commentaries, it might perhaps be appropriate to consider, in this context, the case of two or more third States, which is obviously different from the case of two or more successor States, dealt with here. The former occurs when, particularly in the case of decolonization, the predecessor State has set up a public establishment which is common to two or more neighbouring countries, but with the headquarters and most of the patrimony or activity situated in the territory which has become independent. A case in point is the Djibouti-Addis Ababa Railway. The patrimony of the colonial Power in the public establishment must be the subject of a plan for apportionment which takes into account the size of the share in the establishment held by each State. The problem can be solved only through treaty provisions stating that the successor State shall grant to third States compensation in proportion to their share, or, better still, providing for economic co-operation between all the States involved.

VI. PROVISIONS CONCERNING TERRITORIAL AUTHORITIES

Article 36. Definition of territorial authorities

Version A:

For the purposes of the present articles, “territorial authority” means any administrative division of the territory of a State.

Version B:

For the purposes of the present articles, “territorial authority” means any administrative division of the territory of a State which is characterized by its own territory, population and administrative authority but does not possess international legal personality.

COMMENTARY

(1) The Special Rapporteur suggests two different versions for the definition of territorial authorities, one being an extension of the other. The first version merely defines them as simple administrative divisions. The second provides a somewhat negative definition: anything which is not a State, although it has a territory, a population and authority, can only be a territorial authority.

(2) International law does not provide a definition of a subject of municipal law. Territorial authorities, municipalities, districts, cantons, arrondissements, provinces, regions and even federated States—have legal personality, but only in the internal juridical order of a unitary or federal State. They are not subjects of international law.

(3) The Special Rapporteur could have referred to the municipal law of a State in order to define territorial authorities. However, even if such a definition existed and it was possible and desirable to give a rule of municipal law the force of a rule of international law, such a solution would be unsatisfactory because the nature and role of territorial authorities and the law governing them vary considerably from one State to another.

(4) International lawyers have approached the problem of defining “property of municipalities”, and therefore indirectly that of defining municipalities, in the context of the law of war, and particularly of the Hague Conventions of 1907. They have considered the question of the treatment of municipal property in the case of foreign
military occupation. However, they differ in their interpretation of the meaning to be attributed to the term "property of municipalities". Some feel that, under the Hague Convention, the same régime was to be applied to the property of municipalities and that of the State. Others considered that the distinction between the property of municipalities and State property is not realistic and proposed criteria for determining the patrimony of the State. Max Huber, faced with the difficulty of defining the patrimony of the State and that of what he calls "independent establishments", proposes two criteria: one of form concerning the legal personality of the holder of the patrimony, and the other of substance covering the purpose for which the patrimony is to be used. If there is any doubt, according to the author, the existence of a legal personality separate from the State must be acknowledged provided that the following three elements are present:

(a) A body legally independent of the administrative organs of the State;
(b) The capacity to possess rights and property;
(c) A different purpose [from that of the State].

(5) Other writers believe that the régime applicable under the Hague Convention to "the property of municipalities"—which allows such property to be assimilated to private property for the purposes of protection—also applies to the property of all other territorial authorities, the deciding factor being that the property concerned meets purely local needs.

These different interpretations, formed in the context of the law of war, do not allow for a precise definition of territorial authorities. Consequently, the Special Rapporteur would prefer one or the other of the two versions he proposes.

**Article 37. Public property proper to territorial authorities**

**Version A**

The change of sovereignty shall leave intact the ownership of the patrimonial property, rights and interests proper to territorial authorities.

**Version B**

The change of sovereignty shall leave intact the ownership of patrimonial property, rights and interests proper to territorial authorities, which shall be incorporated, in the same manner as the said authorities themselves, in the juridical order of the successor State.

(1) In draft article 8 relating to the "General treatment of public property according to ownership", the Special Rapporteur has inserted a subparagraph (b) reading thus: "Public property of authorities or bodies other than States shall pass within the juridical order of the successor State".

His commentaries on this article, to which he now refers the reader, allow him to be brief here.

(2) It will be recalled that a resolution adopted by the Institute of International Law in 1952, at its Siena session, stated that local corporate bodies retained the right of ownership over their property after territorial changes. It is also known that the régime of public property belonging to local authorities themselves was the subject, in particular, of a decision by the Franco-Italian Conciliation Commission on 9 October 1953. The Commission had to adjudicate upon the fate of property of the frontier municipalities whose areas had been divided by the new frontier established by the Treaty of Peace with Italy of 10 February 1947.

(3) The agent of the French Government considered that the para-statal property transferred to the successor State under paragraph 1, sub-paragraph 2 of annex XIV to the Treaty included the property of local authorities. In the view of Italy, on the contrary, the paragraph referred not to a real transfer of property but to the property's incorporation in the juridical order of the successor State.

The Commission for its part stated that apportionment cannot, as a rule, change the nature of existing rights; it is, however understood that those rights will henceforth, if necessary, be exercised in the context of the French municipal juridical order instead of in the context of the Italian municipal juridical order, and vice versa. The property which belonged to Italian municipalities themselves shall normally, if it is allotted to them at the time of the apportionment, be allocated to them in full ownership, even if henceforth the property is situated in French territory; similarly, property in Italian territory allotted to municipalities which were formerly Italian and are now French must remain in the ownership of those municipalities, if it belonged to the municipality itself before the entry into force of the Treaty of Peace.

(4) However, the Commission based its views on the clear wording of the treaty when it decided that it is the successor State that shall receive, without payment, not only the State property but also the para-statal property, including municipal property, within the territories ceded. It is the municipal legislation of the successor State that must determine the fate (final destination and juridical régime) of the property thus transferred, in the new State context into which the property has passed following the cession of the territory.

(5) It is true that this is a treaty provision, which stipulates unequivocally that the ownership of the property...
of municipalities shall be transferred to the successor State. But the normal solution can only be that in the case of the transfer of territory the territorial authorities retain the right of ownership over their own property. If the successor State subsequently modifies the substance of that right, it will do so by an act of public power as a sovereign State, not as a successor State. That situation falls outside the scope of the succession of States.

On the other hand, however, succession to the property of local authorities raises the problem of succession to legislation, which will be studied by the International Law Commission at a later stage. Such property henceforth is incorporated in a juridical order different from the order to which it formerly belonged. Its juridical régime may therefore remain the same or on the contrary evolve according to the conditions governing the transition from the legislation of the predecessor State to that of the successor State.

(6) One writer has observed that the treaties between the Reich and the Protectorate of Bohemia-Moravia, Slovakia and Hungary, all stipulated that the property of local authorities, in so far as the territory of the latter was not divided under the territorial cessions granted by Czechoslovakia, was to remain intact.\(^290\)

However, despite the exception presented by the division of property of local authorities between Romania and Bulgaria,\(^291\) treaty practice also shows that the right of ownership of territorial authorities is left intact.

**Article 38. Property of the State in territorial authorities**

1. The share of the predecessor State in the property, rights and interests of a territorial authority shall be transferred *ipso jure* to the successor State.

2. Where there are two or more successor States, the said share shall be apportioned between them, with due regard to the viability of the territorial authority, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

**COMMENTARY**

(1) Article 38 corresponds to article 34, which concerns property of the State in public establishments. In other words, it puts forward an identical solution to basically similar concerns. The property owned by the predecessor State in a territorial authority or in an enterprise of the authority has the same fate as other public property which constitutes the patrimony of the State and must therefore be transferred to the successor State.

\(^{290}\) I. Paenson, *op. cit.*, p. 111. Convention of 4 October 1941 between the Third Reich and the Protectorate of Bohemia-Moravia (Reichsgesetzblatt, Teil II, Berlin, 24 April 1942, No. 13, p. 195); Agreement of 13 April 1940 between the Third Reich and Slovakia (ibid., 20 August 1941, No. 34, p. 305); Agreement of 21 May 1940 between the Third Reich and Hungary (ibid., 6 June 1941, No. 23, p. 199).

\(^{291}\) Romania ceded property of local authorities to Bulgaria on the same basis as State property, in the Treaty of Craiova of 7 September 1940, it would seem that this rule is valid for all types of succession of States except the uniting of States. In the latter case, the normal procedure would appear to be the maintenance of the *status quo*, unless a contrary decision is taken by agreement. The Commission must decide whether it should deal with this case separately or redraft the article in order to take it into account.

(2) If there are two or more successor States, the property of the predecessor State in the patrimony of territorial authorities will be apportioned justly and equitably among the successor States. The criteria for apportionment (viability, geographical location, origin of the property, equalization payments and offset) will be defined in greater detail during the consideration of article 39, which covers the problem of territorial authorities divided following transfers of territory.

**Article 39. Divided territorial authorities**

Where the change of sovereignty has the effect of dividing a territorial authority into two or more parts attached to two or more successor States, the patrimonial property, rights and interests of the territorial authority shall be apportioned equitably between the said parts, due regard being had to the viability of the latter, to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset.

**COMMENTARY**

(1) The Franco-Italian Conciliation Commission based its decision of 9 October 1953 (which has already been mentioned on paragraph 18, of annex XIV to the Treaty of Peace with Italy, which provided that the property of municipalities whose areas were divided should be “equitably apportioned” among those municipalities.\(^{292}\)

This case concerns the apportionment of municipal property between a predecessor State and a successor State, not among several successor States. However, the solutions remain the same and the suggested article 39 could just as well apply to the case of a change of sovereignty which would have the effect of dividing a territorial authority into two or more parts, one part being retained in the predecessor State, if it still exists, and the other part or parts being attached to one more successor States.

(2) The Conciliation Commission stated that the apportionment of such property must be carried out *within the context of each former municipality*. On the basis of the text of the Treaty of Peace of 1947, it formulated certain principles. Paragraph 18, of annex XIV to the Treaty of Peace provided for apportionment by agreement between the successor States. That apportionment must be just and equitable. Moreover, it must ensure the maintenance of the municipal services necessary to the inhabitants. It must therefore be carried out according to a principle of utility. The Commission stressed that the interest of the population must be the governing factor.

\(^{292}\) See above note 40.

in the apportionment of the property belonging to the divided municipalities. The Commission was, of course, alluding to the population of the dismembered municipality, not the population of the municipality whose area has been expended by the annexation.

(3) The Commission gave a definition of the "municipal services necessary to the inhabitants" referred to in annex XIV, paragraph 18: "... a set of facilities which by their use, their nature or their location, exert a decisive influence on local life **". Moreover, in this case of modification of the frontier "... the essential characteristic of a public service in this instance is the link between possession by the municipality of the property in question and the fulfilment, by means of such possession, of the economic, social or family needs of the inhabitants*; the type of use is irrelevant; the degree of directness of the link in question is also irrelevant.".294

(4) On the basis of this decision by the Franco-Italian Conciliation Commission it can therefore be concluded that the apportionment of the property of territorial authorities whose areas are divided must:

(a) Be carried out in a spirit of justice and equity;
(b) Take account of the economic, geographical, social and demographic conditions of those territorial authorities, as well as of the nature and location of the property;
(c) Safeguard the interest of the public service in the widest sense;
(d) If necessary, include compensation in kind or cash, assessed according to the needs of the population. However, in the present case, the Commission did not deem it necessary to establish an apportionment account.

(5) The principle of taking account of conditions of viability was also applied at the time of the division of the canton of Basle into two half cantons, pursuant to a decision by the Federal Diet in 1833. The arbitral tribunal presided over by Professor Keller assessed the administrative and fiscal wealth of the State and apportioned it between the two half cantons with due regard to population density.295

(6) Similarly, examples of conventions which always provide for a just and equitable apportionment of the property of territorial authorities whose areas have been divided are to be found in the book by Paenson already mentioned.

VII. PROPERTY OF FOUNDATIONS

Article 40. Property of foundations

1. So far as the public policy of the successor State permits, the legal status of the property of religious, charitable or cultural foundations shall not be affected by the change of sovereignty.

2. Where the predecessor State possessed a share in the patrimony of a foundation, that share shall be transferred to the successor State, or where there are two or more successor States, apportioned equitably between them.

COMMENTARY

(1) The property of religious, charitable, cultural or scientific foundations has been the subject of special provisions in many agreements relating to State succession, as well as of a relatively large number of judicial decisions. Certain principles can therefore be derived from international practice and from judicial practice.

The article suggested above raises three aspects of the question of foundations: (i) respect for private foundations which in principle retain their property without any change; (ii) possible involvement of the concept of public policy, which may lead the successor State to infringe upon respect for the status quo; and (iii) transfer to the successor State or States of the property owned by the predecessor State in the patrimony of a foundation.

A. Patrimonial situation unchanged

(2) The Austro-Bavarian Convention of 3 June 1814,296 the Treaty of 20 May 1815 between the King of Sardinia, Austria, England, Russia, Prussia and France,297 the Treaty of 18 May 1815 between Prussia and Saxony,298 and the Act of the Congress of Vienna 299 provided that the foundations or communities, corporations and religious or public educational establishments in the provinces and districts ceded should retain their property as well as the income they possessed in accordance with the act of foundation or with acquisitions legally made by them.

Article XV of the Additional Treaty relating to Cracow, signed at Vienna on 21 April-3 May 1815 by Austria, Prussia and Russia read:

The Cracow Academy is confirmed in its privileges and in the ownership of the buildings and the library appertaining to it, as well as of the amounts it owns in land or in mortgaged capital.299

It would be possible to cite in this manner a multitude of diplomatic texts of the same type, showing that territorial changes have had no effect on the situation with regard to the patrimony of foundations.

(3) Property known as "dedicated" in Moslem law,300 which is withheld from trade and from the process of inheritance, and thus becomes inalienable and impermissible on religious grounds, is assigned by its owners...
to a religious, social assistance, charitable or other work or purpose of public utility.

Under article XII of the Treaty of Constantinople between Turkey and Bulgaria the problem of such property was settled by maintaining the status quo:

The Mustesna, Mulhaka, Idjaristein, Moukataa and Idjarievahide vakoufs as well as vakouf tithes in the ceded territories, as specified under current Ottoman law, shall be respected.

They shall be managed by duly authorized persons.

The régimes to which they are subject may be modified only if fair prior compensation is paid.

The rights of the religious and benevolent establishments of the Ottoman Empire to vakouf income in the ceded territories, derived from idjarei-vahide, moukataa, miscellaneous titles and the equivalent value of vakouf and other tithes, on vakoufs whether built or not, shall be respected.

(4) When France annexed Nice and Savoy, article 7 of the Franco-Sardinian Convention of 23 August 1860 in principle settled the problem of the property of churches and religious congregations by maintaining the status quo. However, difficulties arose, especially after the passage of the French Act of 9 December 1905 separating church and State. Even after the adoption of this Act, however, France retained the system of scholarships and cartelli. The church scholarships were provided for poor schoolchildren, and French legislation agreed to continue payment of them. The French Government also continued to pay ecclesiastical stipends, in particular the cartelli, which were a perpetual annuity paid regularly by the Sardinian Government to ministers of religion, despite the affirmation of the Act of Separation of 1905 that "the Republic...shall not give financial support to any religion".

(5) Similarly, we read in the Convention between the United States and Denmark providing for the cession of the Danish West Indies that "The congregations belonging to the Danish national Church shall retain the undisturbed use of the churches which are now used by them, together with the personages appertaining thereunto and other appurtenances, including the funds allotted to the churches."

(6) The Franco-Indian Agreement of 21 October 1954 concerning the transfer of the French Establishments in India to the Indian Union affords another example. Article IX of the Agreement reads:

Properties pertaining to worship or in use for cultural purposes shall be in the ownership of the missions or of the institutions entrusted by the French regulations at present in force with the management of those properties.

The Government of India agree to recognise as legal corporate bodies, with all due rights attached to such a qualification, the "Conseils de fabrique" and the administration boards of the Missions.

Article 32 of the same Agreement adds

...Properties which are at present in the possession of the religious authorities shall be retained by them and the Government of India agree, whenever necessary, to convey the titles to them.

(7) The Treaty of Peace with Italy of 10 February 1947, for its part, provided that property belonging to Italian religious bodies or private charitable institutions would be exempt from any confiscation measures.

(8) In the case Bolsharin et al. v. Zlobin et al., the District Court of Alaska ruled in favour of the maintenance of the property rights of religious foundations. Members of the Russian Church at Sitka, Alaska, claimed ownership of the church buildings and lands by virtue of the 1867 Treaty by which Russia ceded Alaska to the United States. Article II of this treaty provided that "the churches which have been built in the ceded territory by the Russian Government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein". The defendants, the priest and the Metropolitan of the Greco-Russian Church in America referred to a patent granted them by the United States Government in 1914. The Court judged that private titles granted by a former sovereign were not affected by the change in sovereignty that had taken place.

(9) In the Peter Pázmány University case, adjudicated by the P.C.I.J., the same principles of respect for the property of foundations were applied. Article 250 of the Treaty of Trianon followed the same direction, providing that "...the property, rights and interests of Hungarian nationals or companies controlled by them..."
situated in territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation...". \(^{311}\)

The Hungaro-Czechoslovak Mixed Arbitral Tribunal, in a judgement rendered on 3 February 1933, had stated that under the terms of article 250, quoted above, the Czechoslovak State should restore certain immovable property to the University of Buda and then to Pest in 1804, and was converted into a title of ownership. Another piece of land, the subject of the litigation, had been purchased by the University in 1914. In 1918, Czechoslovak troops invaded northern Hungary, and the University property situated in Slovakia was seized by the Czechoslovak State. It was placed under the administration of the Central Commission for the Property of the Roman Catholic Church in Slovakia. The University then appealed to the Hungaro-Czechoslovak Mixed Arbitral Tribunal for restoration of its property. The Tribunal, confirmed in its judgement by the Permanent Court of International Justice, upheld the University’s claim.\(^{312}\)

(10) A case adjudicated by the Paris Appeals Court, concerning the “Waqf Abou Médiène” foundation, relates to the problem of what should become of the property of religious foundations. The Court ruled that the commitment entered into by the French State with an Israeli lawyer to protect a Moslem private foundation established for Moslem pilgrims from the Maghreb was contracted neither in the name of Algeria nor in the name of an Algerian public establishment, and is therefore not transferred to the Algerian State by article 18 of the Franco-Algerian Declaration of Principles concerning Economic and Financial Co-operation of 19 March 1962.\(^{313}\)

The Court based its reasoning on the fact that, on the one hand, the foundation concerned was not Algerian but multinational, and on the other hand that what was involved was not a public establishment reverting to Algeria but a non-transferable private fund.

**B. Exceptions to the principle**

(11) The final decision of the Special Commission of the German Empire dated 25 February 1803, concerning the settlement of compensation established under the peace of Lunéville provided, in paragraphs 35 and 37, that the property of certain chapters, abbeys and convents should be placed “at the free and complete disposal of the territorial princes concerned” \(^*\) for expenses connected with worship, instruction, and other facilities for the public use and also to ease their finances...” and that “the property and income belonging to hospitals, church councils, universities, colleges and other religious foundations... shall be placed at the disposal of the rulers concerned” \(^{**}\).\(^{314}\)

But this is almost certainly explained by the survival, here and there, of mediaeval or feudal law which provided for the free disposal of ecclesiastical property in Europe.

(12) The problem of the property belonging to the churches of Savoy after the annexation of this former Sardinian province by France in 1860 was dealt with in a decision by the Conseil d’Etat in which this high administrative court of France rejected the principle of non-retroactivity of the law and made the churches of Savoy subject to the same juridical régime as the other churches of France.\(^{315}\) These churches belonged to the municipalities, which thus acquired the churches of Savoy and their appurtenances which, according to Sardinian law, belonged to the church councils and parochial benefices and normally could be transferred to the municipalities only by expropriation for public purposes.\(^{316}\) Subsequently the “ecclesiastical corporations” (chapters, canonries, establishments for public worship, lay chaplaincies and hospital institutions) were either abolished or prevented from enjoying the property status they had had prior to the annexation of Savoy.\(^{317}\)

(13) But the most celebrated case was the case of the hospitals of the English-speaking Protestant missions in Madagascar.\(^{318}\) The case known as the Soavinandriana hospital case raised the question of general appropriation...

\(^{311}\) British and Foreign State Papers, 1920, vol. 113 (op. cit.), p. 607.

\(^{312}\) P.C.I.J., Series A/B, No. 61, p. 223.

\(^{313}\) Czechoslovakia had unsuccessfully invoked the provisions of the sixth paragraph of article 249 of the Treaty of Trianon, whereby “Legacies, donations and funds given or established in that Kingdom shall be placed by Hungary, so far as the funds in question are in her territory, at the disposal of the Allied and Associated Power of which the persons in question are now, or become, under the provisions of the present Treaty... nationals” (British and Foreign State Papers, 1920, vol. 113 (op. cit.), p. 607). Czechoslovakia also unsuccessfully invoked before the Court the Paris Protocol of 26 April 1930 (G. F. de Martens, ed., Nouveau Recueil général de traités (Leipzig, Buske, 1934), 3rd Series, vol. XXXIX, p. 356), which specified that “Each of the two contracting States shall retain the legacies, donations and foundations of every kind existing in its territory”. The Court could not have decided otherwise, since the Protocol stated that it should “in no way affect the case which has been brought by the University of Budapest before the Hungaro-Czechoslovak Mixed Arbitral Tribunal”.


\(^{318}\) See Ch. Rousseau, op. cit., p. 168 and references to the opinions and judgements of the Conseil d’Etat.

\(^{319}\) See Yearbook...1970, vol. II, pp. 137-138, document A/CN.4/226, part two, paragraph 18 of the commentary to article 1. The bibliographical references given should be supplemented by the addition of D. Bardonn’s well documented work, published later and entitled La succession d’Etats à Madagascar... (op. cit.), passim, and particularly pp. 179-205.
of religious edifices by the successor State. The hospital had been built by British missionaries on the basis of a deed of concession by Queen Ranavalo, who was entitled to retain ownership of the entire property on the date of cessation of the hospital’s activities. When the French protectorate was replaced by annexation in 1896, the concession was terminated by General Gallieni, who requisitioned the hospital. The British Law Officers of the Crown gave two opinions, on 22 March 1897 and 2 February 1898, criticizing the French position, which remained unchanged. The two Parliaments, the two Governments and the English and Franco-Malagasy courts hotly debated the issue, which culminated in the award of a very meagre amount of compensation to the dispossessed missions.

(14) The status of the “habous property” and the property of various religious foundations in Algeria was not respected by the successor State in 1830. Similar property was treated in the same way when Libya was annexed by Italy. The Libyan religious foundations recovered their property in 1950 and the buildings used in connexion with non-Moslem public worship were transferred by Italy to the respective religious communities.

(15) Similarly, the various treaties of cession of Ottoman Empire territory, particularly to Bulgaria and Greece in the nineteenth or early twentieth century did not always respect the nature of the habous property or awqaf as understood by the municipal law of the ceding State. Thus the Protocol between Greece and Turkey signed at the Conference held in London on 16 June 1830 abolished the awqaf without compensation in the territories occupied by the Greek army and transferred to Greece the property of the State and Moslem foundations in the other territories which were to pass to Greece. Only the privately-owned awqaf were respected.

C. Property of the State in foundations

(16) There are semi-public foundations of which the State owns a share of the capital. These are usually cultural or scientific foundations or schools and institutes. According to paragraph 2 of article 40, the share of the predecessor State is transferred to the successor State or States. There have been cases, however, in which the predecessor State kept a share of the property of these foundations. For example when Indo-China became independent, the property belonging to the Pasteur Institute in Indo-China.

(17) Mention may be made in passing—although this has nothing to do with property of the State in foundations—of two cases where the predecessor State kept the assets of such foundations either temporarily or permanently. The violent conditions in which Israel was established led the United Kingdom, which was the mandatory Power in Palestine, to take such measures. Consequently, the Rockefeller Endowment Fund, intended for the Archaeological Museum of Palestine, remained in the possession of the United Kingdom Government pending a decision by the Foreign Office.

An agreement between Jordan and the United Kingdom also allowed half of the assets of a foundation to be unblocked for the benefit of Jordan after several years. Article 7 of this Agreement provided that

The Government of the United Kingdom shall, within the terms of the bequest of the late Sir Ellis Khadoorie, make available to the Government of Jordan one-half of the balance of that bequest, which balance amounts to £86,237, and one-half of the accrued interest on the said balance, to be used for the purposes of the Khadoorie Agricultural School in Jordan.

D. The property of the Moslem Institute and of the Mosque in Paris

(18) As a sequel to these developments, it may be useful to provide some information concerning the case of the foundation known as the “Society of the Habous and Holy Places of Islam”, which was established at Algiers before Algeria became independent and had built and administered a Moslem Institute and Mosque in Paris. This is a case of property belonging to a religious foundation and situated outside the territory affected by the change of sovereignty.

(19) The “Society of the Habous and Holy Places of Islam” was established at Algiers on 16 February 1917 by a deed deposited with the hanifite cadi of Algiers. The Society, whose headquarters were situated in the Great Mosque at Algiers, had decided to purchase two buildings at Mecca and Medina for the benefit of needy North and West African pilgrims.

On 24 December 1921 the Society was converted into an association under French law subject to the French Act of 1901 on associations, and registered as such with the Prefecture of Algiers. The Society then decided to build and establish a Mosque and a Moslem Institute in Paris and, for that purpose, received a sum of 500,000 francs from the French Government, a grant from the Municipal Council of Paris for the purchase...

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323 See also the Greek-Turkish Convention of 2 July 1881 concerning the final demarcation of the frontiers between the two countries (G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1883), 2nd series, vol. VIII, p. 2) which left the successor State free to determine, in accordance with its laws and the requirements of public policy, the regulations governing the few remaining awqaf, the others having been abolished.
326 According to an agreement of 13 March 1950 between the United Kingdom and Israel, the other half of the Khadoorie bequest was handed over to Israel.
of land and, from Algeria, Morocco, Tunisia and other African countries annual subsidies of which that from Algeria was by far the most regularly paid.

(20) After the establishment of the Mosque and the Moslem Institute, an Algerian was always appointed by the Administrative Board of the Society to represent it in Paris, and to be in charge of the administration of the two Parisian institutions. But during the Algerian war, Mr. Guy Mollet, the Prime Minister, replaced the Administrative Board of the Society and, by a decree of 18 May 1957, appointed an Algerian—in the purely ethnic sense of the word—as director of the Mosque and the Institute. On 16 January 1958, this director had the Society's statutes revised, thus annulling the constituent act of the foundation and, two weeks before the cease-fire in Algeria, had the Society's headquarters transferred from Algiers to Paris on 2 March 1962.

(21) On 13 February 1963 the Administrative Tribunal of Paris, on the grounds of irregularity, annulled Mr. Guy Mollet's decision concerning the appointment of the director of the Mosque and the Institute. The Conseil d'Etat, by a decision dated 8 November 1963, confirmed the unlawful nature of the Prime Minister's action. However the director continued to head the two religious institutions, availing himself of a decision allegedly adopted by a “general meeting” of the Society after he had amended the Society's statutes.

(22) Immediately after Algeria acquired independence, the French Government, to which the matter had been referred by the Algerian authorities, informed those authorities that, in its opinion, the Society could no longer claim to have a legal existence and that its property, having escheated, should be subject to jus soli. The Algerian Government, on the other hand, contended that the Society still existed at Algiers and that its rights in respect of the Mosque and the Institute had not been extinguished.

The French Government then proposed, in 1963, that the property of the Society, which in its opinion was defunct, should be handed over to a new association to be established at Algiers with Moroccan and Tunisian participation.

(23) Subsequently the Seine Court of First Instance, by a decision handed down on 24 May 1967, ruled that (a) the Society was a foreign one and that, according to article 21 of the 1901 Act on associations, its headquarters were still at Algiers, and (b) that the Society had not acquired, from the Algerian Government, the capacity to be a party to legal proceedings.

(24) Consultations are still in progress between the French Government on the one hand, and the Algerian, Tunisian and Moroccan Governments on the other hand, with a view to settling the matter definitively by relieving the present director of his duties, since he was appointed under a decree considered to be irregular, and handing over the property of the two Parisian institutions to the Maghrebian authorities.

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 4]

DOCUMENT A/CN.4/271

Second report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

[Original text: French] [15 May 1972]

CONTENTS

Abbreviations ............................................. 76

Paragraphs

INTRODUCTION .............................................. 1-6 76

PART ONE. QUESTIONS OF METHOD .............................................. 7-21 77

A. Preparation of a set of draft articles as the final objective .... 8 77

B. Adherence to the framework of the 1969 Vienna Convention on the Law of Treaties .... 9-12 77

C. Scope of the first questionnaire addressed to international organizations .... 13-15 78

D. The difficulty of principle ............................................. 16-21 78

PART TWO. SOME PROBLEMS OF SUBSTANCE .............................................. 22-107 79

A. Part I (Introduction) of the 1969 Convention and the concept of “party” .... 23-33 79

B. Part II (Conclusion and entry into force of treaties) of the 1969 Convention .... 34-77 81

1. Form of agreements ............................................. 35-37 81

2. Capacity of international organizations to conclude treaties .... 38-52 81

3. Representation ............................................. 53-77 83

(a) Determination and proof of capacity to represent an international organization at any stage in the conclusion of a treaty ............ 56-64 84

(b) Agreements concluded by subsidiary organs ............ 65-68 85

(c) Participation of an international organization in a treaty on behalf of a territory it represents ............ 69-77 86

C. Part III (Observance, application and interpretation of treaties) of the 1969 Convention .... 78-107 88

1. Agreements concluded with a view to applying other agreements .... 79-82 88

2. “Internal agreements” with respect to an international organization .... 83-88 88

3. Effects of agreements with respect to third parties .... 89-107 89

(a) Is the international organization a third party in relation to certain treaties between States? .... 92-98 90

(b) Are States members of an international organization third parties in relation to agreements concluded by that organization? .... 99-107 91

ANNEX. QUESTIONNAIRE PREPARED BY THE SPECIAL RAPPORTEUR ............................................. 93

75
ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Name</th>
</tr>
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<tbody>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization of the United Nations</td>
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<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<tr>
<td>I.C.J.</td>
<td>International Court of Justice</td>
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<tr>
<td>I.C.J. Pleadings</td>
<td>I.C.J., Pleadings, Oral Arguments, Documents</td>
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<tr>
<td>I.C.J. Reports</td>
<td>I.C.J., Reports of Judgments, Advisory Opinions and Orders</td>
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<tr>
<td>IDA</td>
<td>International Development Association</td>
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<tr>
<td>IFC</td>
<td>International Finance Corporation</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IMCO</td>
<td>Inter-Governmental Maritime Consultative Organization</td>
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<td>ITU</td>
<td>International Telecommunication Union</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WMO</td>
<td>World Meteorological Organization</td>
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Introduction

1. In a first report \(^1\) dated 3 April 1972, the Special Rapporteur described to the Commission how the subject had developed historically, and he then attempted to outline certain approaches which, in his view, should be adopted from the outset. He also raised a number of questions on which he wished to know the Commission's feelings.

Owing to the Commission's very heavy agenda and the priorities it was obliged to observe, the first report was not considered at its twenty-fifth session (2 May-7 July 1972).

2. This second report is designed to supplement the preceding one, to make it easier to consider by summing up its essential features, and particularly to incorporate new elements \(^2\)—primarily, the substantial information received in the meantime from international organizations.

It will be recalled that at its twenty-third session the Commission, when appointing a Special Rapporteur, stated specifically that the documents to be prepared for the proposed study were to include “an account of the relevant practice of the United Nations and the principal international organizations”, \(^3\) the latter being defined “for the time being” and “for the purposes of the present topic” as “those which were invited to send observers to the Vienna Conference on the Law of Treaties”. \(^4\)

3. In pursuance of this decision, the Special Rapporteur prepared a questionnaire which the Secretary-General addressed to the organizations concerned, stating in his covering letter that, as the consultation was merely of a preliminary nature, the replies would for the moment be communicated only to the Special Rapporteur. The Secretary-General added: “Once the outline of the account requested by the Commission has been more clearly defined, your organization will again be consulted and given an opportunity of presenting a final reply, which will be published in the account itself”.

4. The organizations consulted submitted replies of varying length, depending on the extent of the response which the questions elicited in the light of each organization's own experience and particular concerns; but all their communications are of the greatest interest. Anyone who knows how much work the secretariats of international organizations are required to undertake will appreciate the true value of the effort they have made, and the Special Rapporteur wishes to express his gratitude for the invaluable assistance they have given him. These replies will have to be studied carefully and considered at length but, even before they help to lead the work of the Special Rapporteur to its conclusion, they can already be used to illustrate certain general considerations which must be submitted to the Commission.

\(^2\) Among the various publications on this subject, particular mention must be made of the provisional report by R. J. Dupuy, L'application des règles de droit international général des traités aux accords conclus par les organisations internationales (Geneva, Imprimerie de la Tribune de Genève, 1972), submitted to the Institute of International Law.
5. The Special Rapporteur will in this connexion abide by the terms and undertakings entered into with respect to the organizations—that is to say, the replies will not for the time being be published; only the questionnaire to which the organizations have replied will be annexed to this report. The substance of the replies will be presented only in general terms, without reference to the position adopted by individual organizations, except in cases where the representatives of an organization have made its position known in circumstances unconnected with the circulation of this questionnaire.

6. To simplify the Commission's work, the Special Rapporteur will refer again—briefly but, he hopes, more precisely and categorically—to some of the approaches proposed in his first report, and he will dwell at some length on the new information received as a result of the co-operation of international secretariats. The following observations will deal first with questions of method, which still appear to be of exceptional importance in this particular case, and secondly with some of the most important questions of substance.

Part One
Questions of method

7. The task which now seems to be incumbent on the Special Rapporteur can be presented under four headings.

A. Preparation of a set of draft articles as the final objective

8. The final objective which the Special Rapporteur is setting himself for his work is the preparation of a set of draft articles, since it seems that this method, which is now followed by all special rapporteurs, is the only one which in itself incorporates the exactitude and the precision which should characterize all the Commission’s work; it is indeed essential, unless one rules out the possibility that the work of the Special Rapporteur is ultimately to be reflected in the form of a formal convention. This last remark would be superfluous, were it not at the same time essential to reserve entirely the question of the final legal form to be given to the work, on account of a certain difficulty which is inherent in the subject. The difficulty resides in the fact that the international organizations concerned will in some way or another have to be associated with the undertaking, particularly in order to bring it to its conclusion, and the participation of international organizations in the conclusion of a convention on treaties of this kind raises the very problems of substance which such a convention would be designed to solve, since the participation of international organizations in a general multilateral convention gives rise to certain objections. Possible solutions other than a general convention are a declaration by the General Assembly, or resort to machinery similar to that evolved for the 1947 Convention on the Privileges and Immunities of the Specialized Agencies; 5 we shall return to some of these points later.

B. Adherence to the framework of the 1969 Vienna Convention on the Law of Treaties

9. In the work of the Sub-Committee which preceded the appointment of a Special Rapporteur, it was agreed that the objective to be attained was to extend or, failing that, to adapt the articles of the Vienna Convention on the Law of Treaties 7 to the agreements of international organizations, while adhering faithfully to the spirit, forms and structure of that Convention. This approach has one important negative effect: in principle, matters or questions which, in regard to treaties between States, the 1969 Convention deliberately left aside must not be included. Hence, in particular, it would seem necessary—apart from making one or two observations—to leave aside both the definition and the régime of unwritten agreements. 8

10. However, this position of principle has many other basic consequences. For instance, in regard to the scope of the draft articles to be prepared, it would be necessary at least at the outset to use a definition of “international organization” identical to that given in the 1969 Convention, since that Convention already contains certain rules concerning international organizations. 8 Assuming for a moment that a set of draft articles on the agreements of international organizations was based on a more limited definition of the organizations to which its provisions related, the result would be a three-fold legal régime applicable to the agreements of organizations—the régime of the 1969 Convention, the régime of the draft articles and the régime deriving from custom and general principles of law. That would defeat all the purposes of codification, by introducing complications and uncertainties into the existing situation.

11. Another consequence of abiding by the framework of the Convention—a consequence to which further reference will be made later, but which is important enough to be mentioned more than once—is that the provisions of the future draft articles would necessarily be very general. If, in regard to international organizations, one starts with the very wide and even indeterminate definition which appears in the 1969 Convention, it follows that the proposed rules must be applicable to all international organizations and they are therefore bound to be very general.

12. Finally, the Special Rapporteur will have to go into greater detail and consider the articles of the 1969 Convention one by one in order to determine which articles can be applied without adaptation to the agreements of international organizations, and to propose the necessary amendments to the other articles.


8 See para. 37 below.

C. Scope of the First Questionnaire Addressed to International Organizations

13. This last remark helps to illustrate the scope of the questionnaire which was addressed to international organizations on the understanding referred to above.

14. This very close adherence to the text and framework of the 1969 Convention is based on the idea that there is not any single problem which is both important and lends itself to a general solution common to all international organizations and, at the same time, lies outside the scope of the provisions of the 1969 Convention. This idea may be correct, but it needs to be verified by counter-proof. It is in fact essential to place oneself outside the carefully elaborated framework of the Convention, and try to discover whether any important point lending itself to codification has been left aside.

15. It was with this in mind that a number of questions, deliberately limited to a few carefully chosen points, were addressed to international organizations. As the Special Rapporteur conceived them, they were designed merely to ascertain opinions, and nothing more. Nothing could be further from his intentions than that they should be thought to represent an attempt to extend the scope of codification, or that it should be imagined that draft articles on the subjects referred to in the questions are to be submitted immediately. The Special Rapporteur had no such far-reaching ambitions on that score; he was hoping above all to obtain confirmation of certain views and to determine more exactly the limits of his undertaking. By the end of this report it will be clear that many questions are not yet ripe for codification, either because the practice has not yet been established or because the problems concerned have not yet been encountered in practice, or even because the solutions for which they call are too varied to lend themselves to codification; it is this last point that we shall now consider.

D. The Difficulty of Principle

16. As has been stated previously, the international organizations followed with some concern the discussions leading to the 1969 Convention, since the texts adopted seemed to touch upon the activities of international organizations in regard to agreements—both agreements concluded by organizations and agreements concluded within them or under their auspices. Although the scope of the Convention was finally somewhat limited in this respect, and guarantees were provided for international organizations, it is understandable that misgivings of this kind should still be felt concerning the preparation of a draft which deals specifically with agreements concluded by international organizations. The organizations consulted at the request of the Special Rapporteur replied very willingly to the questionnaire addressed to them, and they are all the more deserving of gratitude in that some of the questions related, almost indiscreetly, to practices or positions on which they had not yet adopted a definite line of conduct.

17. The Special Rapporteur has always been aware that, apart from particular aspects affecting a specific issue, the preparation of draft articles on the agreements of international organizations raises a basic question of principle. Hitherto, international organizations, acting principally through their secretariats and in most cases with no general texts or precedents to use as a basis, have—slowly and unobtrusively, by the development of practice alone—built up a corpus of solutions adjusted to the individual needs and character of each organization. The codification now envisaged may affect this spontaneous process by introducing into the régime of the agreements of international organizations two new features: stability and generality.

18. It was explained at length in the first report that although the 1969 Convention was applicable to the constituent treaties of an international organization and to treaties adopted within an international organization, it was so applicable “without prejudice to any relevant rules of the organization” (article 5), and that some doubt had arisen as to whether the relevant rules of an organization could also include practice at a stage when practice could not yet be considered as constituting a rule of law. What is certain in any case is that codification, if it is to retain its essential meaning, must have a stabilizing effect, at least for a certain time, on the development of practice and the origin of custom. Codification would be incomprehensible if it were completely deprived of any legal effect.

19. But codification also has a generalizing and standardizing effect. Each organization, instead of establishing an individual régime for its own use, will be subject to a general rule formulating an average solution applicable to all organizations. Hence there is a fear that the autonomy hitherto enjoyed by each organization may be lost. Occasionally, even, it is thought and even written that the existence of a law common to all organizations—a “law of international organizations”—would be difficult to imagine and even impossible to achieve.

It was pointed out earlier that the very basis of this position is the existence of a law peculiar to each organization—a law which is itself only the expression of the differences existing in the régime of each organization and especially in its functions. At the same time an indication was given of the general lines on which a place might be found for considerations of this kind without radically undermining the principle of codification in regard to the agreements of international organizations. But the point is of such paramount importance that it is necessary to refer to it again.

20. A comparison between the position of States and that of international organizations will perhaps help to indicate more clearly what can reasonably be accepted in this matter. Each State has considerable freedom to settle the problems of its own constitution and to provide itself with the internal rules most suited to its needs. Nevertheless, in its relations with other States and in particular in regard to the régime of international treaties,
replies which were interesting from other points of view but which concerning the law of treaties on which—in the light of the certain agreements to the "internal" law of the organization. showed that they do not at present envisage the general subjection to applying other agreements), the organizations consulted offered process of integration. To questions A.3 (Agreements having an there is no reason for thinking that the provisions of the formulated, in order to avoid, as far as possible, excessive rigidity; the other precaution is to refrain from estabhshing common rules on questions that should be regulated, in the case of each organization, according to its own characteristics. If these basic ideas are accepted, there is no reason for thinking that the provisions of the 1969 Convention are not in general valid for the agreements of international organizations.

Part Two

Some problems of substance

21. If this is really the correct approach to the problem of agreements concluded by international organizations, it must be admitted that there should be no major obstacles to the establishment of a body of rules governing agreements by international organizations, provided that certain precautions are taken. One such precaution is to eliminate any formalism or unnecessary details from the formulation of rules, in order to avoid, as far as possible, excessive rigidity; the other precaution is to refrain from establishing common rules on questions that should be regulated, in the case of each organization, according to its own characteristics. If these basic ideas are accepted, there is no reason for thinking that the provisions of the 1969 Convention are not in general valid for the agreements of international organizations.

A. Part I (Introduction) of the 1969 Convention and the concept of "party"

23. The general provisions of the 1969 Convention contain some provisions which the Special Rapporteur—offering a tentative opinion before he has heard the views of the Commission—believes it would be better not to change. Also, there will be no further reference to points already made, such as the desirability of considering only written agreements, in the case of the agreements of organizations just as in the case of the agreements of States, or the need to keep the same definition of international organizations. On the other hand, it would be useful to deal at some length with a difficult and important point concerning the definition of "party" to a treaty.

24. Article 2, paragraph 1 (g) of the 1969 Convention defines the term "party" as follows: "'party' means a State which has consented to be bound by the treaty and for which the treaty is in force". It is evident both from the context and from the work of the International Law Commission, that this definition was drafted to distinguish the term "party" from the term "contracting State", which is defined as "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force" (article 2, paragraph 1 (f)). It seems that the question was never raised as to whether a State might be in a position which was neither that of a "party" nor that of a "third State"—that is to say that although the State would be bound by the substantive rules of the treaty, it would not participate in the administration of the treaty, and particularly not in its revision. The 1969 Convention makes provision for machinery collateral to a treaty, whereby a third State can accept certain rights and obligations, but this machinery is an agreement completely distinct from the original treaty and disposes quite freely of certain rights and obligations. It seems therefore that, from the standpoint of the Vienna Convention, there is not, properly speaking, any intermediate position between that of "party" and that of "third State" with regard to a treaty.

25. The question concerning the position of an organization with regard to a multilateral treaty might be solved along the same lines. It may, however, be wondered whether the case of an organization having extensive
rights and obligations without being a party to a treaty between States may not be very common, and may therefore need to be considered afresh.

26. Accordingly, each organization consulted was asked in intentionally general terms to state whether, with regard to multilateral treaties between States, it was in the position of "a party to these treaties", "an associate" or "a person bound to respect these treaties" (question A.5).

In general, the replies on this topic have been most informative and show that there are a number of different situations which have been regulated in different ways. A distinction may perhaps be made between two groups of situations described by the international organizations.

27. (A) In the first group, States members of an organization—and sometimes also non-members—conclude a convention to which the organization is not a party but under the terms of which it acquires new rights and obligations. This situation is extremely common in the case of all organizations. Can we say that it does not require any special consideration and can be explained where necessary in terms of a tacit collateral agreement between States parties to the convention and the organization? Or should it be regarded as a special situation which occurs so often that it requires special codification?

28. The problem will be discussed again later, since it raises the question of the effects of treaties with respect to third parties. It needs to be studied in greater detail not only from the standpoint of law but also in order to determine whether, in the case of the agreements of international organizations, a special category should be established for organizations which are not parties to an agreement but are closely associated with its implementation.

29. (B) The second group includes agreements which are binding on international organizations in all their substantive provisions but do not confer on the organization the powers normally enjoyed by parties to a treaty in regard to the administration or revision of the convention or participation, with the right to vote, in the organs established by the convention. Apart from certain provisions in commodity agreements, the most recent examples are the agreements which have made it possible for international organizations to participate in certain international conventions concerning outer space; but there are earlier examples, particularly with regard to the position of the United Nations in ITU.

30. Two special cases were referred to in two specific questions, one addressed to the United Nations and the other to the specialized agencies. They relate respectively to the position of the United Nations with regard to the Convention of 13 February 1946 on the Privileges and Immunities of the United Nations, and the position of the specialized agencies with regard to the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies.

31. With regard to the Convention of 13 February 1946 it is enough merely to mention that the position constantly maintained by the Secretary-General since the Advisory Opinion on reparation for injuries suffered in the service of the United Nations is that the United Nations is a party to that Convention. The arguments on which this position is founded have been stated frequently in the United Nations and may be summarized by saying that the Organization and the Secretariat claim the right to watch over the observance of that Convention and, if necessary, to ensure that it is complied with by all States. The Special Rapporteur does not seek to question the effects of the status of the United Nations as a "party", or the grounds for affirming the principle itself, which has certain advantages; however, one may ask whether the United Nations technically has the position of a party in respect of all the problems which may arise in connexion with the life of the Convention and particularly its revision.

32. The same question may be asked in the case of the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies, whose original machinery is well known; there are sound arguments for considering the organizations as parties to that Convention, and almost all the specialized agencies which have accepted its machinery in regard to themselves have considered themselves as parties to it. However, one of them stated that in its view the organizations were not parties, but had a legal interest in the Convention that might be described as sui generis; another takes the view that the status of party is acquired, but inclines to the belief that this is a sui generis status. Another takes the following position, which is of such interest that it must be quoted in its entirety:

As to the juridical standing of the specialized agencies under the Convention of 1947, a distinction might be made between being a "party" (a term which the Convention employs only with regard to States) and participation in another sense, i.e., having rights and obligations derived from the provisions of the Convention. The specialized agencies are clearly participants in this wider sense, as pointed out in the legal opinion of the Office of Legal Affairs of the United Nations of 10 July 1964 which concluded:

"Accordingly, each specialized agency enjoys the same degree of legal interest in the terms and operation of the Convention as does a State party thereto, irrespective of the question whether

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15 See below paras. 89 et seq.
17 Ibid., vol. 33, p. 261. IAEA is covered not by the Convention of 21 November 1947 but by a special agreement in the case of which the problem under discussion does not arise; in this case it is the organization itself which has reserved to itself the right to revise the agreement (see Yearbook ... 1972, vol. II, p. 194, foot-note 181).
18 I.C.J. Reports 1949, p. 185.
19 See the statement by the Legal Counsel at the 1016th meeting of the Sixth Committee on 6 December 1967 (Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385).
20 In particular, it eliminates the theoretical anomaly which existed originally, whereby the Convention could enter into force as a result of ratification by a single State (P. Reuter, Introduction au droit des traités (Paris, Colin, 1972), p. 42, para. 69.)
Question of treaties concluded between States and International Organizations

or not each agency may be described as a 'party' to the Convention in the strict legal sense. 22

33. These positions show that there is in fact a problem of vocabulary and of substance. To solve it, we shall later have to refer again to the machinery of the Vienna Convention concerning the effects of treaties with respect to third parties. 23 It is sufficient for the time being to have, as it were, established the outer contours of the problem.

B. PART II (CONCLUSION AND ENTRY INTO FORCE OF TREATIES) OF THE 1969 CONVENTION

34. There are several points which call for discussion. In the case of some of them, all that can be done is to recall what the Special Rapporteur has stated previously; in the case of others, it will be possible to take a better informed and therefore a firmer position than in the first report. These various points will be grouped under three headings: the form of agreements, the capacity of organizations, and representation.

1. Form of agreements

35. There is nothing to add to what has been said on this point in the first report, which can be summarized in two propositions:

(a) Most of the objections and reservations made by international organizations to the extension of the 1969 Convention to the agreements of international organizations related to the conditions as to which form the draft articles prepared by the Commission were rightly or wrongly believed to establish for the normal conclusion of international treaties. 24

(b) The adoption by the Conference on the Law of Treaties of the amendment which became the existing article 11 of the 1969 Convention eliminated any rigidity in the conclusion of written agreements. 25

36. The logical consequence of these two propositions is very simple: the major obstacles which stood in the way of the extension of the 1969 Convention to the agreements of international organizations have now disappeared. The principle of pure consensualism on which the Convention is based cannot have an adverse effect on the practice and development of international organizations. It also justifies the assumption that all the consequences of that principle, which are the subject of the Convention as a whole, apply to international organizations. 26

37. There is nothing to add to this clear-cut conclusion. However, in order to emphasize the liberty given to parties by article 11 of the 1969 Convention, we shall make one final comment which relates to some exceptionally significant examples. Neither the 1969 Convention nor the work of the International Law Commission contains a very precise definition of a treaty concluded in writing; though this expression excluded purely oral agreements and—even more so—tacit agreements—it was not clear whether the expression applied only on condition that the written agreement consisted of an instrument specially drafted for the purpose, or whether it was enough merely for the text to be expressed in writing. In the latter case, an agreement resulting incidentally from ordinary correspondence may be regarded as a written agreement, as may an agreement based on the record of a meeting accepted by two parties that have made oral statements which are reproduced in the record and from which an agreement results. Before the adoption of article 11, it was still possible to hesitate between the two solutions but now it seems that the question has been settled by adopting the wider solution, since this article states that the consent of a State to be bound by a treaty may be expressed by "... any other means if so agreed". It is quite clear that this means may be agreed in ways other than in writing, 27 and these two forms of agreement which are very common in the practice of international organizations—namely, agreement by exchange of correspondence and agreement in the form of the proces-verbal of a meeting accepted by the parties concerned—come within the category of written agreements as it seems to be conceived by the 1969 Convention.

2. Capacity of international organizations to conclude treaties

38. Article 6 of the 1969 Convention on the Law of Treaties states that: "Every State possesses capacity to conclude treaties". Does not this provision call for a corresponding provision concerning international organizations? Before replying to this question, it must be noted that a provision of this kind would, in the case of international organizations, respond to a somewhat different need. Article 6 is what remains of a much more ambitious article 28 to which we shall refer later; though its meaning has been the subject of discussion, it is probably designed to ensure—with protectorates of the colonial type in mind—that a State cannot forego once and for all this capacity which is inherent in statehood. In the case of international organizations, on the other hand, what is required is a rule which would be applicable in cases where the constituent charter is silent on the matter. The view has often been taken that the capacity to conclude agreements belongs naturally to international organizations and is for them an inherent capacity. Such a view may be supported by certain precedents of the International Court of Justice which introduced concepts such as functional competence and implicit powers. Such concepts are based on the observation that an international organization is by nature intended to participate in international relations and that such participation is difficult to imagine if the possibility of concluding agreements is ruled out.

23 See below, paras. 89 et seq.
25 Ibid., pp. 188 and 195-196, paras. 55 et seq and para. 80.
26 Ibid. See particularly para. 81 concerning the régime of nullity, rules of interpretation, etc.
27 P. Reuter, op. cit., p. 41, para. 67.
39. If the Commission inclines towards a solution of this kind it might well take as a basis certain formulations such as that suggested by Professor René Jean Dupuy in his report:

Article 4. Unless the constituent instrument provides otherwise, every international organization has the capacity to conclude agreements in the exercise of its functions and for the achievement of its objectives.\(^{29}\)

40. However, although the Special Rapporteur is attracted by formulations of this kind, he would prefer rather to propose to the Commission a more radical solution, namely, not to have any article on the capacity of international organizations at all. There are, he believes, some considerations of principle, and also some practical considerations, to justify this solution.

41. The basic consideration of principle relates to the very simple fact that the capacity of an international organization derives from its own statutes, from the law peculiar to the organization, and not from a rule of general international law. It may of course be argued that there is no rule of general international law which prohibits States from establishing any kind of international organization which they want to establish, or from giving the organization the capacity to conclude treaties; and one may be tempted to conclude from this that there is in international law a permissive rule concerning the capacity of international organizations. But this permissive rule is nothing other than the rule \(\text{pacta sunt servanda} \), and a recognition of the fact that States enjoy a wide freedom in the conclusion of treaties. It should be noted that the existence of the organization with respect to third States will depend on its recognition by them and is thus also derived from the rule \(\text{pacta sunt servanda} \).\(^{30}\)

42. Against this, may be cited the famous precedent of the International Court of Justice, which in the Advisory Opinion on reparation for injuries suffered in the service of the United Nations referred to an "objective" personality of the United Nations \(^{31}\) which could bring claims against third States. But the United Nations (and perhaps other organizations of the same family) constitute a special case because of their universality, and in any case considerations which apply to them cannot be extended to every organization of every kind. International practice in this matter is too well-known to need further comment.

43. Moreover the fundamental point we have just stressed does not relate to the theoretical existence and significance of the international "personality" of organizations: it is a fact that there are organizations and that they conclude treaties between themselves and with States. The fundamental point is that no organization has a capacity identical with that of any other, and that the capacity of each organization depends on the founding States and subsequently on the member States. On this last principle, agreement is unanimous; it can scarcely be denied that there is a wide variety of possible solutions and that States have complete freedom in the matter.

44. Thus, though a rule stating that, in the absence of any express provision in its constituent charter, an organization enjoys full capacity to conclude the international agreements necessary for the exercise of its functions and the achievement of its objectives may be satisfactory and true in the majority of known cases, it might be open to criticism on the grounds of its universality and excessive rigidity. In the case of certain international organizations whose constituent treaty contains no provision concerning capacity to conclude international agreements, it might well be that the intention of States, as crystallized by continuing practice, was that the organization should not have the capacity to conclude international agreements or should have only a limited capacity; and, even in cases where there is a provision ruling out the capacity to conclude agreements, it is conceivable that a practice might develop permitting the conclusion of certain agreements on administrative matters. However, one would not go so far as to say that it is practice alone which decides the question of the capacity of international organizations, although in fact this is usually the case. This is a problem which may, in the case of international organizations, be described as \(\text{constitutional} \); it depends on individual solutions and not on a rule common to all organizations, and there may be some very rigid constituent charters that do not recognize this creative power of practice.

45. These are not the only considerations to be advanced on this topic. It might be thought that one possible objective, instead of stating a general rule defining the fundamental principle of the capacity of international organizations, would be to define a \(\text{minimum} \) capacity possessed by all international organizations, though some of them would have a more extensive capacity than this \(\text{minimum} \). However, before attempting to decide what this minimum capacity might be, it is essential to consider carefully the far-reaching implications of such a solution: it would imply re-defining the concept of "international organization" for the purposes of the future draft articles, since the draft could not prevent the term "international organization" from being used in practice to designate entities not possessing this minimum capacity, and a new definition would be needed to exclude these entities from the application of the draft articles. The result would be a departure from the initial position defined above—namely, the maintenance of the definition of international organizations as given in the 1969 Convention.

46. Even with this fairly limited degree of rigidity, the rule envisaged still presents some disadvantages. There may at present exist an entity which the member States have described as an international organization, though it has not hitherto concluded any agreement, its constituent instruments make no reference to any capacity to conclude such agreements and the member States do not at present envisage any development likely to confer on it even a limited international capacity. If a text referring to a minimum capacity for international organizations was at present in force, it would be necessary to conclude therefrom that for the purposes of that text the entity

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\(^{31}\) I.C.J. Reports 1949, p. 185.
in question was not an international organization; and this consequence would do nothing to encourage a possible development whereby States might gradually come to recognize that this entity had a capacity to conclude international agreements.

47. Lastly, the question arises as to the matters to which this minimum capacity would apply. As previously stated, the vast majority of agreements concluded by international organizations relate to administrative questions and operational activities. These two terms may be fairly clear in an academic context, but would seem to need some further clarification if they were to be used in a convention for defining the limits of capacity. For example, the question of the immunities of an organization of its officials and of the representatives of member States is an administrative question, but it also has some purely fundamental aspects and might equally well be described as political; in any event it is noteworthy that in certain cases member States reserve to themselves the conclusion of agreements on immunities and privileges.

This is only one example of the problems that would have to be faced if there were a feeling in favour of establishing a definition of the minimum capacity of international organizations.

48. These are the considerations of principle which lead the Special Rapporteur not to recommend to the Commission the insertion of an article or series of articles concerning the capacity of international organizations, although he must admit that he has arrived at this decision after much hesitation and he is prepared in his work to follow any guidance which the Commission may wish to give him.

49. However, certain considerations other than those of principle have reinforced the opinion expressed above; these are practical considerations based on the Commission's previous experience. The Commission examined the problem of the capacity of international organizations in its work on the codification of the law of treaties, in particular at the time when the Special Rapporteur, Sir Humphrey Waldock, was proposing that treaties between States and the agreements of international organizations should be considered simultaneously. The first report contains a lengthy review of the Commission's discussions on the subject. It appears from this that the Commission remained divided on this question, and finally preferred not to include in its draft any provisions relating to the capacity of international organizations. However, if it were thought to be desirable to adopt a formulation expressing the opinions of Sir Humphrey Waldock in their final stage, it may be recalled that the Commission considered the following formulation:

In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted. Again, if one wished to use the formulations devised later in other contexts and finally adopted in the 1969 Convention, the following wording might be suggested:

In the case of international organizations, the capacity to conclude treaties depends on any relevant rule of the organization.

50. It is obvious that a general rule of this kind merely expressed the idea that the capacity of each organization is determined individually by the terms of its own statutes; and this is tantamount to admitting that, with regard to the capacity of international organizations, there is no general rule. Such a provision might be discussed by the Commission at the appropriate time, but the Special Rapporteur has doubts as regards its usefulness.

51. Still more interesting than the rather negative results obtained by the Commission in its earlier work—as described above—are the positions adopted on the subject by several Governments. The history of international organizations (including those of a pre-federal character) shows that Governments are extremely sensitive in regard to any intervention by international organizations in their foreign affairs, and have often questioned the legitimacy of such interventions even when they are of a minor nature, since experience teaches them that it is intervention in foreign affairs that leads to the development of federative processes in unions of States. Also every international organization may in certain circumstances appear as a technical machinery designed to impose the views of the majority of the States controlling it, and for that reason States are often suspicious of any process which extends the powers of that mechanism. In short, the development of the right of international organizations to conclude international agreements has specific political aspects; and in the circumstances it may be felt that it is not advisable to propose a general formulation, which in some cases would represent a definite retrograde step from what is already possible (or even accepted), and in others might impede a development which is quite possible in the near future.

52. In brief, a justifiable concern for the constitution of international organizations—still fragile, and still unexplicit on so many points—seems to call for a certain caution in the formulation of general rules. This attitude does not imply any pessimistic view of the future of the international organizations but, on the contrary, a basic confidence in their natural and spontaneous development which must be encouraged—and hence, in the first place, respected.

3. Representation

53. In reality, the very term “representation” covers a series of problems which differ widely from one another.
although there are certain links—practical, perhaps, rather than theoretical—between them. The complication arises from the fact that it is necessary to ask “Who is representing whom?” This question is usually a single one, relating to the representation of a clearly defined legal entity (a given State or a given international organization) by a natural person empowered to undertake obligations on its behalf, but it may perhaps sometimes be a double question, relating also to the identification of the entity which is in fact assuming the obligation. This was the case, for instance, in the so-called protectorate systems where it was sometimes uncertain whether the protecting State was negotiating on its own behalf or on that of the protected State, or on behalf of both.

54. In the case of relations between States, existing law does not favour systems of representation in which one State can be represented by another State; such systems, it is said, encourage processes contrary to the sovereign equality of States. Even in cases where the question arises in the context of a developing federalism, it has sometimes given rise to the complaint that it introduces an undesirable lack of clarity into international relations. In any case the International Law Commission, followed in this matter by the United Nations Conference on the Law of Treaties, did not deal with this problem. On the other hand, the Commission did draft a long article, confirmed in the 1969 Convention, concerning the representation of States in the conclusion of treaties (article 7 of the Convention (Full powers)).

55. In the case of international organizations, the determination and proof of capacity to represent an international organization at any stage in the conclusion of a treaty is a problem that arises at least in principle. A question (A.2) on this subject was included in the questionnaire addressed to international organizations. But since, as stated above, the 1969 Convention had nothing to say on the problems of “representation” which relate to the identification of the entity bound by a treaty, it did seem useful to sound out opinions on two problems concerning the question as to who in the case of the organization is really bound by an agreement. Two further questions were therefore asked in the same context, one on agreements concluded by subsidiary organs and one on the participation of an organization in a treaty on behalf of a territory it represents (A.1). On these three points, the Special Rapporteur would like to make a few brief comments based on the replies received.

(a) Determination and proof of capacity to represent an international organization at any stage in the conclusion of a treaty

56. This problem is, in fact, two-fold since it is necessary to know, first, which organ is competent to decide that an act relating to the conclusion of an agreement should be performed and, next, who is the natural person empowered to represent the organization in the performance of the act. The two problems may be reduced to one in the simplest cases, for instance when an act is statutorily the responsibility of the highest official of the international secretariat and when this official performs the act himself. But the situation is much more complicated in certain fairly common cases.

57. In some cases, competence to perform a specific act is statutorily shared between several organs, or certain organs may request another organ of the organization, or even an ad hoc organ, to act in their place; does this constitute a “delegation of authority,” or representation analogous to a “mandate”? Replies vary widely from one organization to another. The various solutions accepted have often been described and classified, and fall within the scope of the comparative law of international organizations. The information thus collected may in certain cases suggest some ideas for solving a problem of constitutional law concerning a given organization; but although the suggestion has sometimes been made, it seemed to the Special Rapporteur that such problems related to what might be described, as the constitutional law of international organizations. In that capacity, they do not lend themselves to a general solution, even as a means of filling existing lacunae in the constituent charters.

58. Theoretically, and if the same considerations applied to organizations as to States, it should be easy to identify the natural persons empowered to express, in respect to third parties, the organization’s will in regard to the performance of one of the acts relating to the conclusion of an agreement. As in the case of States, it would be sufficient to decide which persons have a power of certification similar to that of the Head of State or the Minister for Foreign Affairs in the case of a State, which persons are, by reason of their functions, not required to furnish proof of their powers, and how the documents certifying the legal capacity of other persons to represent the organization are to be drawn up.

59. Then, as in the case of States, there would be a clear separation—and this is a point of great practical importance—between the problems and procedures which, in accordance with the organization’s own constitution, relate to the formulation of its decision in regard to a specific act, and the problems and procedures relating to the communication of that decision to the other parties to a convention. But, in the case of organizations, the problem may arise in different terms, because organizations have no agents specializing in external relations grouped together under the authority of a senior official.

37. This reluctance to do so may be compared with the position taken by the International Law Commission on the question of the representation of more than one State by a single person, in its draft articles on the representation of States in their relations with international organizations (Yearbook ... 1971, vol. II (Part One), pp. 311-312, document A/8410/Rev.1, chap. II, D, para. 3 of the commentary to article 42).

38. In the report by R. J. Dupuy to the Institute of International Law, the question is examined in all its aspects (op. cit., pp. 64 et seq.), and on the subject of powers an article 7, as follows, is proposed: “The person who represents the international organization or expresses its consent to be bound by the agreement shall furnish the other party with proof of his powers, if the latter so requests.” (Op. cit., p. 102) (Translation by the Secretariat.)

The conditions on which this authorization is issued are established by each international organization. An act relating to the conclusion of an agreement performed by a person who cannot produce proof of his powers has no legal effect, unless it is subsequently confirmed by the international organization.
who is himself a specialist and is in turn subordinate to a supreme head, who, like a Head of State, has general powers of representation. Not only are there radical differences between the general structures of the international organizations themselves; this absence of specialized representatives means that there is also a difference between the case of organizations and the case of the State.

60. The most direct consequence of this situation might be that the entity concluding an agreement with an international organization should, in theory, ask for a much more extensive proof of the involvement of all the organs competent to assume a commitment on behalf of the organization, and should then require the natural person finally expressing the will of the organization to furnish proof that he is duly authorized to perform the acts he is proposing to perform. In other words, the distinction between the “internal” and the “international” phases of the conclusion of agreements could not, in the present state of international relations, be as clear-cut as it is in the case of States.

61. However, it appears from the information given by international organizations that in practice the difficulties are not as serious as might be feared. In the first place, by force of circumstances, the most senior official of international secretariats enjoys a privileged situation; the permanence of his position, the weight of the international responsibilities he bears and his relative independence combine to give him a privileged situation in external relations; in all organizations he seems in fact to acquire a power of certification which is accepted as such by the partners of the organization, and by reason of his rank no certification is required for his own acts. Though in certain organizations the situation of the head of the secretariat may be extended to include some officials of a rank approaching or similar to his, and though in some other organizations there are specifically executive organs which act in a comparable manner, the basic fact remains the same. There is a tendency in each organization to create a privileged situation in external relations and in the procedure for concluding agreements, particularly with regard to the certification of the will of the organization to perform one of the acts relating to the conclusion of an agreement.

62. Secondly, all the organizations stressed the practical importance of the correspondence exchanged prior to the conclusion of an agreement. In fact, all the stages—constitutional stages, internal stages, authorizations, delegations of authority, and approvals—are mentioned and described in this correspondence; and in addition copies of the documents and records of the discussions concerning them are generally included in this exchange of correspondence. The partner of an organization is thus informed regularly, and often from day to day, of the development of a situation affecting any stage in the conclusion of an agreement. The final certification relating to the natural person authorized to perform the act—if he is not one of the senior officials or high-ranking representatives for whom by reason of their functions no certification is required—will generally be conveyed in a letter from these senior officials or high-ranking representatives designating the official who is authorized to express the will of the organization.

63. Thus, the situation as it seems to emerge from the information received may be summed up, rather surprisingly perhaps but nevertheless accurately, by saying that it is not radically different from that of relations between States. As in the case of States, the internal procedure of each organization remains the affair of each organization, but the partner to the agreements of the organization is generally informed of it by administrative correspondence. The organizations determine by their practice the high-ranking officials or representatives who have a doubly privileged position in the conclusion of agreements, in the sense that their own acts require no certification and that they themselves authenticate the acts of others. Though there are no “powers” in the formal sense of the term, the production of administrative correspondence is generally accepted instead.

64. If the foregoing analysis is correct, it is obviously permissible to consider the possibility and desirability of drafting texts which would correspond to article 7 of the 1969 Convention, on full powers. Is it necessary to state the principle that each partner in an agreement may demand proof of the capacity of an official to assume a commitment on behalf of the organization? Is this affirmation necessary? Is it in fact true, when the partner in the agreement is a member of the organization, and must in that capacity must be able to verify directly the validity of all expressions of consent and all forms of representation? Is it necessary to refer in precise terms to the existence of high-ranking officials or representatives who, in principle, have a privileged power of representation? These are a few of the questions which may be raised at the present stage, even if they are not solved.

(b) Agreements concluded by subsidiary organs

65. As a result of the decentralization of the activities of the international organizations, the need to seek extra-budgetary means of finance, and the involvement in increasingly specialized technical sectors, the international organizations and especially the United Nations have been obliged to multiply the organs—based entirely on a unilateral act of the organization, entrusted with a wide range of different functions, and sometimes enjoying extensive powers—which are generally known as “subsidiary organs”. Some of these organs conclude international agreements. Are these agreements binding on the subsidiary organ or on the organization to which they belong, or on both? The question is not purely theoretical and may have very important implications, particularly from the financial standpoint.

66. The organizations consulted deserve great credit for replying to the relevant question (A.4), since—in the case of some of them at least—the matter has clearly not yet been decided. What is most surprising in the variety of replies received is that not all organizations adopt the

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39 It will have to be considered later whether this comment has any implications with regard to the adaptation of the provisions of the 1969 Convention, concerning the constitutionality of agreements (article 46).
solution of subsidiary organ; some resort to it in certain cases only. For the majority of organizations the problem does not yet seem to have had any practical aspects at all. Though some organizations have specifically provided for the possibility of giving subsidiary organs a capacity to conclude international agreements, that capacity has not yet apparently been exercised. Two organizations definitely consider agreements concluded by the subsidiary organ as agreements of the international organization itself. Another organization states that, although as a general rule an act of the subsidiary organ is binding on the organization itself, registration practice reveals some uncertainty in the designation of the party to the agreement; moreover, under the actual terms of the agreement, the organization may be bound by it only in part.

67. Two conclusions seem to emerge at present from the information received. First, there is no hard-and-fast concept concerning the legal status of the subsidiary organ; practice seems to be still developing. Also, there is nothing to indicate that there should be a set of rules on the subject, common to all international organizations. Lastly, the question is part of the law peculiar to each international organization. On reflexion, there is nothing surprising in this: the freedom to establish organs and to confer upon them varying degrees of decentralization is an important feature of the constitutional law of each organization. The question of subsidiary organs, seen in this light, does not lend itself to codification applicable to all international organizations—not even to codification confined to the special topic of the agreements of international organizations.

68. Secondly, there is in practice some uncertainty regarding the identification of the party to an agreement concluded by a subsidiary organ. Is it possible and necessary to try to remedy this situation by a general rule? An affirmative answer would be based on the idea that the party to an international agreement must always be clearly designated and, if it is not so designated, it is best to adopt the solution which offers the greatest security to the other parties to the agreement. This would be tantamount to stating as a general rule that the organization itself is in principle party to the agreement, but that the contrary solution is possible in certain cases which should be studied and defined. This solution seems technically possible but the Special Rapporteur cannot decide, in the light of information available to him, whether it is useful and expedient.

(c) Participation of an international organization in a treaty on behalf of a territory it represents

69. Some constituent charters and certain international treaties state, in terms which vary considerably from one case to another, that an organization can participate in a treaty on behalf of a territory it represents. The question arises whether this situation is sufficiently important and clearly defined for the Special Rapporteur to study it and submit proposals on it.

70. The replies given by the organizations consulted are generally of a negative character, either because they do not have the capacity necessary for this purpose or because the capacity has been provided for in certain conventions but has never been exercised. The Special Rapporteur would have been reduced to abandoning the subject altogether if the Secretary-General of the United Nations had not carried out a very extensive and remarkable piece of research on it, which would appear worthy of immediate publication and would serve as a basis for considering the problem in detail. The Special Rapporteur cannot claim to cover immediately, in a few observations, all aspects of the information he has thus received; but there are, it seems, some general comments he can submit to the Commission forthwith.

71. The cases in which an international organization may, with respect to a treaty, be exercising a certain participation in this treaty on behalf of a territory in regard to which it performs certain functions are in principle fairly numerous. Such a situation might have arisen under Article 81 of the Charter in connexion with the Trusteeship System; but this possibility has hitherto had no practical application, not even in the case of the measures taken in 1947 with regard to the Italian colonies or solutions considered at about the same time with regard to Jerusalem and the Holy Places.

72. Similarly, in a relatively large number of treaties (which are either the constituent charters of international organizations or open multilateral treaties), there are provisions covering the case in which the United Nations is the Administering Authority of a Trust Territory or any other territory, or the more general case of any authority responsible for the administration of a territory or for its international relations. Among the most important instances, may be mentioned the constituent instruments of WMO (articles 3 and 34), IMCO (articles 9, 58 and 59), ITU (articles 1 and 21), FAO (article II), WHO (article 8), UNESCO (article II, amended 11 July 1951), and the ILO (article 35, amended 9 October 1946), as well as the following conventions: the Convention on Road Traffic of 19 September 1949, the Protocol on Road Signs and Signals of 19 September 1949, the International Convention for the Safety of Life at Sea of 17 June 1960, the International Convention of 12 May 1954 for the Prevention of Pollution of the Sea by Oil (article XVIII, amended 11 April

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40 In a short study published some years ago, the Special Rapporteur may perhaps have fostered certain illusions on this score (P. Reuter: "Les organes subsidiaires des organisations internationales", in Hommage d'une génération de juristes au Président Basdevant (Paris, Pédone, 1960), pp. 415 et seq.).
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In the few agreements which it concluded with Irian) by the United Nations from 1 October 1962 to West New Guinea (West Irian) and Namibia.

The administration of West New Guinea (West Irian) by the United Nations through the agency of a subsidiary organ of the General Assembly—the United Nations Council for South West Africa—and the United Nations Commissioner for South West Africa, the confirmation of the personality of the territory by giving it the new name “Namibia”, and the extension of the responsibilities of the United Nations Council for Namibia were to lead to the broadest possible development, for the benefit of Namibia, of a certain form of international personality represented by the organs established for that purpose within the United Nations itself. This has raised the question of the international agreements concluded by the authorities responsible for representing Namibia in the United Nations. The six agreements concluded so far concern the issue of travel documents by the United Nations Council for Namibia. But the General Assembly resolutions which affirm the fully representative character of the Council ask it to perform a treaty-making function in very general terms. As regards form, the existing agreements were concluded in the name of the Council for Namibia; it would therefore seem that the conclusion of these agreements conforms to the procedure adopted for many agreements concluded by subsidiary organs, and it is not yet possible to establish the extent to which they are concluded by the United Nations as such. They are not drawn up in the form of agreements concluded by the United Nations on behalf of a territory, but rather as agreements directly committing the territory. In any event, it is not possible to draw very precise conclusions from this precedent and it will be necessary to await further developments before presenting a final analysis—and especially before proposing any generalization.

Thus the studies undertaken by the United Nations Secretariat show, in conclusion, that this is a matter which has very varied aspects and that it has been the subject of recent developments, especially within the framework of the United Nations. But specific applications are few in number and practice is little developed. Hence it does not seem possible, for the moment, to devote specific provisions to this case. Its examination, however, has been far from useless. As in the case of subsidiary organs in general, it reveals some uncertainty. When an organization assumes international responsibilities with respect to a territory, it is almost inevitable that it should have specialized organs and even some local administration. Where there is an agreement, it is important to clarify the respective positions of the organization and the territory, and to specify whether or not the organization has the status of a “party” to the agreement, on its own account or on behalf of the territory. As the real problem is to identify the parties to an agreement, it


See above paras. 65 et seq.
might be imagined that the aim is to establish a residuary rule on this point, under which, in the absence of specific provisions, an organization is presumed to be party to an agreement on behalf of the territory. For the time being, however, it does not seem certain that it would be advisable to propose provisions of this kind.*

C. PART III (OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES) OF THE 1969 CONVENTION

78. Two questions put to organizations in the questionnaire have already been raised in connexion with the conclusion of treaties; they also have certain consequences with regard to the rules embodied in part III of the 1969 Convention. We shall examine them again briefly; they relate to agreements concluded with a view to applying other agreements (question A.5) and the characterization as “internal” of certain rules binding organizations (question A.3). We shall then take up the fundamental principles relating to the situation of third parties in regard to agreements concerning international organizations; this difficult question will have to be examined at greater length.

1. Agreements concluded with a view to applying other agreements

79. In many cases, an international treaty constitutes an act of execution of another treaty, whether the basic treaty is concluded between the same parties or between different parties. The main consequence of such a situation is clearly stated in article 30, paragraph 2, of the 1969 Convention, which reads:

When a treaty specifies that it is subject to, or that it is concluded on behalf of the territory. For the time being, however, it does not seem certain that it would be advisable to propose provisions of this kind.*

80. The replies received on this subject show that the importance of the question varies from one organization to another: some organizations seem to be unaware of it, while others acknowledge that it often arises. The latter organizations cite as an example agreements concluded for the application of a headquarters agreement and agreements concluded in application of a basic agreement concerning assistance. All these organizations deduced legal consequences from the “derivative” nature of an agreement: in general the “derivative” agreement can be concluded by officials of a lower rank than those who concluded the basic agreement and, in principle, the derivative agreement is subordinate to the main agreement as regards its interpretation and legal régime. Although the first consequence follows from the constitutional law of the organization itself, this is not true of the second, which constitutes an interesting application of the above-mentioned article 30, paragraph 2, of the 1969 Convention.*

81. We shall add a final consideration which relates to the registration of agreements (or their classification and recording). The questionnaire asked what criteria had been applied for the registration of agreement concluded by the organization (question A.8). Although registration constitutes only a secondary formality in the conclusion of treaties, it is well known that this formality sometimes brings to light some of the most characteristic features of treaties.* The organizations’ replies once again confirm what was already well known from the practice, namely, that agreements of minor importance, of short duration or subject to frequent changes are not registered. Agreements whose purpose is the application of another agreement are frequently treated in this way.

82. Despite certain very interesting features, agreements which constitute an act of execution of another agreement do not for the moment, in the opinion of the Special Rapporteur, call for separate general provisions.

2. “Internal agreements” with respect to an international organization

83. Cases might conceivably arise where certain international agreements, instead of being governed solely by general international law are subject to the law peculiar to an organization. These agreements would include, in particular, but not exclusively, agreements concluded between different organs of an organization, and agreements concluded between an organization and member States. The effects of such subjection to the law of the organization may vary in extent according to the content and development of the law peculiar to each organization.

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* If it were possible to reason by analogy with what happened under the international mandates system of the League of Nations, the conclusion would be reached that it is easy for an international organization to establish flexible and evolutive systems. For although, in the case of B and C mandates, the mandatory confined itself either to extending the effect of the treaties it had concluded to the mandated territories, or to concluding, albeit in its own name, treaties relating to those territories, the situation was quite different where A mandates were concerned. In the latter case, certain treaties directly designated the mandated territory as a “party”, so that it possessed a certain international personality, although, as Lissitzyn observes, “the ultimate responsibility for their foreign relations remained with the mandatories” (O. J. Lissitzyn, “Territorial entities in the law of treaties”, Recueil des cours de l’Academie de droit international de La Haye, 1968-III (Leyden, Sijthoff, 1970), vol. 125, pp. 54 et seq.) same a writer admits that such “territories assume, should the occasion arise, a responsibility of their own which does not exclude that of the mandatory. Such solutions could be applied to the case of agreements concluded by a territory or on behalf of a territory under United Nations administration, or even, more generally, to the problem of subsidiary organs. What is to be hoped is that for every agreement the solution adopted will be as clear as possible.

* One organization rightly drew attention to the particular significance of the following case: State A places funds at the disposal of an organization to be used for the benefit of third States B, C, D, etc., though it reserves certain rights relating to the conclusion and execution of the agreements which the organization will conclude with States B, C, and D. It may be said that the agreements between the organization and the beneficiaries B, C, and D are agreements applying the agreement between State A and the organization. This is a complex legal situation in which two agreements concluded at different times can perform the same function as a multilateral agreement (Yearbook ... 1972, vol. II, pp. 190-191, document A/CN.4/258, paras. 61-63) but have an original legal character.

* For observations on the conclusion of treaties by subsidiary organs, see para. 66 above.

In the simplest cases, the agreements would be subject to the constituent treaty of the organization. In more complex cases, the subject would be extended to instruments other than constituent treaties, and the agreements could be subject to precise rules governing their conditions of application and their rank in the legal system of the organization.

84. There is nothing revolutionary in raising this problem. When the 1969 Convention specified, in article 5, that it applied to the constituent instrument of an international organization and to any treaty adopted within an international organization “without prejudice to any relevant rules of the organization”, it recognized the fundamental principle which, at the same time, affirms the existence of a law peculiar to each organization and recognizes, with respect to treaties, its precedence over the general rules of the law of treaties. As we have already said, but must repeat, what is true of treaties between States “adopted within an international organization” should be more true of agreements concluded “within” an international organization to which either the international organization itself or some of its organs are parties.

85. As already indicated, the question asked on this subject did not arouse great interest among the organizations consulted. There are several reasons for this. First of all, the organizations have hardly any agreements concluded between their organs; agreements between subsidiary organs of the same organization do exist, but this situation does not seem to have caused any problems. Moreover, the relevant rules of each organization are perhaps not so rich in substance as to constitute a special régime for international agreements which might be assumed to come under those rules.

86. That does not mean, however, that to transfer the rules of the 1969 Convention does not introduce the problem just mentioned. We shall give here only one example relating to articles 27 and 46. There is obviously no a priori reason for not applying the rules set out in these articles in the case of international organizations. Their transfer does, however, create some difficulties.

87. First of all, a question of terminology arises. Can one speak of the “internal law” of an international organization? Not only would the corresponding English term “municipal law” have to be changed, but it is open to question whether it would be found acceptable to call the “relevant rules” of an organization “internal law”. It could, indeed, be maintained that such rules are special international law rather than internal law.

88. It may also be wondered whether the rule patiently drawn up and established by article 46 is valid in all cases for international organizations. It finally achieves a delicate balance between the rights and interests of third States acting in good faith and those of the party which may demand, up to a certain point, compliance with the statute which determines how its will to be bound must be legally formed. But, if this rule can be transferred as it stands, to apply to an agreement between two international organizations or an agreement between an organization and a third State, does the same hold good for an agreement between an organization and one of its members? The fact is that, as we shall have occasion to say later, the member State is not a third party in relation to the organization. Not only must it be supposed to know the constitution of the organization in its entirety, but it has the duty to know it. One must go further; through its representatives in the organization, the member State contributes to the formation of the will of the organization. To maintain for its own advantage an agreement irregularly concluded by the organization would not be justified for reasons of security; such an agreement should therefore be void unless the other members of the organization bear as much responsibility as the State party to the agreement for the breach of the organization’s law. Is it possible to reason on these lines? There is some merit in the foregoing analysis, but it is not entirely convincing in the last resort, because it leaves the organization’s own existence out of account and reduces the problem to the situation of its members in relation to one another. It therefore seems that article 46 of the 1969 Convention should be modified slightly, if at all.

3. The effects of agreements with respect to third parties

89. The 1969 Convention provided a rigorous solution of the problems relating to the position of third States with respect to treaties, though it tried to avoid taking any dogmatic position. The rules laid down in the Convention on this subject did not take the agreements of international organizations into consideration; but it is possible to go further and say that, even in the case of treaties between States, those rules did not consider the particular situation in which an international organization might be place when it was not a party to such treaties, but was directly interested in them. It is therefore necessary to examine here not only the problems peculiar to the agreements of international organizations, but also those relating to certain treaties between States which closely concern the position of an international organization.

90. Reference has already been made to the link between these two categories of agreement. They appear to be
The distinction holds good so long as one does not in particular, it must be established whether those light of the specific provisions of the 1969 Convention; it has already been said that initially the organization is manifestly a third party in relation to the treaty; the relationship of the organization to the treaty could to thus normally come within the scope of rules based on articles 34 to 38 of the 1969 Convention. To examine the merits of such a solution, it is necessary to refer to the very essence of the régime established by the Convention, to describe briefly the practice of organizations and, finally, to draw the conclusions which follow.

94. The question becomes more difficult in the case of treaties to which a certain number of States members of the organization, but not all, are parties, usually, with a few States which are not members of the organizations, and when, in addition, the treaty assigns to the organization or one of its organs new functions and hence rights and obligations. That is a very frequent case: it enables the organization to develop in a rational way, avoiding the onerous solution of setting up a separate organization for each treaty. But here it must be accepted that initially the organization is manifestly a third party in relation to the treaty; the relationship of the organization to the treaty could to thus normally come within the scope of rules based on articles 34 to 38 of the 1969 Convention. To examine the merits of such a solution, it is necessary to refer to the very essence of the régime established by the Convention, to describe briefly the practice of organizations and, finally, to draw the conclusions which follow.

95. Where the purpose of a treaty is to confer rights and obligations on a third party, in this case the organization or one of its organs, the strictest régime applies and in principle (article 35) the organization must expressly accept its obligations in writing. The exact interpretation of such a rule in the case of an organization is debatable, but it excludes any tacit or implicit acceptance. Once the situation of the organization is thus established in relation to the treaty, the question arises whether it can be unilaterally modified by the parties to the original treaty. The 1969 Convention deals with this question in article 37; it naturally allows the parties to the original treaty and the third State, or in this case the organization, to settle the question as they see fit; but in addition, article 37 establishes presumptions for the case in which the will of those concerned is not established. Where an obligation has arisen for the third State, it is presumed that its consent is necessary if the obligation is to be revoked or modified. Conversely, in the case of rights it is presumed that the consent of the third State is not required.

96. In their replies to the questionnaire, the organizations consulted reported abundant practice which is sufficient to show that this is an important point. Some of the replies merely noted that the organization is obliged to comply with such treaties in so far as they do not conflict with its constituent charter; others pointed out that some conventions have created rights for certain organizations without those organizations having expressly given their consent (for instance, article 6 ter of the Convention of

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69 Paras. 23 et seq.
Question of treaties concluded between States and International Organizations

91. It can therefore be said that in all these cases the consent of the organization is always required, but that it is not subject to any condition as to form. On the other hand, there is nothing in the practice to suggest that an organization can oppose the abolition of functions entrusted to it; if such functions are to be modified, it is normal for the organization to be consulted and its consent required. These procedures thus depart considerably from the provisions of the 1969 Convention, and this is easy to understand. A State has sovereign power of which the law of treaties must take account; an organization, on the contrary, is entirely concerned with the service to be rendered to the human communities which may appeal to it. It is therefore natural that no condition as to form should be attached to the consent of the organization, and that it should not be able to invoke any "subjective right" to retain a function which all the States that instituted that function have decided to abolish. On the other hand, consent to accept new functions is always necessary, for several reasons. First of all, the organization must be able to verify that it is legally competent under its constituent charter to perform the functions to be assigned to it, and that it has the material means to perform them. Secondly, the group of States bound by the constituent charter is practically never identical with the group of States parties to a convention extending the powers of the organization; if this difference is not to lead to distortions, it is necessary to take certain precautions, particularly in financial matters. In practice, the cost of executing the convention is so distributed that States which are not members of the organization, but are parties to the convention, bear their part; this individualization of the financial burden of the convention also makes it possible, though the practice is not uniform, to exempt from payment States which are members of the organization, but not parties to the convention.

98. Subject to further study of the problem later, the Special Rapporteur therefore concludes that this is a frequent and important case for which solution identical with those of the 1969 Convention would not be adequate; the text of that Convention would therefore need fairly extensive adaptation.

(b) Are States members of an international organization third parties in relation to the agreements concluded by that organization?

99. Before answering this question, the form of which has deliberately been made rather provocative, we should consider its practical scope. In the case of a treaty concluded by an international organization and providing only for rights for its member States, for instance a headquarters agreement, the principle laid down by the 1969 Convention in article 36 could be applied without great disadvantage: member States could normally invoke such rights since their consent would be presumed; the organization, with the agreement of the State with which it had contracted, could amend or abrogate the agreement without the specific consent of the member States (article 37, paragraph 2 of the 1969 Convention), but that situation would not present any great dis-

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73. For instance, the resolution of 30 September 1968 of the General Conference of IAEA (IAEA, General Conference, Twelfth Regular Session, 24-30 September 1968, Resolutions and other decisions (GC (XII)/Resolutions (1968) (Vienna, 1969), p. 7.) authorizing that organization to assume the role envisaged in the Treaty on the Non-Proliferation of Nuclear Weapons (General Assembly resolution 2373 (XXII), annex); the signature of IDR to certain agreements (Articles of Agreement of IFC (United Nations, Treaty Series, vol. 264, p. 117) and of IDA (ibid., vol. 439, p. 249) to the Indus Waters Treaty 1960 (ibid., vol. 419, p. 215); the 1965 Convention on the settlement of investment disputes between States and nationals of other States (ibid., vol. 575, p. 259); in the case of the 1969 Convention, the General Assembly expressly approved (resolution 2534 (XXIV) of 8 December 1969), paragraph 7 of the annex to the Convention after the representative of the Secretary-General had explained to the Conference that such approval was necessary (see Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations publication, Sales No. E.70.V.6), pp. 149-150, 26th plenary meeting, paras. 71-72). For the Convention of 21 February 1971 on Psychotropic Substances (United Nations publication, Sales No. E.73.XI.3), the Economic and Social Council, by its resolution 1576 (L), of 20 May 1971, formally accepted the functions assigned to it by that Convention.

74. For example, the International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly by resolution 2106A (XX) of 21 December 1965; the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights adopted by the General Assembly by resolution 2200A (XXI) of 16 December 1966.


76. If the groups of States were identical, could it be considered, at least in certain cases, that the problem was simplified and the consent of the organization rendered unnecessary, at least formally? The answer is debatable.
advantages, since it is obvious that the member States are represented in the organization and collectivity determine its will; in other words, the member States would not have to consent individually in a manner which might be described as external, to the modification of their rights under the Convention, but they would in fact consent collectively through the organization itself, by its internal procedures. Thus the case of the headquarters agreement seems relatively simple, as certain organizations have pointed out.

100. The difficulties begin when obligations are created for the States members of an organization by an agreement concluded by that organization. The problem is all the more serious because there are very few agreements which create only rights for the States members of an organization without providing, in one way another, for some obligation, and because, as has already been said, where there is a mixture of rights and obligations it is the strictest rules which should in principle prevail.77

101. On the basis of purely formal reasoning, does it not follow from a rule similar to that of the 1969 Convention that, failing express consent, the agreements of international organizations will have no legal effect on the member States without their explicit consent? Is not such a solution in conflict with practical requirements and even with the necessities of the proper functioning of international organizations? If these two questions are answered affirmatively, one is tempted to propose a rule different from that deriving from the 1969 Convention.78

102. It is difficult to draw from the practice a conclusion which cannot be contested. At the very least, before referring to a few date, it is necessary to make a distinction which seems to follow from the general principles of the law of treaties. Before determining what might be the content of the obligation of a member State, it is, indeed, necessary to determine with respect to whom the obligation of the member State would exist. For it may be imagined that the obligations assumed by the organization under an agreement with a State A are directly binding on the member States with respect to State A; in that case, the agreement would have a direct effect on the members of the organization. It may also be imagined that, in accordance with the most classical rules, an agreement between the organization and State A as such would have no effect on the member States, but that they would have an obligation to respect, or even to execute, such an agreement by virtue of the rules of the constituent charter of the organization, though they would have that obligation only with respect to the organization itself, not with respect to State A.

103. These two situations are legally very different. In the first, the organization negotiates both on its own behalf and on that of the member States; legally, it represents the member States in all agreements. In the second situation, the organization commits only itself, but in its relations with its own members it has statutorily a strong position which enables it to fulfil its undertakings under the best possible conditions. It will also be noted that the legal personality of the organization is established more strongly and independently in this latter case: for State A deals only with the organization, which is solely responsible for executing the treaty. The above distinction may perhaps help to clarify the practice.

104. The practice contains some indications which at first sight seem favourable to a classical analysis and to respect for the principle of the relativity of treaties, even with regard to the members of an international organization in relation to an agreement concluded by the organization. In principle, to deal with an international organization is not the same thing as to deal with its members: one need only refer to all the agreements concluded by international organizations on questions of finance and development: it is clear that only the organization and not its member States as such have the status of "parties" to these agreements.79 What proves the reality of this situation is that State A, which concludes an agreement with an organization, can demand, and in fact sometimes does demand, that the States members of the organization, or some of them, shall intervene as "parties" to the agreement, either by undertaking to guarantee the obligations of the organization or by committing themselves "for matters within their competence".80

105. The practice also shows that within each organization there prevails a general principle according to which member States co-operate in all the measures decided on by the organization, and assist it in the accomplishment of its task and the attainment of its purposes. To establish the general content of such an obligation it is necessary to refer to all the relevant rules of the organization, that is to say, first of all to its constituent charter, but also to duly established practices. Sometimes these obligations are expressed in very general terms81 sometimes they are more precise and occasionally they take account of particular agreements concluded by the organization.82 But it is clear that in every international organization the member States commit themselves with respect to the organization by general obligations to

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77 This is true, at least, of the forms of consent required; the Special Rapporteur recognizes that where the rules concerning revocation or modification are concerned the problem is less simple, but this is not the place to discuss it.

78 This certainly appears to follow from the provisional report of Mr. R. J. Dupuy which proposes the following formula: "An agreement lawfully concluded by an international organization is legally binding on all its members." (op. cit., p. 108.) (Translation by the Secretariat.)

79 Excepting, of course, the case in which some member States intervene expressly as parties and the case—which need not be considered here—in which an organization being terminated examines the question of succession to its obligations.

80 The European Economic Community has had extensive recourse to mixed agreements in which, on the Community side, the Community as such and each of its member States appear as "parties".

81 For the United Nations, see Article 1, paragraph 4, Article 36 and Article 73 d of the Charter.

82 The Treaty establishing the European Economic Community (United Nations, Treaty Series, vol. 298, p. 11) contains wording which has often been commented on by writers and referred to in judicial decisions, in particular article 228, paragraph 2, which provides that the agreements of the Community "shall be binding on the institutions of the Community and on Member States" (P. Pescatore, "Les relations extérieures des Communautés euro-
co-operate and that, even in the absence of any express reference, that obligation imposes duties on them with respect to the agreements of the organization: the passive obligation to respect those agreements and not to hinder their execution and the active obligation to facilitate the execution of the agreements within the limits of their general undertakings. In no case does it seem possible for a member State to ignore agreements regularly concluded by an organization.

From the foregoing, it seems possible to draw a few conclusions:

(a) Nothing in the practice precludes the idea that an organization concluding an agreement with a third State (or with another organization) wishes to create a direct obligation for one or more or all of its member States with respect to its co-contractor. In that case a mechanism similar to that of article 35 and 37 of the 1969 Convention can be imagined. It would then appear that the consent of the member States should be required, but that it should be express and in writing, and that these direct relations with a partner of the organization should not be capable of being modified or revoked without their consent, since obligations of the member States are involved. But it appears that this possibility has so far remained theoretical: if the partners of the organization wish to enter into other commitments, it is in their interests that the member States should become “parties”, alongside the organization.

(b) The agreements concluded by the organization cannot be ignored by the member States in their relations with the organization. These agreements create obligations which are more or less limited, depending on the organization, the subject of the agreements and how they touch on the competence of the member States. They create at least a general obligation of conduct involving the duty of every member State to respect the undertakings of the organization and co-operate with it. In this sense it might be said, though not entirely correctly, that the member States, though not “parties” to the agreements of the organization, are not third parties with respect to them.

These are the observations which the Special Rapporteur submits to the International Law Commission, on an entirely provisional basis, regarding the problem of the effect of treaties on third parties in the case of international organizations.

ANNEX

Questionnaire prepared by the Special Rapporteur

A. Questions intended for all the international organizations to which the questionnaire has been addressed

1. Possibilities that may be open to an international organization, by virtue of treaties concluded under the auspices of your organization, of participating in an agreement on behalf of a territory it represents

This question was raised by the United States of America in its written statement submitted to the International Court of Justice in connexion with the advisory opinion on Namibia in 1971.

In addition, two Conventions sponsored by IMCO—the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (article XIII) and the International Convention on Civil Liability for Oil Pollution Damage (article XVII)—both published in the Juridical Yearbook also contain some interesting provisions on this point.

2. Recourse in the conclusion of agreements to “powers”, to other documents proving the capacity to represent or to documents establishing a delegation

This is an important practical question. It should be broadened to include the problem of “delegations” of one organ to another and to a subsidiary organ.

3. Distinction between internal agreements having an internal character as regards the organization and those which have an external character. Is this distinction recognized? Is anything known about the problems it covers?

Internal agreements would include all the agreements between principal organs or between subsidiary organs. It is not so sure that agreements between the organization and a member State would also be internal agreements, even if the State signs in its capacity as a State member.

4. The organization’s practice with regard to agreements concluded by its subsidiary organs: are these agreements of the organization or not?

5. Does the organization know of any agreement it has concluded with a view to applying other international agreements or treaties? Does the fact that these agreements are governed by the instruments they are intended to execute have legal consequences (power to conclude the agreements, legal status)?

6. With regard to multilateral treaties between States, is the organization in the position of “a party to these treaties”, “an associate”, or “a person bound to respect these treaties”?

7. Are there any actual cases in which the position of the States members of an organization in connexion with an agreement concluded by the organization—an agreement to which those States are not parties stricto sensu—has been questioned? In other words, do you know of any cases where an agreement concluded by an organization has had certain consequences for the member States of the organization which are not parties stricto sensu to the agreement?

It may also be imagined that this express written consent is given, not with regard to a particular agreement, but en bloc for a more or less extensive variety of agreements, in the constituent charter of the organization. In that case the precise position of the members with respect to agreements of this kind concluded by the organization would have to be defined according to the precise provisions of the constituent charter.

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8. What criteria have been applied by the organization for the registration of the agreements to which it is a party?

B. Question intended only for the United Nations

Exact position of the United Nations with regard to the 1946 Convention on the Privileges and Immunities of the United Nations

I have several references to statements by representatives of the Secretary-General on this point; I do not wish to have an official statement on the subject, but only the most up-to-date references to positions already taken.

C. Question intended only for the specialized agencies and IAEA

Statements setting out: (1) the position of the specialized agencies with regard to the Convention of 1947 on the Privileges and Immunities of the Specialized Agencies; (2) the position of IAEA with regard to the Convention on the Privileges and Immunities of IAEA

What I want to know is whether the agencies consider themselves to be parties to these agreements and if any specific legal problems in connexion with them have been discussed.
PRIORITY TO BE GIVEN TO THE TOPIC OF THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (PARA. 5 OF SECTION I OF GENERAL ASSEMBLY RESOLUTIONS 2780 (XXVI) AND 2926 (XXVII))

[Agenda item 5 (b)]

DOCUMENT A/CN.4/270

Supplementary report on the legal problems relating to the non-navigational uses of international watercourses requested by the General Assembly in resolution 2669 (XXV)

Advance report submitted by the Secretary-General pursuant to General Assembly resolution 2926 (XXVII)

Original: text English
[11 April 1973]

CONTENTS

<table>
<thead>
<tr>
<th>Paragraphs</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1-2 95</td>
</tr>
<tr>
<td>A. Plan of the supplementary report</td>
<td>3 95</td>
</tr>
<tr>
<td>B. Information received for inclusion in the supplementary report</td>
<td>4-5 95</td>
</tr>
<tr>
<td>C. Progress of work on the various parts of the supplementary report</td>
<td>6-12 96</td>
</tr>
</tbody>
</table>

Introduction

1. By resolution 2669 (XXV) of 8 December 1970, entitled “Progressive development and codification of the rules of international law relating to international watercourses”, the General Assembly requested the Secretary-General to continue the study initiated by the General Assembly in resolution 1401 (XIV) in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses, taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies on this matter.

2. By resolution 2926 (XXVII) of 28 November 1972, the General Assembly requested the Secretary-General to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the General Assembly in resolution 2669 (XXV) of 8 December 1970, and to present to the International Law Commission at its twenty-fifth session an advance report on such study.

Pursuant to this resolution, the Secretary-General submits the present report.

A. Plan of the supplementary report

3. It should be recalled that the Secretary-General's report on “Legal problems relating to the utilization and use of international rivers”, prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, was issued as a mimeographed document1 in 1963. As requested by that resolution, the report contained: (a) information provided by Member States regarding their laws and legislation in force on the matter; (b) a summary of existing bilateral and multilateral treaties; (c) a summary of decisions of international tribunals, including arbitral awards; and (d) a survey of studies made or being made by non-governmental organizations concerned with international law. The supplementary report, which is now in process of preparation pursuant to General Assembly resolution 2669 (XXV), is intended to include the same categories of information as the initial report, together with relevant studies made by intergovernmental organizations.

B. Information received for inclusion in the supplementary report

4. In the report on the work of its twenty-third session, the International Law Commission recorded its understanding that in preparing the “supplementary report” the

1 A/5409. To be printed in Yearbook ... 1974, vol. II (Part Two). An important part of the material summarized in that document was published in a volume in the United Nations Legislative Series entitled Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation (United Nations publication, Sales No. 63.V.4).
Secretary-General "will certainly invite Governments of Member States to provide him with additional materials regarding legislative texts and treaty provisions, as well as any other relevant information which may be useful as evidence of their practice". On 22 November 1971, the Secretary-General addressed a circular note to Governments of Member States requesting them to send him, not later than 1 October 1972, the additional materials and information referred to in the understanding of the International Law Commission quoted above. In the report on the work of its twenty-fourth session, the Commission observed "that the problem of pollution of international waterways was of both substantial urgency and complexity. Accordingly, it requested the Secretariat to continue compiling the material relating to the topic with specific reference to the problems of the pollution of international watercourses". On 22 September 1972, the Secretary-General addressed a circular note to Governments of Member States by which after having referred to his first note mentioned above, requested them to send him, not later than 1 July 1973, the relevant materials and information, with specific reference to the question of the pollution of the international watercourses as indicated in the observation of the International Law Commission quoted above. On 27 December 1972, a similar circular letter was also sent to intergovernmental organizations.

5. Up to 15 April 1973, information had been received from nine Member States. Of these, eight had sent the texts of the relevant treaties to which they were parties; only one Member State had sent information regarding its national legislation in force on the matter. In addition, three international organizations had transmitted materials concerning their work on the subject.

C. Progress of work on the various parts of the supplementary report

6. The supplementary report is being prepared on the basis of the information provided by Member States and intergovernmental organizations as well as on the basis of the relevant research work undertaken by the Secretariat.

7. As in the initial report, the part of the supplementary report relating to national legislation is expected to include information concerning a very limited number of Member States. So far, as already indicated, only one Member State has made available national legislative texts to be reproduced in this part.

8. A sizable number of relevant bilateral and multilateral treaties have been collected. Of these, nearly 60 treaties have been summarized and made ready for inclusion in the supplementary report. The summary of the other treaties is now being prepared.

9. As yet, no decisions of international tribunals, other than those included in the initial report, have been found. The supplementary report might, therefore, appear without containing any information of this nature.

10. As regards that part of the supplementary report concerning the studies made or being made by intergovernmental organizations, the work being done within, or under the auspices of, the United Nations has been examined. Specifically, the relevant resolutions and reports of the Economic and Social Council and the activities of the Water Resources Development Centre of the Department of Economic and Social Affairs of the Secretariat have been considered for inclusion in the supplementary report. However, the relevant work done by the regional economic commissions, by specialized agencies and by the International Atomic Energy Agency, as well as by other intergovernmental organizations, will be examined on the basis of information received in reply to the circular letters of the Secretary-General already referred to. In addition, the preparatory work for the United Nations Conference on the Human Environment held at Stockholm in 1972, as well as the relevant resolutions of that Conference, will be considered.

11. The part of the supplementary report concerning studies made or being made by non-governmental organizations concerned with international law will include the available relevant work done by the Institute of International Law, the Inter-American Bar Association and the International Law Association.

12. In conclusion, the preparation of the supplementary report is expected to be completed before the opening of the twenty-sixth session of the International Law Commission.

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4 See para. 5 above.
6 See para. 4 above.
MOST-FAVOURED NATION CLAUSE

[Agenda item 6]

DOCUMENT A/CN.4/266

Fourth report on the most-favoured-nation clause, by Mr. Endre Ustor, Special Rapporteur

*Draft articles with commentaries (continued)*

[Original text: English]

[7 March 1973]

CONTENTS

<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>97</td>
</tr>
<tr>
<td>Article 6. Presumption of unconditional character of the clause</td>
<td>98</td>
</tr>
<tr>
<td>Commentary</td>
<td>98</td>
</tr>
<tr>
<td>Article 7. The <em>ejusdem generis</em> rule</td>
<td>102</td>
</tr>
<tr>
<td>Commentary</td>
<td>102</td>
</tr>
<tr>
<td>Article 8. Acquired rights of the beneficiary State</td>
<td>108</td>
</tr>
<tr>
<td>Commentary</td>
<td>108</td>
</tr>
<tr>
<td>ANNEX. Resolution adopted on 10 September 1969 by the Institute of International Law at its Edinburgh session (4-13 September 1969)</td>
<td>116</td>
</tr>
</tbody>
</table>

ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
</tr>
<tr>
<td>I.C.J.</td>
<td>International Courts of Justice</td>
</tr>
<tr>
<td>I.C.J. Pleadings</td>
<td>I.C.J., Pleadings, Oral Arguments, Documents</td>
</tr>
<tr>
<td>I.C.J. Reports</td>
<td>I.C.J., Reports of Judgments, Advisory Opinions and Orders</td>
</tr>
<tr>
<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
</tr>
</tbody>
</table>

* For draft articles 1-5, see the third report.
Article 6. Presumption of unconditional character of the clause

Except when in appropriate cases most-favoured-nation treatment is accorded under the condition of material reciprocity, the most-favoured-nation clause is unconditional, i.e., the granting State is obliged to accord and the beneficiary State is entitled to receive most-favoured-nation treatment irrespective of whether the favours accorded by the granting State to any third State are accorded gratuitously or against compensation.

COMMENTARY

(1) Different scholars have shown great skill in classifying the diverse types of the clause. For the present purposes it seems enough to retain three basic types: the conditional clause; the unconditional clause; and the clause conditional upon material reciprocity, which is a variety of the first.

(a) The unconditional and the conditional form

(2) With regard to the notion and history of the “conditional” most-favoured-nation clause, the reader is referred first to the relevant passages in the working paper on the most-favoured-nation clause in the law of treaties prepared by the Special Rapporteur, and in his first and second reports. The views of the League of Nations Economic Committee are reproduced in an annex to the first report. The paragraphs which follow provide further explanation.

(3) The difference between the unconditional clause and the conditional form of the clause as it appeared in United States practice until 1923 was well explained by the Department of State in 1940:

... Under the most-favoured-nation clause in a bilateral treaty or agreement concerning commerce, each of the parties undertakes to extend to the goods of the country of the other party treatment no less favorable than the treatment which it accords to like goods originating in any third country. The unconditional form of the most-favored-nation clause provides that any advantage, favor, privilege, or immunity which one of the parties may accord to the goods of any third country shall be extended immediately and unconditionally to the like goods originating in the country of the other party. In this form only does the clause provide for complete and continuous nondiscriminatory treatment. Under the conditional form of the clause, neither party is obligated to extend immediately and unconditionally to the like products of the other party the advantages which it may accord to products of third countries in return for reciprocal concessions; it is obligated to extend such advantages only if and when the other party grants concessions “equivalent” to the concessions made by such third countries.

(4) Urging the Senate to approve the change in the policy of the United States in matters of trade, Secretary of State Hughes wrote in 1924:

... It was the interest and fundamental aim of this country to secure equality of treatment but the conditional most-favored-nation clause was not in fact productive of equality of treatment and could not guarantee it. It merely promised an opportunity to bargain for such treatment. Moreover, the ascertaining of what might constitute equivalent compensation in the application of the conditional most-favored-nation principle was found to be difficult or impracticable. Reciprocal commercial arrangements were but temporary makeshifts; they caused constant negotiation and created uncertainty. Under present conditions, the expanding foreign commerce of the United States needs a guarantee of equality of treatment which cannot be furnished by the conditional form of the most-favored-nation clause.

While we were persevering in the following of the policy of conditional most-favored-nation treatment, the leading commercial countries of Europe, and in fact most of the countries of the world, adopted and pursued the policy of unconditional most-favored-nation treatment: Each concession which one country made to another became generalized in favor of all countries to which the country making the concession was obligated by treaty to extend most-favored-nation treatment ... As we seek pledges from other foreign countries that they will refrain from practicing discrimination, we must be ready to give such pledges, and history has shown that these pledges can be made adequate only in terms of unconditional most-favored-nation treatment.

(5) Stated simply, the conditional clause served the purposes of the United States so long as it was a net importer and its primary aim was to protect a growing industrial system. When the position of the United States in the world economy changed after the First World War, the conditional clause was inadequate. The essential condition for a successful penetration of international markets, that is, the elimination of discrimination against American products, could only be achieved through the unconditional clause.

(6) Not only did the commercial policy of the United States and the relevant treaty practice change from the use of conditional clauses to that of unconditional ones, a shift in the interpretation of the remaining conditional clauses also took place. At the time of the conclusion of the Treaty of Friendship, Commerce and Consular Rights of 8 December 1923 between the United States and Germany, the American position was stated by Secretary of State Hughes as follows:

There is one apparent misapprehension which I should like to remove. It may be argued that by the most-favored-nation clauses in the pending treaty with Germany we would automatically extend privileges given to Germany to other Powers without obtaining the advantages which the treaty with Germany gives to us. This is a mistake. We give to Germany explicitly the unconditional most-favored-nation treatment which she gives to us. We do not give unconditional most-favored-nation treatment to other Powers unless they are willing to make with us the same treaty, in substance, that...

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Germany has made. Most-favored-nation treatment would be given to other Powers only by virtue of our treaties with them, and these treaties, so far as we have them, do not embrace unconditional most-favored-nation treatment. We cannot make treaties with all the Powers at the same moment, but if the Senate approves the treaty which we have made with Germany we shall endeavor to negotiate similar treaties with other Powers and such other Powers will not obtain unconditional most-favored-nation treatment unless they conclude with us treaties similar to the one with Germany. 8

(7) Ten years later, however, Secretary of State Hull took the less rigid position that the according of a benefit to a country pursuant to an unconditional most-favored-nation clause constitutes according it freely within the terms of a conditional most-favoured-nation clause, with the result that the benefit should be accorded immediately and without compensation pursuant to the conditional clause. Consistent with this interpretation, when in 1946 the United States sought waivers from most-favoured-nation clauses in existing treaties, for tariff preferences to be accorded on the basis of reciprocity to most Philippine products following Philippine independence, such waivers were sought from countries with which the United States had treaties containing such clauses which were conditional as well as from those the treaties with which contained clauses which were unconditional. 9

(8) The use of the conditional clause, as practised until 1923 by the United States, completely disappeared from the international scene. The reasons for this are stated by Virally as follows:

... the elimination of automatism from the most-favoured-nation clause, ostensibly better to ensure reciprocity, fails to achieve its aim and renders the clause itself completely useless. That fact, together with the trends towards trade expansion which currently characterizes the trade policy of all States, explains why the conditional clause has generally been abandoned in recent treaty practice. 10

(9) Because of its general abandonment the conditional form of the clause is now of historical significance only. All available sources agree that this form of the clause has definitely fallen into disuse. 11

(b) The clause and reciprocity

(10) When speaking of reciprocity in relation to the most-favored-nation clause we have to keep in mind that normally most-favored-nation clauses are granted on a reciprocal basis, i.e., both parties to a bilateral treaty or all parties to a multilateral treaty accord each other most-favoured-nation treatment in a defined sphere of relations. This formal reciprocity is a normal feature of the unconditional most-favoured-nation clause—one could say it is its essential ingredient. Unilateral most-favoured-nation clauses occur only exceptionally at the present time. 12 Unilateral most-favoured-nation clauses, coupled with formal reciprocity, were included in the Peace Treaties which the Allied and Associated Powers concluded in 1947 with Bulgaria 13 (article 29); Hungary 14 (article 33); Romania 15 (article 31); Finland 16 (article 30); and Italy 17 (article 82). The same clause was included in the State Treaty for the re-establishment of an independent and democratic Austria (article 29). 18 By the mere stipulation of formal reciprocity a unilateral clause does not become bilateral (as seen by the Rapporteur of the Institute of International Law). This can be illustrated by the following quotation from article 33 of the Hungarian Peace Treaty.

... the Hungarian Government shall... grant the following treatment to each of the United Nations which, in fact, reciprocally grants similar treatment in like matters to Hungary:

(a) In all that concerns duties and charges on... the United Nations shall be granted unconditional most-favoured-nation treatment;...

The meaning of this clause is clear: although the United Nations' right to claim most-favoured-nation treatment was subject to the offering of reciprocity it still was a unilateral right; the provision did not entitle Hungary to demand most-favoured-nation treatment.

(c) The clause combined with material reciprocity (réciprocité trait pour trait)

(11) While the American form of the conditional clause can now be deemed to have virtually disappeared, the most-favoured-nation clause, coupled with the condition of material reciprocity still exists. It is to be noted, however, that the application of this form of the clause is restricted to certain fields, such as consular immunities and functions, matters of private international law and those matters customarily dealt with by establishment treaties.

(12) It was indicated by Mr. Richard Kearney, at the twentieth session of the International Law Commission, 21 that the shift in the policy of the United States from conditional to unconditional most-favored-nation treatment with regard to commercial matters in the early 1920s had not been accompanied by a shift in relation to consular rights and privileges, with respect to which the use of the conditional clause continued. This situation is illustrated by the following excerpt from a letter dated

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8 M. Whiteman, op. cit., p. 754.
9 Ibid., p. 753.
14 Ibid., p. 135.
15 Ibid., vol. 42, p. 3.
16 Ibid., vol. 48, p. 203.
17 Ibid., vol. 49, p. 3.
18 Ibid., vol. 217, p. 223.
20 January 1967 from the Department of State to the Senate Foreign Relations Committee in regard to a provision in the Consular Convention with the USSR,\textsuperscript{25} then before the Committee, relating to immunity in criminal cases for consular officers:

The United States has thirty-five agreements presently in force with other states requiring this country to afford most-favored-nation treatment to consular officers and, occasionally, to consular employees of those States. A list of these thirty-five States is given as an enclosure to this letter. Based upon a recent survey, twenty-seven of those States have consular establishments in the United States, and include approximately 577 entitled consular personnel. A list of these States is also given as an enclosure to this letter. The criminal immunity provision contained in article 19 of the US-USSR consular convention would be applicable to those personnel should the sending State concerned agree to give reciprocal treatment to American consular officers and employees assigned there. Our Embassies in those twenty-seven States were requested to give their assessment as to whether most-favoured-nation treatment would actually be sought on a reciprocal basis. The replies indicated that at most eleven States would probably request such treatment, and that approximately 290 of their foreign consular officers and employees in the United States would be affected.\textsuperscript{25}

The provision of the Consular Convention of 1 June 1964 with the USSR, under consideration was article 19, paragraph 2, which reads as follows:

Consular officers and employees of the consular establishment who are nationals of the sending state shall enjoy immunity from the criminal jurisdiction of the receiving state.\textsuperscript{24}

(13) No detailed research could be made as to the 35 agreements mentioned in the quoted letter, to the most-favoured-nation clauses of those treaties, or to the phraseology involved. It can be safely assumed, however, that most if not all of them are conditional only upon the granting of material reciprocity (either expressly stipulated or construed in this sense). This kind of conditional clause is clearly different from the traditional American form of the conditional clause ("freely", "if the concession was freely made..." etc.) and its survival is not limited to treaties concluded by the United States\textsuperscript{30} or to consular treaties. Examples such as the Hungarian-Turkish Convention regarding conditions of residence of 20 December 1926,\textsuperscript{28} (article 3), and the Finland-Turkey Convention of commerce and navigation of 2 June 1926,\textsuperscript{27} (articles 2 and 10 (in section I on conditions of residence and business)) are given by Suzanne Basdevant in an article on the most-favoured-nation clause.\textsuperscript{28}

(14) A more recent instance of such a provision is the first paragraph of article 3 of the Convention on conditions of residence and navigation between the Kingdom of Sweden and the French Republic signed at Paris on 16 February 1954:\textsuperscript{30}

Subject to the effective application of reciprocity, the nationals of each of the High Contracting Parties residing in the territory of the other Contracting Party shall have the right, in the territory of the other Contracting Party, under the same conditions as nationals of the most-favoured-nation, to engage in any commerce or industry, as well as in any trade or profession, that is not reserved for nationals.\textsuperscript{30}

(15) Another recent example can be found in the Consular Convention between the Polish People’s Republic and the Federal People’s Republic of Yugoslavia, signed at Belgrade on 17 November 1958,\textsuperscript{31} article 46 of which reads as follows:

Each Contracting Party undertakes to accord the other Contracting Party most-favoured-nation treatment in all matters relating to the privileges, immunities, rights and functions of consuls and consular staff. However, neither Contracting Party may invoke the most-favoured-nation clause for the purpose of requesting privileges, immunities and rights other or more extensive than those which it itself accords to the consuls and consular staff of the other Contracting Party.\textsuperscript{29}

(16) The clause conditional upon material reciprocity can be considered a simplified form of the traditional conditional clause.\textsuperscript{33}

According to Alice Piot:

This system seems clearer and more practical than the preceding one: it does not refer to the counterpart provided by the favoured State, but seeks to establish perfect symmetry between the benefits provided by the granting State and by the State benefiting by the clause. In other words, it seeks to establish material reciprocity. This implies a measure of symmetry between the two legislations. As Niboyet says, "this diplomatic reciprocity thus has an international head, but two national feet. It is a triptych"...

... From the purely logical point of view, this is quite satisfying intellectually, but not very satisfactory in practice. Quite apart from the difficulties which the interpretation of reciprocity always entails, this system has the disadvantage of reducing the benefits, if any, of the most-favoured-nation clause, without eliminating the resulting disadvantages for the granting State. Of course, the beneficiary State cannot bring the clause into operation without offering the very advantages which it claims, but the unilateral nature of that step will almost always mean that the reciprocal benefits, although theoretically equivalent, will be very different in practice:...

(17) Clearly the drafters of most-favoured-nation clauses combined with the condition of reciprocity do not aim at treatment of their compatriots in foreign lands equal with that of the nationals of other countries. (Equality with competitors is of paramount importance in matters of trade and particularly as regards customs duties.) What the y are interested in is a different kind of equality: equal treatment granted by the contracting States to

\textsuperscript{26} M. Whiteman, op. cit., pp. 752-753. (Italics supplied by the Special Rapporteur.)
\textsuperscript{29} League of Nations, Treaty Series, vol. LXXII, p. 245.
\textsuperscript{30} Ibid., vol. LXX, p. 329.

\textsuperscript{29} United Nations, Treaty Series, vol. 228, p. 137.
\textsuperscript{30} Ibid., p. 141.
\textsuperscript{31} Ibid., vol. 432, p. 267.
\textsuperscript{32} Ibid., p. 332.
\textsuperscript{34} A. Piot, "La clause de la nation la plus favorisée", Revue critique de droit international privé (Paris), vol. 45 (January-March 1956), No. 1, pp. 9-10 (translation from French).
each other’s nationals. Hence the view of Level: “... The most-favoured-nation clause combined with the condition of reciprocity does not seem to be conducive to the unification and simplification of international relations, a fact which deprives the clause of the few merits formerly attributed to it.” 35

(d) Doctrine

(18) In the last century and in the first decades of the present one, international doctrine and practice was divided on the interpretation of a most-favoured-nation clause which does not explicitly state whether it is conditional or unconditional.36 The division was due to the then constant practice of the United States according to which even if the character of the clause was not spelled out explicitly it was construed as conditional.37 The American position can be traced as far back as 1817 when it was stated by Secretary of State Adams:

The eighth article of the treaty of cession [the Louisiana Purchase of 30 April 1803] stipulates that the ships of France shall be treated upon the footing of the most-favored-nations in the ports of the ceded territory; but it does not say, and can not be understood to mean, that France should enjoy as a free gift that which is conceded to other nations for a full equivalent.38

(19) The British and continental position at that time was that concessions granted for consideration could properly be claimed under a most-favoured-nation clause. According to that view:

... The basis of the American theory is to be found in the Anglo-Saxon system of contracts and the requirement that advantages must be reciprocal for the formation of a contract (consideration). However, this application of the theory is not justified here, for the nation which has acquired equal treatment has paid in advance for the third-party rights which it may thus acquire, since it has granted to the other contracting party the same equal treatment and the right to receive the advantages of third parties... The search for “equivalents” designed to pay for the third-party right by conventional means imposed on the contracting parties is tantamount to stating that the most-favoured-nation clause in itself has absolutely no effect. Lastly, from the customs point of view the American system leads to a preferential system based on favours granted to some nations and refused to others, for States which have amended their tariffs no longer have any equivalents to offer.39

(20) The Institute of International Law in its 1936 resolution entitled “The effects of the most-favoured-nation clause in matters of commerce and navigation” expressed the view that:

The most-favoured-nation clause is unconditional, unless there are express provisions to the contrary.

Consequently, in matters of commerce and navigation, the clause confers upon the nationals, goods and ships of the contracting 36 P. Level, op. cit., p. 338, para. 37 (translation from French).
37 S. Basdevant, loc. cit., p. 479, para. 73.
countries, as a matter of right and without compensation, the regime enjoyed by any third country.40

Other sources state this rule in general terms not restricted to the fields of commerce:

If there is any doubt, the most-favoured-nation clause should be considered unconditional.41

Since it is liable to limit the application of the clause, the condition cannot be implied.42

The clause is, in principle, unconditional... Although the high contracting parties have the option of stating that the clause is conditional, its conditional nature is not presumed and is thus not an essential feature of the clause...43

... If it is not expressly stated that the clause is conditional, it is agreed... that it shall be considered unconditional.44

In the commercial treaty practice of the Soviet Union and other socialist countries the most-favoured-nation clause is always applied in its unconditional and gratuitous form. This is expressly provided for in many treaties but even without express provision to this effect most-favoured-nation clauses are understood to grant m.f.n. treatment unconditionally and without compensation. This follows from the fact that the treaties in question do not contain any reservation concerning compensation or countervalue.45

In principle, m.f.n. clauses ought to be interpreted unconditionally... “those clauses have the same meaning whether that word [unconditionally] be inserted or not”.46

The same writer adds:

This rule of interpretation must, however, be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type of m.f.n. clause as part and parcel of its national treaty policy.47

On that matter a more balanced view was taken before the International Court of Justice by the representative of the United States in the Case concerning the Rights of Nationals of the United States of America in Morocco (1952):

43 P. Level, op. cit., p. 338, para. 35.
45 See State Institute of Law of the Soviet Academy of Sciences, Kurs ... (op. cit.), p. 251.
47 Ibid.
The United States is entirely in agreement that the meaning of the clause should be determined by reference to the intent of the parties at the time. The only difference that we have with our distinguished opponents is that they would construe the clause as conditional by referring only to the practice of the United States in interpreting other treaties signed under other circumstances, and not by what the United States and Morocco intended when they signed the treaties which are in issue before this Court.\[48\]

The following excerpt from a Memorandum of the Counselor for the Department of State (Moore) of 8 October 1913 is also of relevance:

It is proper to advert to the fact that the so-called most-favored-nation clause does not bear an invariable form. In two instances during the past twenty-five years the United States has been obliged to yield its interpretation when confronted with documentary proof that the most-favored-nation clauses then in question were, during the negotiation of the particular treaties, expressly understood and agreed to have the wider effect claimed by the other contracting parties.\[49\]

(21) The rule proposed in articles 6 does not state simply that unless otherwise agreed a most-favored-nation clause is unconditional. The drafting wishes to give expression to the fact that because of the complete disappearance of the traditional conditional clause (the American form) only two forms of the clause exist: the unconditional clause and the clause conditional upon material reciprocity. The rule states that in case of doubt the presumption militates for the unconditionality of the clause. Indeed one could spell out explicitly that in matters of trade and particularly in those of customs duties and like, the clause is always unconditional; whereas in matters of private international law, immunities and the like the condition of reciprocity may be stipulated but in the absence of such stipulation the clause is unconditional in such cases as well. The Commission may choose to employ this kind of the drafting of the rule. The expression “appropriate cases” in the article is meant to refer to cases of private international law, caution luditum solvi, consular immunities, etc.

(22) The question arises whether the presumption works also in cases where the internal law of a country prescribes for certain matters reciprocity as a rule. Thus article 11 of the French Civil Code provides as follows:

An alien shall enjoy in France the same civil rights as those which are now or shall in the future be granted to French nationals by treaties of the nation of which the alien in question is a national.\[50\]

On the basis of this and upon a varying practice in French courts Guggenheim concludes:

...If a rule of internal law makes the application of the clause dependent on the granting of reciprocity, the clause is considered to have been granted conditionally.\[51\]

Other sources, like the 1936 Resolution of the Institute of International Law (paragraph 2)\[52\] and particularly Sauvignon\[53\] hold the view that a provision of internal law cannot prevail over treaty obligations of a State. This view is shared.

(23) The conditions of reciprocity in a most-favored-nation clause can give rise to serious questions of interpretation mainly if the relevant rules of the interested countries differ substantially from each other.\[54\] This inherent difficulty, however, does not alter the validity of the rule.

*Article 7. The ejusdem generis rule*

Under a most-favored-nation clause the beneficiary State cannot claim any other rights than those relating to the subject-matter of the clause and falling within the scope of the clause.

*COMMENTARY*

(1) The *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice. The essence of the rule is explained by McNair in the following graphic way:

Suppose that a most-favored-nation clause in a commercial treaty between State A and State B entitles State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.\[55\]

Although the meaning of the rule is clear, its application is not always simple. From the abundant practice the following selection of cases may illustrate the difficulties and solutions.

(2) In the *Anglo-Iranian Oil Company Case* (1952), the International Court of Justice stated:

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most favoured nation. The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application

\[52\] *Yearbook... 1969*, vol. II, p. 181, document A/CN.4/213, annex II.


of its Treaty with Iran, it is because that Treaty is subsequent to the
ratification of the Iranian Declaration. This cannot give rise to any
question relating to most-favoured-nation treatment.\textsuperscript{56}

(3) The conclusions reached as to the operation of the rule in
the \textit{Ambatielos Case} \textsuperscript{57} were referred to in the
Special Rapporteur’s second report.\textsuperscript{58} A somewhat
fuller quotation of the relevant part of the award of 6 March 1956 of the Commission of Arbitration seems to be in place here.

With respect to the interpretation of article X (most-
favoured-nation clause) of the Anglo-Greek Treaty of
Commerce and Navigation of 1886, the Arbitration
Commission stated:

The Commission does not deem it necessary to express a view on
the general question as to whether the most-favoured-nation clause
can never have the effect of assuring to its beneficiaries treatment in
accordance with the general rules of international law, because in
the present case the effect of the clause is expressly limited to “any
privilege, favour or immunity which either Contracting Party has
actually granted or may hereafter grant to the subjects or citizens
of any other State”, which would obviously not be the case if the sole
object of those provisions were to guarantee to them treatment in
accordance with the general rules of international law.

On the other hand, the Commission holds that the most-favoured-
nation clause can only attract matters belonging to the same category
of subject as that to which the clause itself relates.

The Commission is, however, of opinion that in the present case
the application of this rule can lead to conclusions different from
those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-
nation clause is defined as including “all matters relating to commerce
and navigation”. It would seem that this expression has not, in
itself, a strictly defined meaning. The variety of provisions contained
in Treaties of commerce and navigation proves that, in practice,
the meaning given to it is fairly flexible. For example, it should be
noted that most of these Treaties contain provisions concerning the
administration of justice. That is the case, in particular, in the
Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees
the “admission and treatment of subjects of the two
States into the Courts of Justice for the prosecution and defence of their rights”. That is also the case as regards the other Treaties referred to by the
Greek Government in connexion with the application of the most-
favoured-nation clause.

It is true that “the administration of justice”, when viewed in
isolation, is a subject-matter other than “commerce and navigation”,
but this is not necessarily so when it is viewed in connection with the
protection of the rights of traders. Protection of the rights of traders
naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so
far as it is concerned with the protection of these rights, must
necessarily be excluded from the field of application of the most-
favoured-nation clause, when the latter includes “all matters relating
to commerce and navigation”. The question can only be determined
in accordance with the intention of the Contracting Parties as
deduced from a reasonable interpretation of the Treaty.\textsuperscript{59}

In summing up its views with respect to the interpretation
of article X of the Treaty of 1886, the Commission
stated that it was of opinion:

(1) that the Treaty concluded on 1st August, 1911, by the United
Kingdom with Bolivia cannot have the effect of incorporating in
the Anglo-Greek Treaty of 1886 the “principles of international
law”, by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained
in Article X of the said Treaty of 1886 can be extended to the
system of the administration of justice in so far as concerns the
protection by the courts of the rights of persons engaged in trade
and navigation;

(3) that none of the provisions concerning the administration of
justice which are contained in the Treaties relied upon by the Greek
Government can be interpreted as assuring to the beneficiaries of
the most-favoured-nation clause a system of “justice”, “right” and
“equity” different from that for which the municipal law of the
State concerned provides;

(4) that the object of these provisions corresponds with that of
Article XV of the Anglo-Greek Treaty of 1886, and that the only
question which arises is, accordingly, whether they include more
extensive “privileges”, “favours” and “immunities” than those
resulting from the said Article XV;

(5) that it follows from the decision summarised in (3) above that
Article X of the Treaty does not give to its beneficiaries any remedy
based on “unjust enrichment” different from that for which the
municipal law of the State provides.

... the Commission is of opinion that “free access to the Courts”,
which is vouchsafed to Greek nationals in the United Kingdom by
Article XV of the Treaty of 1886, includes the right to use the Courts
fully and to avail themselves of any procedural remedies or guarantees
provided by the law of the land in order that justice may be admin-
istered on a footing of equality with nationals of the country.

The Commission is therefore of opinion that the provisions
contained in other Treaties relied upon by the Greek Government
do not provide for any “privileges, favours or immunities” more
extensive than those resulting from the said Article XV, and that
accordingly the most-favoured-nation clause contained in Article X
has no bearing on the present dispute.\textsuperscript{60}

(4) Decisions of national courts also testify to the
general recognition of the \textit{ejusdem generis} rule.

In an early French case (1913), the French Court of Cassation had to decide whether certain procedural
requirements for bringing suit as provided in a French-
Swiss Convention on jurisdiction and execution of
judgement applied also to German nationals as a result of
a most-favoured-nation clause in a Franco-German
Commercial Treaty signed at Frankfurt on 10 May 1871.
“The Franco-German Treaty guaranteed most-favoured-
nation treatment in their commercial relations including
the admission and treatment of subjects of the two
nations.” The decision of the Court was based in part
on the following propositions: that “these provisions
pertain exclusively to the commercial relations between
France and Germany, considered from the viewpoint of the
rights under international law, but they do not


\textsuperscript{57} The \textit{Ambatielos Case} (merits: obligation to arbitrate), Judgment of 19 May 1953 (I.C.J. Reports 1953, p. 10).


\textsuperscript{59} United Nations, \textit{Reports of International Arbitral Awards}, vol. XII (United Nations, publication, Sales No. 63.V.3), pp. 106-107. (Italics supplied by the Special Rapporteur.)

\textsuperscript{60} \textit{Ibid.}, pp. 109-110.
concern, either expressly or implicitly, the rights under civil law, particularly, the rules governing jurisdiction and procedure that are applicable to any disputes that develop in commercial relations between the subjects of the two States”; and that further: “The most-favoured-nation clause may be invoked only if the subject of the treaty stipulating it is the same as that of the particularly favourable treaty the benefit of which is claimed.”

(5) In Lloyds Bank v. De Rieqles and De Gaillard before the Commercial Tribunal of the Seine, Lloyds Bank, which as the plaintiff had been ordered to give security for costs (cautio judicatum solvi) invoked article I of an Anglo-French Convention of 28 February 1882. That Convention intended—according to its Preamble—to regulate the commercial and maritime relations between the two countries, as well as the status of their subjects, and article I provided, with an exception not relevant here, that:

...each of the High Contracting Parties engages to give the other immediately and unconditionally the benefit of every favour, immunity or privilege in matters of commerce or industry which have been or may be conceded by one of the High Contracting Parties to any third nation whatsoever, whether within or beyond Europe.

On the basis of that article Lloyds Bank claimed the benefit of the provisions of a Franco-Swiss Treaty of 15 June 1889, which gave Swiss nationals the right to sue in France without being required to give security for costs. The court rejected this claim, holding that a party to a convention of a general character such as the Anglo-French Convention regulating the commercial and maritime relations of the two countries could not claim under the most-favoured-nation treatment clause the benefits of a special Convention such as the Franco-Swiss Convention, which dealt with one particular subject, namely freedom from the obligation to give security for costs.

(6) The comparison between these two French judgements on the one hand and the award of the Commission of Arbitration for the Ambaetlos Case on the other reveals that while the ejusdem generis rule is recognized by all, there is a large difference between the liberal construction of the Arbitration Commission and the strict interpretation of the French courts. This leads to the question whether in the process of codification of the ejusdem generis rule there should not be an effort made to propose a more detailed regulation, particularly with regard to the relationship between a fairly general clause (e.g. in all matters of commerce and navigation) and a particular claim (e.g. administration of justice or cautio judicatum solvi). The question is provisionally answered in the negative by proposing the general rule and leaving the details to treaty interpretation. Drafters of a most-favoured-nation clause are always confronted with the dilemma of either drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the ejusdem generis rule or drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration.

(7) The ejusdem generis rule is observed also in the extra-judicial practice of States as shown by the case concerning the Commercial Agreement of 25 May 1935 between the United States of America and Sweden. Article I provided as follows:

Swedish and the United States of America will grant each other unconditional and unrestricted most-favoured-nation treatment in all matters concerning the Customs duties and subsidiary charges of every kind and in the method of levying duties, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the Customs, and with respect to all laws or regulations affecting the sale or use of imported goods within the country.

A request was submitted in 1949 to the Department of State that it inform the New York State Liquor Authority that a liquor licence to sell imported Swedish beer in New York should be issued to a certain firm of importers. The Office of the Legal Adviser, Department of State, interpreted the treaty provisions as follows:

Since the most-favored-nation provision in the Reciprocal Trade Agreement between the United States and Sweden signed in 1935 is designed only to prevent discrimination between imports from and exports to Sweden as compared with imports from and exports to other countries, I regret that this Department would be unable to send to the New York Liquor Authority a letter such as you suggest to the effect that the Agreement accords to Swedish nationals the same treatment as is accorded to the nationals of other countries.

All of the countries listed in the enclosure to your letter (countries, nationals of which are held by the New York State Liquor Authority to be entitled to liquor licences) have treaties with the United States which grant either national or most-favored-nation rights as to engaging in trade to nationals of those countries. Thus existence of the trade agreements to which you refer in addition to these treaties, is irrelevant...

(8) In the following examples the question of the application of the rule arose under extraordinary circumstances. In the case of Nyugat-Swiss Corporation Société Anonyme Maritime et Commerciale v. State (Kingdom of the Netherlands) the facts were as follows:

On 13 April 1941, the steamship Nyugat was sailing outside territorial waters of the former Dutch East Indies. She sailed under the Hungarian flag. The Netherlands destroyer Korvenaer stopped her, searched her and took


63 Ibid., pp. 23-24.


66 Ibid., p. 111.

67 Legal Adviser Fisher, Department of State, 3 November 1949, MS. Department of State, quoted by M. Whiteman, op. cit., p. 760.
her into Surabaya, where she was sunk in 1942. The plaintiffs claimed that the action taken with regard to the Nyugat was illegal. The vessel was Swiss property. She had formerly belonged to a Hungarian company, but the Swiss corporation became the ship's owner in 1941, when it already held all shares in the Hungarian company. The Hungarian flag was a neutral flag. Defendant relied upon the fact that on 9 April 1941, diplomatic relations between the Netherlands and Hungary were severed, that on 11 April 1941, Hungary, as an ally of Germany, attacked Yugoslavia and that consequently on the basis of certain relevant Dutch decrees the capture of the ship was legal. Plaintiffs contended that these decrees were in conflict with the Treaty of Friendship, Establishment and Commerce, concluded with Switzerland at Berne on 19 August 1875 and with the Treaty of Commerce, concluded with Hungary on 9 December 1924, and notably the most-favoured-nation clause contained in these treaties. Plaintiffs referred to the Treaty of Friendship, Navigation and Commerce signed on 1 May 1829, with the Republic of Colombia, providing that "if at any time unfortunately a rupture of the ties of friendship should take place" the subjects of the one party residing in the territory of the other party "will enjoy the privilege of residing there and of continuing their business... as long as they behave peacefully and do not violate the laws; their property... will not be subject to seizure and attachment." The Court held:

The invoking of this provision fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the Second World War; in the present case the determination of the flag was also based upon the assumption by Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in the provisions of the 1829 Treaty. From the preceding it follows that shipowners are wrong in their opinion that the Court should not apply the Decrees as being contrary to international provisions.

(9) The Italian-Swiss Permanent Conciliation Commission, provided for in the Treaty of Conciliation and Judicial Settlement between Italy and Switzerland concluded in 1924 was seized of a dispute between the two parties concerning the application to Swiss nationals of a certain Italian special capital levy duty.

The Swiss Government contended that this special levy should not apply to the property of Swiss nationals. Their contention was based on the most-favoured-nation clause in article 5 of the Italian-Swiss Establishment and Consular Convention of 22 July 1868, which, it was argued, operated to oblige Italy to exempt from the special levy those Swiss nationals who belonged to the same categories as the nationals of the United Nations who were exempt from the levy by virtue of article 78, paragraph 6, of the 1947 Treaty of Peace with Italy.

The relevant part of the text of article V of the 1868 treaty is as follows:

In time of peace as in time of war, there may not, in any circumstances, be imposed or exacted on the property of a national of one of the two States in the territory of the other, taxes, dues, contributions or charges, other than or heavier than shall be imposed or exacted on the same property if it belonged to a national of the State or to a national of the most favoured nation. It is further agreed that there will not be collected or demanded from a national of one of the two States who is in the territory of the other, any tax whatsoever, other than or heavier than those which may be imposed or levied on a national of the State or of the most favoured nation.

The Italian Government maintained that this most-favoured-nation clause which, it is to be noted contains also a national treatment pledge, could not be invoked in this way. They based their argument on the common intention of the Parties at the time of the conclusion of the Establishment Convention of 1868, alleging that they contemplated the regulation of normal peaceful relations and did not intend the most-favoured-nation clause to apply to circumstances of war and the peace treaties that followed. It was also submitted that a peace treaty fell into a special category and resembled an imposed settlement rather than a contractual agreement.

The Commission held, on 9 October 1956, that the Swiss claim must be rejected. Excerpts from its opinion are as follows:

... From the fact that the conditions of the Peace Treaty were imposed on Italy, and from the fact that the determination of the conditions was not made the object of free negotiations between the Parties to the Treaty, it has been deduced [by the Italian Party] that the exemption of the nationals of the Allied Powers rests upon mere unilateral decisions of these Powers. Therefore, it has been alleged on the Italian side, the non-contractual advantage which arose for these nationals should be considered as outside the scope of the most-favoured-nation clause. The Commission does not share this opinion. Although it may have been motivated by compulsion, the will of the defeated State nevertheless enters into a Treaty of Peace, into each and every one of the clauses which it contains. If it were not so, then the very character of a treaty would have to be denied to any Treaty of Peace bringing to an end a victorious war. ...

In order to extend the operation of the most-favoured-nation clause to the provisions of article 78, paragraph 6, of the Paris Peace Treaty of February 10, 1947, the absolute form of Article 5 of the Establishment Convention of July 22, 1868, has been relied upon: [by the Swiss Party] "in time of peace as in time of war, there may not, in any circumstances...". It is recognized that the first formula ("in time of peace as in time of war") has a purely temporal meaning. The second ("in any circumstances") cannot itself attribute an extravagant function to the clause and one which would be in contradiction to its well known role in international life, which is the role of ensuring equality of treatment to the nationals of different States in normal legal relations. Now, the extension claimed here on the basis of the most-favoured-nation clause would have the effect of extending the exceptional inequality provided for by Article 78 of the Treaty of February 10, 1947. ...

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68 Netherlands, Staatsblad van het Koninkrijk der Nederlanden, No. 137, 1878, Decree of 19 September 1878.
69 Ibid., No. 36, 1926, Decree of 3 March 1926.
71 Judgement of 6 March 1959 by the Supreme Court of the Netherlands (Nederlandse Jurisprudentie 1962, No. 2, pp. 18-19) (original text: Dutch).
73 For reference, see above, note 17.
... The relations which gave rise to the Treaty of February 10, 1947, between Italy and the Allied Powers were the relations of belligerency and post-belligerency, of conqueror and conquered, and which alone could serve to justify the exemption from the special tax on capital contained in Article 78, paragraph 6, of this Peace Treaty. The absence of similar relations between Italy and Switzerland excludes the operation of the most-favoured-nation clause for the benefit of the latter.

... It is equally of little relevance that the clause of Article 5 of the Italian-Swiss Establishment Convention of 1868 is aimed at substantially the same taxes and, duties as those from which Article 78, paragraph 6, of the Peace Treaty of February 10, 1947, has provided exemption in favour of nationals of the Allied Nations. Similar identity would indeed allow Switzerland to invoke the benefit of the clause if the exemption from similar fiscal dues granted by Italy for the benefit of nationals of third States tended to favour economic relations of the same kind as those which exist between Switzerland and Italy.78

The Commission which had "endeavoured to arrive at an equitable settlement of the dispute", while rejecting the Swiss claim based on the most-favoured-nation clause, found that Switzerland was entitled to national relations of the same kind as those which exist between Switzerland and Italy. It is to be noted also that according to the treaty on the basis of which the Conciliation Commission proceeded the permanent Conciliation Commission shall be to further the settlement of disputes by an impartial and conscientious examination of the facts and by formulating proposals with a view to settling the case.79

... The Commission's report shall not be in the nature of an arbitral award, as regards either the statement of facts or the legal considerations.79

(10) According to McNair, "some authority exists" for the view that rights and privileges obtained in the course of a territorial and political arrangement or a peace treaty "cannot be claimed under a most-favoured-nation clause." "The reason", he believes, "presumably is that such concessions are not commercial, while most-favoured-nation clauses are usually concerned with trade and commerce."78 He quotes an opinion of a law officer given in 1851. This denied to Portugal and Portuguese subjects the right "to dry on the coast of Newfoundland the Codfish caught by them on the Banks adjoyning thereto". The claim was based on a most-favoured-nation clause in a treaty of 1842 between Great Britain and Portugal designed to secure the same privileges as were granted by Britain to France and to the United States of America by the Treaties of 1783. Those Treaties formed part of a general arrangement made at the termination of a war. The law officer stated:

... I am of opinion that the stipulation of the 4th Article of the Treaty of 1842 cannot justly be considered as applicable to the permission which he [the Portuguese Chargé d'Affaires] claims on behalf of Portuguese Subjects.

I consider that these privileges were conceded to France and the United States of America as part of a Territorial and Political Arrangement extorted from Great Britain at the termination of a War which had been successfully carried on against her by those Nations.79

(11) There is no writer who would deny the validity of the ejusdem generis rule which derives from the very nature of the most-favoured-nation clause. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties (or unilateral acts) in regard to the same matter or class of matter.79

(12) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.81 Thus the rule follows clearly from the principle of sovereignty and independence of States. They cannot be regarded as being bound beyond the obligations they have expressly undertaken.

(13) Recently a quite novel theory has been developed by a distinguished judge of the Court of Justice of the European Communities, Mr. Pierre Pescatore, in the course of his studies undertaken for the Institute of International Law. His reasoning runs as follows:

The ejusdem generis rule was originally developed to express the requirement that the subjects of the advantages to be granted under the clause should be identical or at least similar. The rule is expressed in this way in the provisions of the General Agreement on Tariffs and Trade, article I of which provides that tariff reductions shall be granted to "the like product".

But this requirement does not stop there. The similitude must also exist with regard to the nature of the measure whose extension is claimed in application of the clause and even with regard to the legal context of that measure, in other words, framework within which it occurs.

Hence, as we have explained above, a State cannot, by virtue of the clause—whose purpose is to ensure the most favourable treatment granted to aliens—claim the benefit of the treatment granted

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76 Treaty of Conciliation and Judicial Settlement between Italy and Switzerland, signed at Rome on 20 September 1924, article 5. (League of Nations, Treaty Series, vol. XXXIII, p. 93.)
77 Ibid., article 12, p. 97.
78 A. D. McNair, op. cit., p. 302.
79 Ibid., p. 303 (italics supplied by the Special Rapporteur).
81 Ibid., p. 211, document A/CN.4/228 and Add.1, para. 72.
to nationals. As we have already said, the national treatment clause is essentially different in scope from the most-favoured-nation clause; it is thus not *ejusdem generis* in relation to the latter and its benefits cannot therefore be acquired through the m.f.n.c.

As for the "legal context", reference was made in paragraph 133 of the provisional report to an example drawn from arbitral practice [this is the case dealt with by the Swiss-Italian Conciliation Commission] which shows that the most-favoured-nation clause inserted in an establishment treaty cannot ensure the enjoyment of advantages granted under a treaty of a quite different kind, namely a peace treaty. What is involved here is not the intrinsic nature of the clause, but rather the legal context: the benefit of the clause cannot be wider in scope than the subject of the treaty in which it is inserted. Now, to confine ourselves to the example mentioned, the purpose of a peace treaty is very different from that of an establishment treaty. The argument has been transposed to the question of the effect of the m.f.n.c., embodied in a commercial treaty, with regard to advantages granted within the context of an economic integration system. In the Rapporteur's view, there is no common measure between a treaty designed simply to facilitate international trade and the much more ambitious and fundamental objective of a treaty designed to bring about economic integration in the form of a free-trade area, a customs union or an economic union. It has thus been concluded that the "commercial" m.f.n.c. has no effect with regard to advantages granted within the framework of an integration system.

The primordial importance of the *ejusdem generis* rule for both the State granting the m.f.n.c. and for the beneficiary States thus becomes clear. It is in fact this rule which indicates to the former the extent of its commitments and to the latter the limits of the claims they may legitimately submit.

To sum up, we may say that the clause has no effect unless three conditions are met with regard to the advantage claimed under it:

The subject must be identical or at least similar;

The nature of the standard of reference envisaged under the clause and of the advantage granted must be the same; and

lastly

The legal context of the clause and the framework within which the advantage is claimed must be the same.

A more detailed statement of the *ejusdem generis* rule will probably make it possible to define the scope of the clause more exactly and thus settle a number of differences of opinion which have arisen concerning its effect. 82

(14) The Special Rapporteur is unable to subscribe to this view. It is sustained neither by theory nor by practice. It is built upon one single precedent (the Swiss-Italian case, to which the Special Rapporteur adds the Portuguese-English case) and it constitutes an undue generalization from two isolated instances. The conclusions of the Conciliation Commission and those of Pescatore are rightly criticized by Sauvignon in the following way:

The drawback of the reasoning of the Commission and the Rapporteur of the Institute of International Law is that it has the result of transforming an unconditional clause into a conditional clause: the clause will not become operative unless the most favourable treatment is of a certain kind, and the relationship between the granting State and the third State and the granting State and the beneficiary State are identical or equivalent, which may, moreover, be very difficult to determine. 83

The same writer concludes that:

... in the case considered by the Commission the legal solution seems to lie in the reference to a custom eliminating conventions of a political nature from the field of application of the clause. 84

This conclusion is, however not sustained by anything but a reference to the Portuguese-English case and to the remark of McNair, quoted above. 85 Two cases obviously do not prove the existence of a binding custom. Still, what are the conclusions which could be drawn from these cases? If we accept the rule stated in article 5 that the source of the rights of the beneficiary (and of the corresponding obligations of the granting State) is the treaty containing the clause then it is there that we have to search for a solution to the Italian-Swiss case. The clause contains the promise of the granting State to accord to the beneficiary State the same treatment it accords (of its free will, of course) to any other State. It promises not to discriminate as between States to the detriment of the beneficiary of the clause. The Swiss claim, however, aimed at the extension of the most-favoured-nation promise to treatment which the granting State was obliged to accord on the basis of a Peace Treaty which, in the words of the law officer of 1851, was extorted by other States. The Italian party referred in its contentions to the fact that the Peace Treaty was imposed on Italy. The Conciliation Commission rejected this argument. "Although it may have been motivated by compulsion", 86 the Commission stated, the Peace Treaty is a treaty concluded also on the will of the defendant State (*jamenetsi coactus voluit, attamen voluit*). It is perfectly true that the 1947 Peace Treaty is a binding treaty—with an element of compulsion in it. That element is not enough to invalidate the Treaty, but it is the factor which prevents the favours it grants to the Allies from being granted to Switzerland. The most-favoured-nation pledge promised Switzerland equality of treatment in the field of application of the clause wherever the granting State was free to distribute its favours on its own consideration of policy among its State partners. The members of the Conciliation Commission found, however—on the basis of equity—that the pledge should not extend to favours accorded under the said special circumstances where the grant of Italy was based upon a treaty—a treaty tinged with an element of compulsion. The Italian-Swiss Permanent Conciliation Commission's ruling, if it were not an isolated case supported by one single other instance, could perhaps permit the inference that a most-favoured-nation clause ordinarily does not attract advantages stipulated in a peace treaty. To make the generalization, however, that for the operation of a most-favoured-nation clause not only the subject-matter but also the relation between the granting State and the beneficiary, and the granting State and the third State, must be similar or identical, is not, it is submitted, an approfondissement of the *ejusdem generis* rule, but a stretching of it beyond acceptable limits.

82 P. Pescatore, loc. cit., pp. 207-209.
83 E. Sauvignon, op. cit., pp. 73-74.
84 Ibid.
85 See above, para. 10 of this commentary.
(15) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. Bluntly, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat. The granting State cannot evade its obligations, unless an express reservation so provides, on the ground that the relations between itself and the third country are friendlier or “not similar” to those existing between it and the beneficiary (as in the dictum of the Swiss-Italian Conciliation Commission). It is only the subject matter of the clause which must belong to the same category, the idem genus, and not the relation between the granting State and the third State on the one hand and the relation between the granting State and the beneficiary State on the other. It is also not proper to say that the treaty including the clause must be of the same category (eiusdem generis) as that of the benefits which are claimed under the clause. To hold otherwise would seriously diminish the value of a most-favoured-nation clause.

(16) The question of the effect of most-favoured-nation clauses on advantages accorded by multilateral treaties (inter alia “treaties of integration”) and on advantages granted as “national treatment”, topics touched in Mr. Pescatore’s quoted passage will be discussed later.

**Article 8. Acquired rights of the beneficiary State**

An agreement between the granting State and one or more third States confining certain benefits to their mutual relations does not affect the rights of the beneficiary State against the granting State under a most-favoured-nation clause unless the beneficiary State expressly consents to the restriction of its right in writing.

**COMMENTARY**

(1) If State A grants most-favoured-nation treatment to State B (and, in case of a multilateral treaty, also to States B1, B2, B3 . . . Bx), it is obliged to extend to State B (B1, B2, B3 . . . Bx) all favours it accords to any other State: to State C in a bilateral agreement (or to States C1, C2, C3 . . . Cx) in a multilateral agreement.

Should States A and C (C1, C2, C3 . . . Cx) agree to accord each other special benefits but withhold the same from others, such agreement cannot affect the right of B (B1, B2, B3 . . . Bx) to claim from A the favours granted to C (C1, C2, C3 . . . Cx).

(2) The rule clearly follows from the general rule regarding third States of the Vienna Convention on the Law of Treaties (articles 34-35) and also from the nature of the most-favoured-nation clause itself. The statement of the rule is, however, warranted by the fact that there exist a number of agreements aiming more or less clearly at a result of the kind referred to in the article, notwithstanding the doubts about the effect of such agreements upon the right of third States, beneficiaries of a most-favoured-nation clause. Such agreements can take the form of treaty provisions (“clauses réservées” in French) or they may purportedly be implied in certain multilateral treaties.

(3) The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon material reciprocity. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936, as follows:

This régime of unconditional equality [established by the operation of an unconditional most-favoured-nation clause] cannot be affected by the contrary provisions of . . . conventions establishing relations with third States.

(a) The “clause réservée”

(4) In the League of Nations Economic Committee there was a discussion of the question, originally raised at the Diplomatic Conference held at Geneva to draw up an International Convention on the Abolition of Import and Export Prohibitions and Restrictions, whether States not parties to the proposed Convention could, by virtue of bilateral agreements based on the most-favoured-nation clause, claim the benefit of any advantages mutually conceded by the signatories of the International Convention. At the Conference it was soon realized, however, that this question could not be answered in the Convention, which could not affect the contents of bilateral agreements based on the most-favoured-nation clause.

In the Economic Committee, a proposal was made to adopt a provision designed to restrict the stipulations of the Convention to the contracting parties.

(5) The first paragraph of article 6 of the International Convention for the Unification of Certain Rules Relating

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87 In connexion with the problem of “like products”, see the relevant passage in the excerpts from the conclusions of the Economic Committee of the League of Nations in regard to the most-favoured-nation clause annexed to the Special Rapporteur’s first report (Yearbook . . . 1969, vol. II, p. 178, document A/CN.4/213, annex I); and articles I, II and XIII of the General Agreement on Tariffs and Trade (United Nations, Treaty Series, vol. 55, pp. 196-200, 204-208 and 234-238; ibid., vol. 62, pp. 82-86 and 90; ibid., vol. 138, p. 336). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose—these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (ibid., vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (ibid., vol. 347, p. 127).


89 See above, para. 13 of this commentary.

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to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926 reads as follows:

The provisions of this Convention shall be applied in each contracting State, with the reservation that its benefits may not be extended to non-contracting States and their nationals, and that its application may be conditioned on reciprocity.94

The following remark is made concerning this provision by Vignes:

Such a provision has the disadvantage of failing to release contracting States from their obligations under previous clauses, of having the status of res inter alios acta for the other States which are parties to those clauses and thus placing the States which subscribe to it in the position of being potential violators of the clause.95

The reference in the clause to reciprocity does not counteract its inherent weakness, because unconditional obligations cannot be transformed into conditional ones without the consent of the respective beneficiaries.

(6) A somewhat milder version of the clause has been inserted in the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages signed at Brussels also on 10 April 1926.98 Article 14 of the Convention reads as follows:

The provisions of this convention shall be applied in each contracting State in cases in which the vessel to which the claim relates belongs to a contracting state, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this convention in favor of the nationals of a non-contracting state.

(7) Article 98, paragraph 4 of the Havana Charter of 24 March 1948, which was signed with the intention of establishing an International Trade Organization, reads as follows:

Nothing in this Charter shall be interpreted to require a Member to accord to non-Member countries treatment as favourable as that which it accords to Member countries under the provisions of the Charter, and failure to accord such treatment shall not be regarded as inconsistent with the terms or the spirit of the Charter.97

The nature of this provision, which is not a “clause réservée” in the strictest sense of the expression, and its criticism by the representative of the Soviet Union in the Economic and Social Council, were discussed in the Special Rapporteur's second report.98 The provision was not included in the General Agreement on Tariffs and Trade.

(8) The drafters of the Treaty Instituting the European Coal and Steel Community 99 did not adopt a “clause réservée”; they did include, however, an important provision in the “Convention containing the transitional provisions” signed at Paris on 18 April 1951:

**EXCEPTION TO THE MOST-FAVORED-NATION CLAUSE**

**Section 20**

While regard to those countries benefiting from the most-favoured-nation clause through the application of Article 1 of the General Agreement on Tariffs and Trade, the member States shall take joint action towards the Contracting Parties to the above-mentioned Agreement in order to exempt the provisions of the present Treaty from the application of the article in question. If necessary, a special session of the Contracting Parties to the G.A.T.T. shall be requested for this purpose.

As concerns those countries which, while not parties to the General Agreement on Tariffs and Trade, nevertheless benefit from the most-favored-nation clause by virtue of bilateral agreements in effect, negotiations shall be undertaken upon the signature of the Treaty. In the absence of consent on the part of the interested countries, such commitments shall be modified or denounced in accordance with the terms thereof.

Should a country refuse its consent to the member States or to any one of them, the other member States agree to lend effective assistance, which may even extend to denunciation by all of the member States of the agreements concluded with the country in question.100

While the provision in the third paragraph can justly be criticized from the economic or political point of view as too “radical” or “threatening”,101 from the strictly legal point of view it clearly demonstrates that the commitment of the granting State under a most-favoured-nation clause cannot be terminated or modified by means other than those offered by the law of treaties.

(9) The treaty establishing the European Economic Community signed at Rome on 25 March 1957 contains the following provision:

**Article 234**

The rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of the fact that the advantages granted under this Treaty by each Member State form an integral part of the establishment of the Community and are therefore inseparably linked with the creation of common institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.102

Paragraphs 1 and 2 voice the same ideas as those included in section 20 of the Convention containing the transitional provisions to the treaty instituting the European Coal and Steel Community quoted above. Paragraph 3 is closer to a “clause réservée” but it avoids

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affecting directly the rights of outsider States. Vignes calls the provision of paragraph 3 "an explanatory and incitant provision. 103"

This "incitant element" is viewed more seriously by the Soviet international law textbook according to which the somewhat obscure formulation of Art. 234 cannot conceal its meaning which lies in obliging every party to the Treaty to deny third countries the extension, in accordance with previously concluded agreements, of the same privileges as are enjoyed by members of the bloc. 104

The approach of a French writer, Thiebaut Flory, is different:

How can the Member States of EEC reconcile the commitments resulting for them from the signing of the Treaty of Rome with the obligations which they had assumed previously by signing multilateral agreements such as GATT? Under article 234 of the Treaty of Rome, the principle of fidelity to prior commitments should predominate. By submitting the Treaty of Rome for consideration by GATT and exhibiting a conciliatory attitude towards the contracting parties, the Six have respected that principle. 104

The two views quoted last, however contradictory at first sight, are not irreconcilable. The first sees in the provision its "incitant" element, the second appreciates that in article 234, taken as a whole, the contracting parties implicitly recognize the validity of their previous pledges.

(10) The European Convention on Establishment signed at Paris on 13 December 1955 does not contain any "clause réservée" either. According to Vignes:

... when [this] Convention was drawn up ... [the drafters first thought] of inserting an express provision excluding non-signatories of the Convention from its benefits, but that idea was discarded because such a provision would have been res inter alias acta. The drafters then confined themselves to inserting in the preamble of the Convention a declaratory sentence stating (and seeking to convince non-Member States of the fact) that the advantages to be granted to each other by the signatories of the Convention were conceded solely by virtue of the closeness of their association.

However, it appears that even the signatories of the Convention were not convinced of the merits of their method and that certain delays in ratifying the Convention were due to a desire to ensure that third States would not claim its benefits. 104

The text of the Preamble, which is relevant in this connexion, reads as follows:

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is to safeguard and to realise the ideals and principles which are the common heritage of its Members and to facilitate their economic and social progress;

Recognising the special character of the links between the member countries of the Council of Europe as affirmed in conventions and agreements already concluded within the framework of the Council ...;

103 D. Vignes, op. cit., p. 293.


106 D. Vignes, op. cit., pp. 283-284; see also A. Ch. Kiss, op. cit., pp. 478-484.


108 Ibid., vol. 197, p. 6.

109 Ibid., vol. 597, p. 42.

110 Ibid., p. 46.

Being convinced that, by the conclusion of a regional convention, the establishment of common rules for the treatment accorded to nationals of each Member State in the territory of the others may further the achievement of greater unity;

Affirming that the rights and privileges which they grant to each others' nationals are conceded solely by virtue of the close association uniting the member countries of the Council of Europe by means of its Statute;

Noting that the general plan of the Convention fits into the framework of the organisation of the Council of Europe,

Have agreed as follows: . . . 107

(11) An inverted clause réservée, i.e. a clause expressly allowing the granting of the benefits of the multilateral treaty to outsiders can be found in article III of the Agreement of 15 July 1949 for facilitating the international circulation of visual and auditory materials of an educational, scientific, and cultural character:

... 4. Nothing in this Agreement shall require any contracting State to deny the treatment provided for in this article to like material of an educational, scientific, or cultural character originating in any State not a party to this Agreement in any case in which the denial of such treatment would be contrary to an international obligation or to the commercial policy of such contracting State. 108

(12) The Convention on Transit Trade of Land-Locked States of 8 July 1965 contains the following provision (article 10) on the relation to the most-favoured-nation clause:

1. The Contracting States agree that the facilities and special rights accorded by this Convention to land-locked States in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. A land-locked State which is not a Party to this Convention may claim the facilities and special rights accorded to land-locked States under this Convention only on the basis of the most-favoured-nation clause of a treaty between that land-locked State and the Contracting State granting such facilities and special rights. 109

The preamble of the 1965 Convention reaffirms principle VII relating to transit trade of land-locked countries adopted by the United Nations Conference on Trade and Development:

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause. 110

This principle stems from a proposal for an article on exclusion of the application of the most-favoured-nation clause included in a set of draft articles on access to the sea of land-locked countries submitted by Czecho-
slovakia to the Preliminary Conference of Land-locked States in February 1958. The proposal was explained as follows:

The fundamental right of a land-locked State to free access to the sea, derived from the principle of the freedom of the high seas, constitutes a special right of such a State, based on its natural geographical position. It is natural that this fundamental right belonging only to a land-locked State cannot be claimed, in view of its nature, by any third State by virtue of the most-favoured-nation clause. The exclusion from the effects of the most-favoured-nation clause of agreements concluded between land-locked States and countries of transit on the conditions of transit is fully warranted by the fact that such agreements are derived precisely from the said fundamental right.  

It was this principle VII on which the drafters of the Convention relied and article 10 is seemingly nothing else but the translation of the principle into practical measures. Hence the question of the validity of article 10 vis-à-vis States not parties to the Convention turns on the nature of the “principle” on which it relies. Is it a principle derived from existing positive law or a principle derived from a conceptual postulate? Does the consensus expressed in UNCTAD suffice to establish the principle as customary law or is the principle no more than an inchoate rule of law, “a ‘stage’ in the progressive development and codification of the principles of international law”, which needs to be made concrete in the practice of individual States before it can acquire the character of a fully fledged rule of international law?  

(13) There is no authority expressly denying the rule proposed in article 8.

... The validity of the “clause réservée” is difficult to assess. Since the “clause réservée” is *res inter alias acta* as far as the beneficiary State entitled to claim most-favoured-nation treatment is concerned, it is hard to see how that clause, to which the State in question has not acceded, can reduce the scope of the commitments assumed towards it by the granting State. 

The same writer tries to distinguish between two situations:

... If the treaty granting the privileged advantages and making them the subject of a “clause réservée” predates the convention according most-favoured-nation treatment, it could be argued, taking into account the publicity necessarily given to treaties, that the beneficiary State could not have been unaware of the commitments entered into by the granting State and the “clause réservée” relating to those commitments. In such circumstances, the beneficiary State may be regarded as implicitly acceding to the “clause réservée”. However, in the case of a “clause réservée” laid down after the most-favoured-nation clauses, the granting State, which has not attached to the latter clauses any accompanying provision limiting their scope, cannot, *a posteriori*, avoid their application by virtue of a commitment entered into with the favoured State to which the granting State has not been a party. 

This distinction, however, seems unwarranted and the argumentation in favour of the effect of the *clause réservée* stipulated previously to the most-favoured-nation clause is not sustained by any rule of the law of treaties. The author quoted himself abandons this idea when he concludes as follows:

... We know the solution ... given by the International Court of Justice [in the *Anglo-Iranian Oil Co.* case]. The legal basis for most-favoured-nation treatment lies in the treaty which provides for such treatment, and the advantages accorded to the third State apply to the beneficiary State only by reference. Consequently, the “clause réservée” cannot be invoked against the State which is a beneficiary of the most-favoured-nation clause, since the rights of that State do not derive from the treaty containing the “clause réservée”.

(b) Multilateral treaties

(14) It seems to follow from the foregoing that a *clause réservée*, i.e. a treaty stipulation whereby a granting State and one or more “third States” expressly exclude the operation of a most-favoured-nation clause, does not affect the treaty rights of the State beneficiary of that clause. Hence, treaty relations between the granting State and third States without an express stipulation in the sense mentioned can even less affect the rights of the beneficiary State. Still there is a certain amount of controversy concerning the question whether, in a defined sphere of relations between States, certain types of agreement should be excepted from the operation of the most-favoured-nation clause. Here we come to the topic of “Plurilateral treaties”, and the reader is referred to the Special Rapporteur’s first report, an annex to which gives a brief summary of a digested report prepared by the League of Nations Secretariat in 1933. The matter was briefly raised in the course of the Commission’s deliberations and therefore the presentation of a somewhat more detailed background material would seem to be appropriate in order to elucidate the question. Without dealing with the antecedents, it will be recalled that the question of plurilateral agreements played a prominent role in the 1933 World Monetary and Economic Conference. A Preparatory Commission of Experts prepared for the Conference a draft annotated agenda, the relevant section of which reads as follows:

A suggestion which has been strongly pressed in various quarters is that States should admit an exception to the most-favoured-nation clause whereby advantages derived from plurilateral agreements should be limited to the contracting States and to such States...
as may voluntarily grant equivalent advantages. This proposal (which has already been adopted in certain bilateral treaties) should certainly be most carefully studied. It has been argued, in support of this proposal, that, in the absence of an exception of this kind, the conclusion of collective conventions would encounter insuperable difficulties, since the application of the clause would, in such circumstances, place a premium on abstention. On the other hand, it has to be borne in mind that the circumstances of various countries differ considerably, so that in many cases they could not adhere to a plurilateral agreement when they are unaware of the concrete cases to which its provisions might later be applied and of the possible consequences which its application might involve for themselves. Moreover, there would be a danger of provoking the formation of mutually opposed groups of countries, thus aggravating the very evils which it is sought to mitigate. Finally, it has been emphasized that care must be taken to avoid prejudicing the rights of third parties.

In any case, these exceptions must be subject to the conditions that agreements of this kind be open to the adhesion of all interested States and that their aim should be in harmony with the general interest. Amongst the conditions that might be considered for this purpose, mention may be made of a proviso that these agreements shall have been concluded under the auspices of the League of Nations or of organisations dependent on the League. Further, these agreements must not involve new hindrances to international trade vis-à-vis countries having most-favoured-nation rights. Finally, "collective agreements" can only be regarded as such when they comply with certain conditions to be determined, as to the number of the participating States.

The Conference should endeavour to find a solution for the whole of this question which will reconcile the interests of all.\(^{119}\)

(15) In the era preceding the 1933 Conference, proposals for reaching agreement as to preferred status for collective arrangements came from Europe and were intended in some form or another to cope with American competition in foreign trade on the European market.\(^{120}\) Such proposals met with strong opposition from the United States. The situation changed somewhat at the 1933 Conference, where the United States Secretary of State Mr. Cordell Hull, outlined the conditions under which the United States would be willing to accept the exception of multilateral arrangements from most-favoured-nation commitments.

The provision proposed by Mr. Hull for adoption by the Conference read as follows:

The participating Governments urge the general acceptance of the principle that the rule of equality shall not require the generalization to non-participants of the reduction of tariff rates or import restrictions made in conformity with plurilateral agreements that give reasonable promise of bringing about such general economic strengthening of the trade area involved as to prove of benefit to the nations generally; provided such agreements:

"(a) Include a trade area of substantial size;

"(b) Call for reductions that are made by uniform percentages of all tariff rates or by some other formula of equally broad applicability;

"(c) Are open to the accession of all countries;

"(d) Give the benefit of the reductions to all countries which in fact make the concessions stipulated and;"


\(^{120}\) See details in J. Viner, op. cit., pp. 22 et seq.

(e) When the countries party to the plurilateral agreement do not, during the term of the plurilateral treaty, materially increase trade barriers against imports from countries outside of such agreement."\(^{121}\)

The London Conference, however, "... was not only fated to be an addition to the already long list of abortive international economic conferences but, as the result of President Roosevelt's famous message blasting the currency stabilization proposals before the Conference, it was destined to collapse without even the standard amount of pretense that it had succeeded in accomplishing anything of consequence."\(^{122}\) Later in 1933, at the Seventh International Conference of American States, held at Montevideo, Secretary Hull submitted and obtained the adoption in principle of a draft agreement having much in common with the proposal he had submitted to the London Conference.

(16) The United States proposal led to the opening for signature on 15 July 1934 of an Agreement concerning non-application of the most-favoured-nation clause to certain multilateral economic conventions.\(^{123}\) The substantive provisions of the Agreement provide:

**Article I**

The High Contracting Parties, with respect to their relations with one another, will not, except as provided in Article II hereof, invoke the obligations of the most-favored-nation clause for the purpose of obtaining from Parties to multilateral conventions of the type hereinafter stated, the advantages or benefits enjoyed by the Parties thereto.

The multilateral economic conventions contemplated in this Article are those which are of general applicability, which include a trade area of substantial size, which have as their objective the liberalization and promotion of international trade or other international economic intercourse, and which are open to adoption by all countries.

**Article II**

Notwithstanding the stipulation of Article I, any High Contracting Party may demand, from a State with which it maintains a treaty containing the most-favored-nation clause, the fulfilment of that clause insofar as such High Contracting Party accords in fact to such State the benefits which it claims.

Notwithstanding the statement of Secretary Hull quoted in the Commission,\(^{124}\) this Agreement can hardly be interpreted otherwise than as an expression of the view that a most-favoured pledge, unless otherwise provided, extends the benefits granted under a multilateral agreement. (It seems that the position taken by the United States at the time is similarly interpreted by


\(^{122}\) J. Viner, op. cit., p. 36.

\(^{123}\) Agreement between the United States of America, Economic Union of Belgium and Luxembourq, Colombia, Cuba, Greece, Guatemala, Nicaragua and Panama to refrain from invoking the Obligation of the Most-favoured-nation clause for the purpose of obtaining the Advantages or Benefits established by Certain Economic Multilateral Conventions (League of Nations, Treaty Series, vol. CLXXV, p. 9).

\(^{124}\) For reference, see foot-note 117.
The intention of the Agreement obviously was to create by common consent a conventional and if possible widely accepted, exception to the general rule. The experiment failed because only three States (and not two as indicated in the first report) became parties to the Agreement: Cuba, Greece and the United States. Little significance can be attributed to the fact that when signing the Agreement, ad referendum, the Belgian Ambassador took the attitude that it did not constitute a new rule but merely stated that which was already international law. What the Belgian Ambassador considered settled law in 1935 was put forward by the Belgian Premier in 1938 as a proposal. M. van Zeeland in his report submitted upon the request of the British and French Governments recommended that

Exceptions to M.F.N. to be admitted in order to allow the formation of group agreements aimed at lowering tariff barriers, provided these are open to the accession of other States.

The idea that the most-favoured-nation clause should not attract benefits resulting from provisions of multilateral trade conventions open for all States found its way into the resolution adopted by the Institute of International Law at its fortieth session (Brussels, 1936).

In the field of theory it was a Japanese writer who proposed that a distinction be made in the field of international trade and customs tariffs between "collective treaties of special interest" and "collective treaties of general interest". Most-favoured-nation clauses embodied in bilateral treaties would attract the benefits stipulated in the former but would not give the right to advantages promised in treaties of the latter types because, the argument went, these treaties being open to all States their advantages can be easily acquired by accession. In this way acceding States assume also the obligations imposed by the treaty and put themselves in a position of equality with the other parties to it, whereas through the operation of a most-favoured-nation clause they would claim only the advantages of the multilateral treaty without submitting to its obligations.

Ito's theory received scathing criticism from E. Allix. Referring to the argument based on the openness of the multilateral treaties in question he wrote:

Two answers may be made to this: the first is that, if the clause is unconditional, it will be turned into a conditional clause since the country acceding to the treaty will have to assume the obligations of that treaty in order to acquire its advantages. To maintain that any other solution would be immoral would be to question the very concept of the unconditional clause, since it invariably has the effect of conferring advantages without corresponding obligations.

Moreover, how can the criticism levelled at the unconditional clause in connexion with plurilateral treaties be reconciled with the Economic Committee's recommendation that the unconditional formula should always be used? Furthermore, the fact that the commitment entered into becomes burdensome at a particular point in time is insufficient grounds for arrogating the right to modify it.

In any event, what is an open treaty? Mr. Ito himself mentions the case of a treaty to which all States wishing to do so could theoretically become parties but whose terms are such that, in practice, they could only be fulfilled by the original signatories.

Furthermore, even if those terms can be fulfilled, they are far from being unimportant. A State acceding to the treaty at a subsequent stage would have to accept them without having been able to discuss them. Such a State may find the obligations imposed on it in return for advantages to which it would in fact be entitled without counterpart if the clause was unconditional more burdensome than do other countries. It may also have special reasons for not acceding to the treaty. Affiliation to a group, even one of a purely economic character, invariably has political repercussions which may preclude such affiliation.

To call upon the country to which the clause has been accorded to accede to an agreement which it may find unacceptable is rather like someone telling his creditor: "I have promised to pay you a million, but I am absolved from having to do so because you are free to marry Miss X, whose dowry will provide you with that amount."

The fact that, in such a case, all the benefits of the clause would be withdrawn from the country to which an undertaking has been made also emerges clearly from the fact that it would be placed on exactly the same footing as countries which had not obtained the promise of most-favoured-national treatment and which are in just as good a position as that country to accede to the open treaty.

We are thus led to conclude that the most-favoured-nation clause is indeed an obstacle to the negotiation of plurilateral treaties and that that obstacle can be removed only by an express reservation in the instrument embodying the clause or by the amicable agreement of the States beneficiaries of the clause.

The views of Allix have received support from Rousseau, who writes:

... whatever the arguments in favour of the opportuneness of excluding [from the advantages of a collective treaty] the State party to the bilateral treaty, such exclusion is difficult to reconcile with the most-favoured-nation clause and clearly contradicts the guarantees of equality previously given to the State which is the beneficiary of that clause. While the ostensible purpose of such action would be to thwart the selfish designs of a State wishing to obtain tariff advantages cheaply, would it not be even more immoral to deny a co-contractor the application of a clause whose benefits it had previously been promised?

Rousseau shares the conclusions of Allix:

It must be recognized that, from the point of view of legal technique, the latter solution [an express reservation or the amicable agreement of the States beneficiaries of the clause] was more correct, since it shows greater concern to respect the concordance of the wills of States, which is the only sound basis for positive law...

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117 G. H. Hackworth, op cit., p. 293.
124 Ibid., p. 778.
(18) Practice also showed that the problem of conflict between plurilateral arrangements and most-favoured-
nation obligations cannot be solved on the line of Ito's theory. Under the Convention, negotiated at Ouchy but
signed at Geneva, on 18 July 1932, by Belgium, Luxembourg, and the Netherlands, the parties agreed, inter
alla, that there should be no increases in existing duties or application of new duties on imports from each other;
that existing duties on imports from each other should be reduced by 10 per cent per annum until the total
reduction reached 50 per cent; that there should be no new barriers other than import duties on imports from
each other; and that there should be open entry to the convention on the part of other countries and extension
of its benefits to non-entering countries if they in fact carried out its terms. Belgium and the Netherlands,
however, both had commercial treaties containing the most-favoured-nation clause with the United Kingdom
and other countries, and the Ouchy Convention provided that it should not come into effect until such countries
had waived their rights. Great Britain refused to waive its rights, the Ottawa Conference held in the same year
passed a resolution declaring that regional agreements could not be allowed to override most-favoured-nation
obligations and the United States made no reply to the request for a waiver. The Convention, in consequence,
lapsed without ever coming into operation.\footnote{136} The Hague Convention of 28 May 1937 was signed by the Ouchy
Convention countries plus Norway, Sweden, Denmark and Finland. The Hague Convention provided for
specified "bindings" of tariff rates, and for removals of specified existing quantitative restrictions on imports
from participating countries and undertakings not to introduce new ones on commodities not already subject
to them. All non-participating States were declared eligible to adhere to the Convention in conformity with
terms to be negotiated between them and the countries already parties thereto. The Hague Convention came
into actual operation, but the Netherlands declined to renew it at the end of its first year of operation, and the
other parties to it thereupon allowed it to lapse. Again the cause of the failure was that other countries, especially
the United Kingdom, insisted on the most-favoured-
nation right.\footnote{138}

(c) \textit{GATT and non-member States}

(19) The General Agreement on Tariffs and Trade does not include a provision on the lines of article 98, para-
graph 4 of the Havana Charter.\footnote{137} The corner-stone of the General Agreement is an unconditional most-
favoured-nation clause. The agreement is open to accession by all States, at least this is how certain authors\footnote{138}
interpret the text of article XXXIII, which reads as follows:

\begin{quote}
A government not party to this Agreement... may accede to this Agreement... on terms to be agreed between such government and the CONTRACTING PARTIES. Decisions of the CONTRACTING
\end{quote}

\footnote{138 J. Viner, \textit{op. cit.}, pp. 30-31.}

\footnote{136 Ibid.}

\footnote{137 See above, para. 7.}

\footnote{138 E. Sauvignon, \textit{op. cit.}, p. 266.}

What is the position of third States, not members of \textit{GATT}? Can they claim under bilateral most-favoured-
nation clauses \textit{GATT} treatment from members? There is no reason for a negative answer to this question. That
some treaties do expressly except \textit{GATT} favours from the operation of the clause does not contradict but
rather supports this view.\footnote{140}

The Working Group on organizational and functional questions of \textit{GATT} considered in 1955 the question of
the extension by contracting parties to non-contracting parties of the benefits of the Agreement by means of
bilateral agreements. It was pointed out in the discussion that non-contracting parties frequently received all the
benefits of the Agreement without having to undertake its corresponding obligations. Despite some dissatisfaction
with this situation, the majority consensus was that the attitude which the contracting party wished to adopt
in this respect was a matter for each contracting party to decide.\footnote{141} According to the Soviet textbook of inter-
national law, Austria, after its accession to the \textit{GATT}, did not immediately extend \textit{GATT} rates of customs
duties to the Soviet Union notwithstanding the most-
favoured-nation treaty in force between the two
countries. The extension of such rates took place only
upon the express demand of the USSR. Other Western European countries having most-favoured-nation treaties
with the Soviet Union extended \textit{GATT} benefits to Soviet
products automatically.\footnote{142}

(20) In \textit{C. Tennant, Sons and Co., of New York v. Dill}\footnote{143}
before the District Court for the Southern District of
New York the claimants invoked a trade agreement
between the United States and Paraguay providing for
most-favoured-nation treatment as to duties and customs
formalities.\footnote{144} They were seeking to obtain on the ground
of the clause the benefits of the "en route" exception to
quota restrictions which is provided for in \textit{GATT} (article XIII, paragraph 3 (b)).\footnote{145} This exception allows
goods en route at the time of the proclamation of quota
restrictions to enter the country applying the restrictions.
Paraguay was not a party to \textit{GATT}, and the plaintiffs
relied on the grant of most-favoured-nation treatment in
the bilateral agreement. The Court, in 1957, rejected the
claim but only on the ground that the "most-favoured-
nation" clause contained in article I of the Paraguayan
trade agreement, drafted with clarity and particularity
extended to customs duties and other matters, but did

\footnote{139 United Nations, \textit{Treaty Series}, vol. 62, p. 34.}

\footnote{140 E. Sauvignon, \textit{op. cit.}, p. 267.}

\footnote{141 \textit{GATT} document L/327, quoted in K. Hyder (Hasan),

\footnote{142 State Institute of Law of the Soviet Academy of Sciences,
\textit{Kurs...} (\textit{op. cit.}), p. 270.}

\footnote{143 158 F. Supp. 63, 67-68 (S.D.N.Y. 1957), quoted in M. White-
man, \textit{op. cit.}, pp. 760-762.}

\footnote{144 Agreement of 12 September 1946, relating to reciprocal trade
(United Nations, \textit{Treaty Series}, vol. 125, p. 179).}

\footnote{145 \textit{Ibid.}, vol. 55, p. 238.}
not contain language from which its applicability to import restrictions involving the fixing of quotas could be implied:

It seems clear, therefore, that the “most-favored-nation” clause contained in the Trade Agreement with Paraguay is not sufficiently broad to entitle Paraguay, and, hence, the plaintiff, to the benefits of the en route provision of GATT.\textsuperscript{146}

Thus the judgement implicitly acknowledged that the benefits of GATT (if \textit{ejusdem generis}) can be claimed under a bilateral clause.

\textbf{(d) Other open multilateral agreements and States not parties}

\textit{(21) Before the United States became a party to the Agreement on the importation of educational, scientific and cultural materials of 22 November 1950 (Florence Agreement),\textsuperscript{147}} it claimed, under most-favoured-nation clauses, for United States products the same treatment as was accorded by a party to the Agreement to the products of another party. Thus, on 12 June 1963, the Department of State instructed the United States Embassy at Rome:

In view of the disadvantageous competitive position in which U.S. exports of scientific equipment have been put by the Italian Government’s action, it is suggested that the Embassy take the matter up informally with the proper Italian authorities. The objective of such discussions should be to obtain duty-free treatment of such equipment if imported from the United States for sale to approved institutions. In its approach to the Italian Government, the Embassy might point out that article XIV-1 of our FCN Treaty with Italy\textsuperscript{148} and article I:1 of GATT\textsuperscript{149} provide for unconditional most-favoured-nation treatment of U.S. products. Although such treatment is subject to specified exceptions, the Florence Agreement does not appear to fall within any of these exceptions. If Italy accords duty-free treatment under certain circumstances to scientific equipment of any other country, then it must accord the same treatment to imports of U.S. scientific equipment.\textsuperscript{150}

In connexion with its presentation to Congress of proposed implementation legislation of the United States for this Agreement, the Executive prepared an affirmative reply to the question whether a country not a party to the Agreement would “be entitled under the most-favoured-nation clause to the duty-free treatment accorded by a party to the Agreement to another such party”, and it was explained that “the United States considers that legally a country not a party to the agreement would be entitled to such treatment pursuant to an unconditional most-favoured-nation clause with a party thereto”, although it was recognized that some parties to the agreement might give a negative answer to the question.\textsuperscript{151}

In a discussion on 21 October 1957, at a Meeting of Governmental Experts on the Agreement on the Importation of Educational, Scientific and Cultural Materials (held at Geneva, 21-29 October 1957), the following was reported regarding a statement by the French representative:

Mr. Rossin (France) recalled that the provisions of paragraph I of Article I were applicable only to materials mentioned in Annexes A, B, C, D and E of the Agreement which were the products of another Contracting State. France, however, granted duty-free entry for such materials, irrespective of the country of origin or exportation, for it considered that, by virtue of the unconditional “most-favoured-nation” clause included in the trade agreements which it had concluded with most countries, and having regard to the obligations mentioned in Article IV, subparagraph (a), of the Agreement, no distinction as to country of origin or exportation should be made with regard to the materials concerned. The French Government wished to know whether such an interpretation was accepted by the other Contracting States.\textsuperscript{152}

Article IV (a) of the Florence Agreement, referred to above, states that the parties “undertake that they will as far as possible ... continue their common efforts to promote by every means the free circulation” of the materials to which the agreement relates, “and abolish or reduce any restrictions to that free circulation which are not referred to in this Agreement”.\textsuperscript{153}

\textbf{(e) Closed multilateral treaties}

\textit{(22) The material presented in the foregoing seems to prove sufficiently that the rule proposed in article 8, being concordant with the general law of treaties, is valid, and an agreement—express or implied—between the granting State and any third State cannot divest the beneficiary State of rights to which it is entitled under the clause. The study carried out in this domain was based mostly if not exclusively upon practice and doctrine in relation to so-called open multilateral treaties concluded in the field of international trade. With regard to treaties of this kind, there were some arguments adduced based upon the misunderstanding of the nature of the unconditional most-favoured-nation clause, and reference was made to a certain practice purporting to establish an exception to the operation of the most-favoured-nation clause. After a careful examination of practice and doctrine, however, “it ... [was] not possible to discern in ... [the practice of States] any constant and uniform usage, accepted as law ...” \textsuperscript{154} which would warrant the proposal of a rule excepting open-ended multilateral treaties, i.e. the favours resulting from such treaties, from the operation of most-favoured-nation clauses. The arguments for excepting the favours of certain multilateral commercial treaties from the operation of the clause were based upon the openness of such treaties, i.e. on the faculty of the beneficiary State to accede to such treaties and share in its benefits as a participant. The examination and rejection of this argument leads a fortiori to the result that any derogation from the operation of a most-favoured-nation clause in

\textsuperscript{144} See M. Whiteman, op. cit., pp. 761-762.
\textsuperscript{146} Article XIV, para. 1 of the Treaty of Friendship, Commerce and Navigation signed at Rome on 2 February 1948 (ibid., vol. 79, pp. 190 and 192).
\textsuperscript{147} Ibid., vol. 55, p. 196 and vol. 138, p. 336.
\textsuperscript{149} Ibid., p. 767.
\textsuperscript{150} UNESCO/MC/34/SR.I-II, p. 9, as quoted by M. Whiteman, op. cit., p. 768.
\textsuperscript{151} United Nations, \textit{Treaty Series}, vol. 131, p. 30,
respect of treaties not open to accession is out of the question. Still this topic needs further study owing mainly to the fact that the question of the exception from the operation of the clause of favours granted within certain types of closed economic groupings of States is raised from time to time and different theories are advanced to promote the recognition of such exceptions. Suffice it to refer here briefly to paragraph 7 of the 1936 resolution of the Institute of International Law. As to the 1936 resolution it has been rightly pointed out by Vignes that it goes much further than originally contemplated by Nolde, the Rapporteur, and that the exception of regional arrangements ("mutual and exclusive agreements between States, implying the organization of regional or continental economic régimes") was adopted by only 19 votes to 14. Vignes, while believing that the resolution had a "progressive character", writes:

The merits of such exceptions may be questioned. They are formulated in very broad terms and do not appear to have been recognized in subsequent practice, at least not universally.

Reference is made also to the text of the 1969 resolution of the Institute. Without touching upon the most important matter dealt with in paragraph 2 (a) it can be safely stated that the importance of its paragraph 2 (b) is limited, first, because it is restricted to most-favored-nations clauses in multilateral conventions on international trade and, second, because there is no indication that the exception is a matter of right. That provision's purpose does not seem to be so much the establishment of a general legal principle as the laying down of a guideline for such unsolved problems as the compatibility of the Treaty of Rome establishing the European Economic Community with the rules of the General Agreement on Tariffs and Trade. The contemplated further study will obviously need to extend to controversial issues such as the "famous problem of the customs union and free trade area... a problem which is very complicated and always of current interest" and it will also have to examine the relation of the proposed rule of article 8 to the conventional and customary exceptions to the most-favored-nations clause.

ANNEX

Resolution adopted on 10 September 1969 by the Institute of International Law at its Edinburgh session (4-13 September 1969)

II. THE MOST FAVOURED NATION CLAUSE IN MULTILATERAL CONVENTIONS

(Fourth Commission)

The Institute of International Law,

Having in mind the Resolution passed at its 40th Session (1936) on "the Effects of the Most Favoured Nation Clause in Matters of Trade and Navigation", especially as regards the unconditional nature of the clause, the automaticity and extent of its effects, as well as the observation of the principle of good faith in the application thereof,

Considering the need to review the problems of application and interpretation of the clause as a result of the profound changes in international relations which have been caused, since then, by the introduction of multilateral and institutional methods in the field of economic relations, both at world and regional level, and taking into account the various economic systems of States, together with the requirements of an economic policy in support of developing countries,

Having examined the thorough report by Mr. Pierre Pescatore, Rapporteur of the Fourth Commission, on the Most Favoured Nation Clause in Multilateral Conventions, and the comments of the Members of that Commission,

Recognizing the greater efficiency of the clause through the incorporation of the most favoured nation treatment in multilateral institutional systems,

Taking into consideration that the investigation of the subject matter, if it were to lead to exhaustive conclusions, would require the Institute to take up a position on various problems which are still controversial and widely open to discussion and which, to be solved, mainly require political decisions:

1. Takes note of the Report and of its conclusions in thanking the Rapporteur and the Members of the Commission for their contribution to the study of the problem considered;

2. Emphasizes in particular, as regards the most favoured nation clause in multilateral conventions on international trade, the following points contained in the Report:

(a) Preferential treatment in favour of developing countries by means of a general system of preferences based on objective criteria should not be hampered by the clause.

(b) States to which the clause is applied should not be able to invoke it in order to claim a treatment identical with that which States participating in an integrated regional system concede to one another.

(c) Derogations from the clause should be linked with appropriate institutional and procedural guarantees such as those provided by multilateral systems.

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156 See annex below.


158 D. Vignes, op. cit., p. 270.

159 Ibid., p. 280.


161 M. Virally, "Le principe de réciprocité..." (loc. cit.), p. 76.
DOCUMENT A/CN.4/269

Decisions of national courts relating to the most-favoured-nation clause

Digest prepared by the Secretariat

[Original text: English/French/Spanish]  
[29 March 1973]

CONTENTS

<table>
<thead>
<tr>
<th>Abbreviations</th>
<th>117</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>117</td>
</tr>
<tr>
<td>I. The most-favoured-nation clause in matters relating to trade and customs</td>
<td>118</td>
</tr>
<tr>
<td>II. The most-favoured-nation clause in matters relating to treatment of aliens, including inheritance rights, taxation and cautio judicatum solvi</td>
<td>127</td>
</tr>
<tr>
<td>III. The most-favoured-nation clause in consular matters</td>
<td>149</td>
</tr>
</tbody>
</table>

ABBREVIATIONS

GATT General Agreement on Tariffs and Trade  
EEC European Economic Community  
IMF International Monetary Fund  
TSUS Tariff Schedule of the United States  

Introduction

1. The present document, prepared by the Secretariat, contains a “Digest of decisions of national courts relating to the most-favoured-nation clause”. As indicated in the report on its twenty-third session, the International Law Commission requested the Secretariat “to prepare on the basis of the collections of law reports available to it and of the information to be requested from Governments, a ‘Digest of decisions of national courts relating to most-favoured-nation clauses’”. Accordingly, the Secretary-General, by a circular note dated 28 December 1971, invited the Governments of Member States to transmit to him, by 31 July 1972, materials and information concerning national courts’ decisions relating to the most-favoured-nation clause. At the time of the preparation of the present digest, the Secretariat had received information from the Governments of Finland, France, Greece and the Netherlands.\(^1\)

\(^1\) In reply to the Secretary-General’s circular note mentioned above:

Argentina stated the following:

"Only indirectly and incidentally, our highest court, in ruling on the merits of an extraordinary appeal lodged against a decision by the High Court of Santa Fe which denied a claim based on the clauses of an international treaty, confirmed the impugned decision in a judgement of 9 December 1919, signed by Mr. Bermejo, Mr. González del Solar, Mr. Palacio and Mr. Figueroa Alcorta."

(Continued on p. 118.)
2. The present digest is based on the information received from the Governments of the above-mentioned Member States. It also reproduces decisions and other relevant information found in various legal publications available, most particularly the International Law Reports

(Footnote 2 continued)
y Méndez, and ruled... that neither the appellant’s invocation of the powers conferred upon consuls under the treaties concluded with the United Kingdom in 1825 (article 13) and with the Kingdom of Prussia and the States of the German Customs Union in 1857 (article 9), which he claims extend to consuls of the Kingdom of Italy by virtue of the most-favoured-nation clause inserted in the agreements concluded with that Kingdom, nor precedent—if any—would affect the settlement of the point at issue under federal law. In the first place, since these were concessions granted subject to reciprocity, it would have been necessary to show that the Italian Government granted, or was prepared to grant, those same concessions to consuls of Argentina...” (Argentina, Fallos de la Corte Suprema de Justicia: con relación de sus respectivas causas, vol. 130, p. 328). [Translation from Spanish.]

Australia made the following observations:

“There are no decisions of Australian courts relating to the most-favoured-nation clause. The reason is that in Australia it is only the national legislation implementing a treaty and not a treaty itself, which can be relied upon in the national courts. Although where required by a treaty, the principle incorporated in the most-favoured-nation clause has been followed in relevant legislation such as the ‘Customs Tariff’, there is no legislation specifically providing that an individual has a general right to most-favoured-nation treatment as such.”

Iran, referring to the most-favoured-nation clause, said that:

“although this clause has been inserted in certain of our treaties of establishment and trade treaties, it should be noted that its scope is extremely restricted in practice, for the following reasons:

“1) Iranian courts apply the national law aliens in matters relating to their civil status;

“2) The conditions attaching to the residence, establishment and work of foreigners, and to their immovable property, are—subject to reciprocity—identical for all aliens;

“3) In trade matters, Iranian customs regulations are based on a single customs tariff and make no provision for any preferential régime.”

Italy said that

“The absence of any specific ruling by Italian courts in this matters implies that the insertion of the most-favoured-nation clause in the bilateral or multilateral international instrument, that is, as a subject of international law. Accordingly, any dispute regarding the application or non-application of the most-favoured-nation clause acquires the character of an international dispute and, since it is the State that plays the active or passive role in the dispute as a subject of international law, a settlement of any such dispute must be arrived at through referral of the dispute to an arbitral organ or to an institutionally preconceived international court.”

United Kingdom of Great Britain and Northern Ireland observed that

“In the United Kingdom, in accordance with its constitutional practice, treaties concluded by the United Kingdom are not self-executing and do not form part of the law of the land. Before they come into force any necessary legislation is enacted to give effect to them. In many fields traditionally covered by m.f.n. clauses, the legislation of the United Kingdom makes no distinction by reference to nationality, and, accordingly, no specific legislation to give effect to the obligations under a m.f.n. clause is required. In these circumstances there is no occasion for the scope and operation of the m.f.n. clauses to come in issue before the courts of the United Kingdom. For this reason the Government of the United Kingdom are not in a position to transmit any material and information other than the explanation given in this Note concerning the decisions of the courts relating to m.f.n. clauses.”

Thomas W. Bartram v. William H. Robertson
United States Supreme Court, 23 May 1887
United States of America: Reports, vol. 122, pp. 116 et seq.

3. The plaintiffs were merchants doing business in New York, and in March and April 1882, they made four importations of brown and unrefined sugars, the produce and manufacture of the Island of St. Croix, a part of the dominions of the Kingdom of Denmark. The goods were regularly entered at the custom house of New York, the plaintiffs claiming that they should be admitted free of duty under the Treaty with Denmark of 26 April 1826, because like articles, the produce and manufacture of the Hawaiian Islands, were, under the Treaty of 30 January 1875 between the United States and the Hawaiian Islands, admitted free of duty. The defendant, however, who was the collector of the port of New York, treated the goods as dutiable articles, and, against the claim of the plaintiffs, exacted duties upon them which they paid to the collector under protest in order to obtain possession of their goods. They then brought the present action against the collector to recover the amount thus paid. The action was commenced in a court of the State of New York, and, on the motion of the defendant, was transferred to the Circuit Court of the United States. The defendant demurred to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action against him. The Circuit Court sustained the demurrer, and ordered judgment for the defendant; and the plaintiffs brought the case for review. The Supreme Court, which affirmed the judgement, said:

The duties for which this action was brought were exacted under the Act of the 14th of July, 1870, as amended on the 22d of December of that year... The Act is of general application, making no exceptions in favor of Denmark or of any other nation. It provides that the articles specified, without reference to the country from which they come, shall pay the duties prescribed. It was enacted several years after the Treaty with Denmark was made.

That the Act of Congress as amended, authorized and required the duties imposed upon the goods in question, if not controlled by the treaty with Denmark, after the ratification of the treaty with the Hawaiian Islands, there can be no question. And it did not lie with
the officers of customs to refuse to follow its directions because of the stipulations of the treaty with Denmark. Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties upon goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were conditional.

The treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods, the produce or manufacture of that country, imported into the United States. It stipulates for the exemption from duty of certain goods thus imported, in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the treaty with Denmark, and if the exemption is deemed a "particular favor" in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. It does not appear that Denmark has ever objected to the imposition of duties upon goods from her dominions imported into the United States, because of the exemption from duty of similar goods imported from the Hawaiian Islands, such exemption being in consideration of reciprocal concessions, which she has never proposed to make.

Our conclusion is that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty. The treaty with the king of the Hawaiian Islands provides for the importation into the United States, free of duty, of various articles, the produce and manufacture of those Islands, in consideration, among other things, of like exemption from duty, on the importation into that country, of sundry specified articles which are the produce and manufacture of the United States... The language of the first two articles of the Treaty which recite the reciprocal engagements of the two countries, declares that they are made in consideration of the rights and privileges and as an equivalent therefore, which one concedes to the other.

The plaintiffs rely for a like exemption of the sugars imported by them from San Domingo upon the 9th article of the Treaty with the Dominican Republic, which is as follows: "No higher or other duty shall be imposed on the importation into the United States of any article the growth, produce or manufacture of the Dominican Republic, or of her fisheries; and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article the growth, produce or manufacture of the United States, or their fisheries, than are or shall be payable on the like articles the growth, produce or manufacture of any other foreign country, or its fisheries."

... The 9th article of the treaty with that Republic... is substantially like the 4th article in the treaty with the king of Denmark... It is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our Government intended to preclude itself from such engagement with other countries, which might in the future be of the highest importance to its interests.

... The act of Congress under which the duties were collected authorized their exaction. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic; and if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. A treaty is primarily a contract between two or more independent nations... For the infraction of its provisions a remedy must be sought by the injured party through reclaims upon the other. When the stipulations are not self executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the Treaty contains stipulations which are self executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed in the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law, the latter must control. A treaty is primarily a contract between two or more independent nations...
other measures as it may deem essential for the protection of its interests. The courts can afford no redress.

... It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous Treaty not already executed. The duty of the courts is to construe and give effect to the latest expression of the sovereign will. "So far as a treaty made by the United States with any foreign nation can be the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

Consequently the judgement was affirmed.

**Douglas Fairbanks v. United States**

**United States of America : Customs Court, Third Division,**

29 October 1929


5. The subject of this protest was an automobile imported from England and assessed for duty at $35\frac{1}{2} per centum ad valorem under paragraph 369 of the Tariff Act of 1922. The plaintiff contended that the assessment of this countervailing duty on an automobile from Great Britain was in violation of the so-called "favored nation clause" in the 1815 treaty between the United States and Great Britain, for the reason that automobiles from other countries were admitted at a lower rate of duty. From this plaintiff argued that this merchandise should not be assessed with a rate of duty in excess of the lowest rate imposed upon similar merchandise imported into the United States from any country. The Court said:

> In our view there is no violation shown of the "most-favored-nation clause", for the reason that there is no discrimination in our law in that it treats all nations alike. The United States imposes the same rate of duty on automobiles from a particular country levies on automobiles imported from the United States. This is within the spirit of the article quoted above. It is within the power of the exporting country to fix the rate at which such merchandise shall enter the United States. There is mutuality of retaliation as well as reciprocity. The law of the United States makes no exceptions for or against Great Britain. Each country fixes the rate at which the countervailing duty shall be assessed. For the foregoing reasons, the protest is overruled.

**United States v. Domestic Fuel Corporation et al.**

**United States of America : Court of Customs and Patent Appeals,** 2 April 1934


Annual Digest 1933—1934, Case No. 199.

6. This case involved the interpretation of the most-favoured-nation clause in treaties between the United States and Great Britain of 3 July 1815 and the United States and Germany of 14 October 1925. The Revenue Act of 1932 made coal subject to tariff "unless treaty provisions of the United States otherwise provide", and subject to the exception of coal imported from countries whose balance of trade in coal was favourable to the United States during the preceding calendar year. In 1931 such a favourable balance existed with Mexico and Canada, and in 1932 the duty was lifted on coal from those countries. The plaintiffs, importing corporations, paid duties under protest on shipments of coal from Great Britain and from Germany, and sued to recover, claiming that the Revenue Act of 1932 had not repealed or modified the "most-favoured-nation" treaties but had specifically recognized them in the section "unless treaty provisions...otherwise provide", and that the exemptions of Canadian and Mexican shipments entitled the plaintiffs to free importation. The United States Customs Court upheld this contention, and the United States appealed.

7. The Court held that the judgment must be affirmed. The treatment accorded the importations from Mexico and Canada and those from Germany and Great Britain resulted solely from a trade condition which was past in time when the instant Revenue Act became law. It was impossible for any one of the nations involved to alter a fact or condition of that nature. Since a tax on coal clearly could not be levied under the law in imports from Canada and Mexico, the according of different treatment to imports from other countries, based upon a condition incapable of being altered, was discriminatory in a legal sense as well as in fact. Accordingly, the duty assessments here complained of were in conflict with the respective treaty provisions involved. The Court said:

> The treaty with Great Britain belongs to that class of treaties which are called "conditional most-favored-nation treaties", while that with Germany is unconditional.

The latter recites: "Any advantage of whatsoever kind which either High Contracting Party may extend to any article, the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article the growth, produce or manufacture of the other High Contracting Party." Article 7.

The treaty with Great Britain contains no such "unconditionally" or "without request and without compensation" provisions, and...
it is insisted on behalf of appellant that, even if it be found that the coal imported from Germany is entitled to free entry, the coal from Great Britain is not.

In other words, it is insisted that, although the treaty with Germany may be self-executing, the treaty with Great Britain is an executory contract which requires affirmative legislation by Congress to render it effective.

... It would thus seem that the trial court associated the British Treaty of 1815 with the German Treaty of 1925, held the former effective. While we agree with the general conclusion reached by the trial court, we do not place our decision as to the importation from Wales upon the ground adopted by that tribunal, but take the view that each case may be properly determined without reference to the other.

It is our opinion that the Revenue Act of 1932 intended to, and did, take cognizance of the most-favored-nation clauses of all treaties to which the United States were then a party.

The British treaty carries the clear provision: "No higher or other duties shall be imposed on the importation . . . of any articles [from Great Britain into the United States and vice versa] . . . than are or shall be payable on the like articles . . . of any other foreign country. . . ." Article 2.

The treaty and the statute are laws pari materia and must be construed together. Such being the situation, so far as the cases here before us are concerned, we fail to perceive any necessity for considering questions growing out of distinctions between treaties, self-executing in their provisions, and treaties which are not self-executing. As we view the matter, since, in 1932, coal was legally imported into the United States from Canada and Mexico duty free, the law, as contained in the statute and the British treaty, entitled the coal imported in that year from the United Kingdom of Great Britain and Ireland to free entry, without any reference to the treaty with Germany.

... Note In the case George E. Warren Corporation v. United States decided by the United States Court of Customs and Patent Appeals on 12 June 1934 (see Federal Reporter, Second Series, vol. 71, p. 434), the plaintiff corporation, joined with the plaintiff in the above case here separately protested against the assessment and collection of duties on certain importations of coal from Russia in 1932, claiming that although the balance of trade in coal in 1931 was favourable to Russia, and although no treaty whatsoever existed between the two countries at that time, the recognition of treaty provisions in the statute and the existence of "most-favored-nation" clauses in treaties with other countries, and the admission of coal free of duty under the balance-of-trade provision, extended freedom from payment of duty to imports of coal from any country. The Court affirmed a judgement of the United States Customs Court overruling the protest: "... If a nation with which no most-favored-nation treaty exists must be permitted to have access to a country's markets upon the same terms as a country with which there does exist such a treaty, because of that treaty, what necessity exists for separate and distinct commercial treaties between nations? Most-favored-nation treaties are always reciprocal in character, whether they be executory or self-executing. We have none with Russia. Russia may lay whatsoever condition her government may choose to lay upon importations of coal from the United States. Because we have contracts whereby we agree not to discriminate in duties upon the goods of one country, the consideration being that that country accords us the same treatment, are we in any wise legally bound to extend the terms of that treaty to a country which is in no wise bound to reciprocate? We think the answer obviously must be in the negative..." When Congress in section 601 of the Revenue Act of 1932 said that the taxes therein provided should be levied, "unless treaty provisions of the United States otherwise provide," we think the intention was merely to recognize and maintain such contracts as existed between the United States and other nations, and that the phrase has no application to importations from countries with which no treaties exist that do "otherwise provide". Surely only those who are parties to a contract are entitled to the benefits of it, only they are bound by it, and they are bound only to each other.

If nations not parties to a treaty are to obtain its favors and benefits in the same manner as those which are parties, we apprehend much confusion will arise in the realm of international commerce and law.

Let us suppose, for the purpose of illustration, that one of the nations with which the United States has a most-favored-nation treaty by reason of which, under our decision in the Domestic Fuel Corp. Case, supra, coal is entitled to free entry, should, for some reason, elect to abrogate or modify that treaty and impose duties discriminating against the products of the United States. Could it logically be maintained that we would continue bound to admit their coal duty free? We are unable to conceive our government as being so bound. But such would be the inevitable result if the principle here contended for by appellant should be adopted and applied.

We had no treaty with Russia in 1932 which provided "otherwise" than that a tax might be levied upon coal imported therefrom, and Russia was not, by any contract with the United States, in the category of most-favored nations. We owed no legal obligation to Russia and Russia none to us respecting the duties or taxes which should be levied upon products exchanged in commerce between the two countries.

There is nothing in the legislative history of the involved statute substantially all of which history is recited in our opinion in the Domestic Fuel Corp. Case, supra, which leads us to conclude that Congress intended that there should be any constructions of the act other than that here given it.

The Yulu Case
Bush et al. v. United States
United States of America: Circuit Court of Appeals, Fifth Circuit, 16 June 1934

8. The Honduran motorboat Yulu was discovered by the coast guard on 28 October 1932, outside the three-mile zone but within twelve miles of the shore of the United States, within the limits of the New Orleans customs district. She was ordered to heave to, but changed her course and attempted to escape by proceeding away from the coast. She was pursued and captured within the twelve-mile limit. Her master declined to produce a manifest and none was found on board after a search. She was seized and taken to Mobile, Alabama, and there turned over to the collector of customs. Later, libels were filed against the vessel and cargo in the District Court for the Southern District of Alabama. The owners of the vessel and cargo filed motions to dismiss the libels on various grounds, all to the effect that the court was without jurisdiction. The motions to dismiss were overruled and a decree was entered forfeiting the vessel and cargo, under the provisions of sections 584 and 585 of the Customs Act of 17 June 1930.
On appeal, it was contended, *inter alia*, that the Republic of Honduras had entered into a treaty with the United States on 7 December 1927, which contained the most-favoured-nation clause; that by reason of said clause citizens of Honduras were entitled to rely upon the provisions of the treaty of 22 May 1924, between Great Britain and the United States. The Court of Appeals said:

An examination of other treaties between the United States and the countries that had negotiated treaties similar to the British treaty of 1924 discloses that they contain the most favored nation clause. Apparently it never occurred to any one that those countries would be entitled to the benefits of the British treaty because of that clause. This is tantamount to executive interpretation.

It is clear that the provisions of the Honduran treaty above quoted were intended to apply to legitimate trade and not to warrant a violation of the customs laws of the United States because of the most favored nation clause. The Yulu was not entitled to the benefit of the provisions of the British-American treaty of May 22, 1924.

*Minerva Automobiles Inc. v. United States United States of America: Court of Customs and Patent Appeals, 7 February 1938*


Annual Digest 1938-1940, Case No. 196.

10. This was an appeal from the judgement of the United States Customs Court, which had overruled the protest of the appellant against the assessment by the Collector of Customs at the Port of Los Angeles of countervailing duty under paragraph 369 § 1 of the Tariff Act of 1922,9 amounting to 960 Belgian francs per 100 kilos upon an automobile imported from Belgium. Appellant claimed that the automobile should have been assessed with the normal duties under the aforesaid paragraph in view of the most-favoured-nation clause contained in the Treaty of 29 June 1875 between Belgium and the United States.10 The judgement was affirmed. The Court said:

Appellant has not attempted to prove the amount of customs duties which are imposed upon American automobiles by Belgium or by Germany, but states that Germany charges more than 25 per cent ad valorem duty thereof and cites a Treasury Decision to that effect. It, of course, is obvious that if appellant's contentions are sound, it is immaterial what rates of duty are charged by Belgium and Germany.

Appellant freely admits that if its contentions in the instant case are correct, every nation having a treaty containing a most-favored-

nation clause of any character is entitled to have its automobiles exempted from the countervailing duty provided for in the paragraph in dispute. It points out that after the German treaty was entered into, the Reciprocal Trade Agreement Act was incorporated into the Tariff Act of 1930 as section 350 thereof, and states:

"... Therefore, to effectuate its policy of expanding foreign trade without disrupting treaty relations, and to avoid dispute and discrimination, Congress expressly extended all favors granted any one nation, to all other nations."

It is a matter of common knowledge that practically every nation of the world with whom we have commercial relations has a most-favored-nation treaty.

The trial court took the view that since Belgium had a conditional most-favored-nation treaty, it was not entitled to claim the same tariff treatment for automobiles as was extended to Germany which had an unconditional most-favored-nation treaty, and cited a number of decisions as bearing on this phase of the case. None of these decisions involved the question presented here, since the tariff treatment extended Germany or extended to any nation having a treaty relationship comparable to that of Germany was not involved therein.

... Here, as there, it is unthinkable that Congress had such a result as is contended for by appellant in contemplation when it enacted the countervailing duty provisions of said paragraph 369. It knew when it enacted the paragraph of the existence of the numerous most-favored-nation treaties and it must have known that if they were permitted to affect the paragraph its enactment would have been a useless and purposeless thing to do. We must not attribute to Congress the intention of performing such a futile and purposeless act.

It is, therefore, our conclusion that the trial court correctly held in substance, that it was the intent of Congress that the countervailing duty provision under paragraph 369 should supersede the said Belgian treaty in respect to the countervailing duty on automobiles. It is our judgment that no other holding can logically be reached without in effect finding that the paragraph of the tariff act in controversy is a nullity. This we must decline to do.

*John T. Bill Co. Inc. et al. v. United States United States of America: Court of Customs and Patent Appeals, 29 May 1939*


Annual Digest 1938-1940, Case No. 197.

11. This was an appeal from the judgement of the United States Customs Court; there were involved two protests of importers (the cases having been consolidated for trial) by which they sought to recover such duties as were assessed as countervailing duties upon merchandise described as bicycle parts imported from Germany in 1931 and 1934. The merchandise was classified under paragraph 371 of the Tariff Act of 1930.11 The import-

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9 See note 6 above.

10 The first two paragraphs of article XII of this Treaty read as follows:

"In all that relates to duties of Customs and navigation, the two high contracting parties promise, reciprocally, not to grant any favor, privilege, or immunity to any other State which shall not instantly be common to the citizens and subjects of both parties respectively; gratuitously, if the concession or favor to such other State is gratuitous, and on allowing the same compensation, or its equivalent, if the concession is conditional.

"Neither of the contracting parties shall lay upon goods proceeding from the soil or the industry of the other party, which may be imported into its ports, any other or higher duties of importation or re-exportation than are laid upon the importation or re-exportation of similar goods coming from any other foreign country."

11 Paragraph 371 of the 1390 Tariff Act reads as follows:

"Bicycles, and parts thereof, not including tires, 30 per centum ad valorem: said if any country, dependency, province, or other subdivision of government imposes a duty on any article specified in this paragraph, when imported from the United States, in excess of the duty herein provided, there shall be imposed upon such article, when imported either directly or indirectly from such country, dependency, province, or other subdivision of government, a duty equal to that imposed by such country, dependency, province, or other subdivision of government on such article imported from the United States, but in no case shall such duty exceed 30 per centum ad valorem." (Federal Reporter, Second Series, vol. 104 (2d), p. 68.)
lations were assessed with duty at 50 per centum ad valorem. Paragraph 371 provided a normal duty rate of 30 per centum ad valorem. The duties resulting from that rate were not in question, it being claimed in both protests that the assessments should be at that rate. The protests were predicated upon the Treaty of Friendship, Commerce and Consular Rights of 14 October 1925 between the United States and Germany, particularly upon article VII. 12

12. The appellants stated that the action of the collector in exacting a duty of 50 per centum ad valorem was in violation of the unconditional grant of most-favoured-nation treatment accorded Germany in the above treaty in view of the fact that bicycle parts of worked iron were then admissible from other countries at a lower rate of duty. The entire contention rested upon the unconditional character of the treaty, it, in effect, being conceded that, upon the authority of a long line of decisions, by both the executive and judicial branches of the Government, the most-favoured-nation doctrine would not apply in this case were the treaty of the conditional type, such, for example, as was the treaty with Belgium involved in another case. 13 The judgement was reversed. The Court said:

That article VII of the treaty was in full force at the time of the respective importations here involved is not in question and various Treasury Decisions are cited which show that at those times merchandise of the kind involved was admissible from other foreign countries at a duty rate of only 30 per centum ad valorem.

12 Article VII reads as follows:

“Each of the High Contracting Parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce or manufacture, of the territories of the other than are or shall be imposed on the importation of any like article, the growth, produce or manufacture of any other foreign country.

“Each of the High Contracting Parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other High Contracting Party than are imposed on goods exported to any other foreign country.

“Any advantage of whatsoever kind which either High Contracting Party may extend to any article, the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally without request and without compensation be extended to the like article the growth, produce or manufacture of the other High Contracting Party.

“With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, and regardless of whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other High Contracting Party, for the benefit of itself, its nationals and vessels.” (United States of America, The Statutes at Large of the United States of America from December, 1925, to March, 1927 (vol. XLIV, Part 3 (Washington, D.C., U.S. Government Printing Office, 1927), p. 2137). (References to this publication in the text of the present document are given in the abbreviated form, “Stat.” preceded by the number of the volume and followed by the page number, e.g. “44 Stat. 2137.”)

13 See para. 10 above.

From the language of the treaty, it seems clear to us that the levy of duties at the rate of 50 per centum ad valorem while similar merchandise was being admitted, or was subject to admission, from other countries at the rate of 30 per centum ad valorem, was in contravention of the treaty’s provisions.

... Paragraph 371 of that act, 42 Stat. 885, was in the precise language of paragraph 371 of the 1930 act... We think it was clearly understood that the intent and effect of the treaty was to modify such provisions of the tariff act in relation to importations from Germany, and Germany was not required to give compensation therefor in her own laws beyond assuring that merchandise imported from the United States should be treated in the same manner as like merchandise imported from other countries.

The treaty was reciprocal and it was self-executing, requiring no legislation other than its own enactment, so far as any matter here involved was concerned. There is no claim that the rate of duty which Germany was then assessing upon bicycle parts imported from the United States was any higher than the rate imposed upon those parts when imported from other countries, and the fact that such rate was higher than the basic rate imposed by the United States is not of legal moment.

There remains to be considered the contention made by counsel for the Government that the most-favoured-nation clause of the treaty with Germany was superseded by the Tariff Act of 1930, specifically (as to the merchandise here involved) by paragraph 371... of the act. As has been indicated, the insistence is that our decision here should be controlled by our decision in the Minerva Automobiles, Inc., case...

We do not agree with this view. The cases are clearly distinguishable. In that case it was held that the conditional most-favoured-nation clause of the Belgian Treaty of 1875, had been superseded, as to the merchandise there involved, by paragraph 369 of the Tariff Act of 1922. So far as we are able to ascertain, there was no provision of law such as paragraph 369 in effect at the time of the ratification of the Belgian Treaty, hence that treaty did not have the effect of repealing or superseding any prior act of Congress.

When the German Treaty was ratified paragraph 371 of the Tariff Act of 1922 was in effect and the treaty, in our view, superseded it so far as importations from Germany were concerned, but the paragraph remained in effect as to importations from countries with which we had no commercial treaties or had only treaties of the conditional type. In order that those countries might have the benefit of the normal rate it was necessary that they should compensate by giving to importations from the United States a similar rate. The agreement between the United States and Germany was that each should receive the benefit of the lowest rate granted by it to any third country, "simultaneously and unconditionally, without request and without compensation"... It was not required that in order to make applicable the rate of 30 per centum ad valorem on bicycle parts imported from Germany that country should give that rate to importations from the United States. It was only required that Germany admit importations from the United States at the lowest rate granted upon importations from any other country.

Such was the situation when the Tariff Act of 1930 was enacted. That act did not repeal paragraph 371 of the 1922 Act,... but continued it. The general repealing clause in the Act of 1930 ran only to “All Acts and parts of Acts inconsistent with the provisions of this Act, [chapter]”. Sec. 651, Tariff Act of 1930... There remained ample room for the application of paragraph 371 to importations from many countries other than Germany. At the time of the enactment of the 1930 tariff act the German Treaty was the only one of its type which had been ratified and embodied in the statutes at large, and we find no history connected with the passage of the tariff act which indicates any intention on the part of Congress to abrogate or supersede that treaty. It is well established, of course, that where a treaty and an act of Congress are in conflict, the latest in date must prevail...
Obviously the treaty with Germany marked the adoption of a new policy on the part of the United States. The history of the period is replete with statements to that effect, and... it was contemplated that such new policy would be followed in the negotiation of additional treaties with other countries. We feel justified in concluding that these facts and the expressed intent must have been in the mind of Congress at the time of the enactment of the Tariff Act of 1930, and that had the Congress intended to alter such policy it would have been expressed in the act.

That the repeal of statutes by implication is not favored is familiar law, and the courts uniformly have intimated an even stronger disposition to apply the rule in cases where treaties are involved... we are of the opinion that paragraph 371 of the Tariff Act of 1930... did not repeal or supersede the unconditional most-favored-nation provisions of the treaty with Germany with respect to the merchandise involved, and, since we are of the opinion that the assessment of the duties here complained of was contrary to such provisions, we disagree with the conclusion reached by the Third Division.

Application of the Trade Agreement between Finland and the United Kingdom of Great Britain and Northern Ireland

Finland, Supreme Court of Administration, 12 March 1943

13. The duties imposed on certain goods in the trade agreement between Finland and the United Kingdom were to be applied also to goods imported from Germany in accordance with the most-favoured-nation clause between Finland and Germany. The court decided that after the United Kingdom had declared war on Finland, the most-favoured-nation clause was no longer applicable to Germany, and, consequently, the duties imposed on goods imported from Germany should be treated autonomously and not according to the trade agreement between Finland and the United Kingdom.

Colonial Molasses Co., Inc. v. United States
United States of America, Customs Court, Third Division
22 January 1957
International Law Reports, 1957, p. 670

14. This was a proceeding on protest against the failure of the Collector of Customs to apply to 50 cans of bees' honey, imported into the United States from Cuba, the 20 per cent preferential reduction in customs duty provided under the Convention of Commercial Reciprocity between the United States and Cuba, signed at Havana on 11 December 1902. The Collector had assessed duty at the rate stipulated in the Tariff Act of 1930, as modified by GATT, signed at Geneva on 30 October 1947. By an exclusive Agreement supplemental to the General Agreement on Tariffs and Trade, signed on the same day, the United States and Cuba had agreed to make inoperative the Treaty of 1902 and the Trade Agreement of 1934 for the period that the United States and Cuba were both contracting parties to the GATT. The Agreement of 1947 eliminated the preferential reduction of 20 per cent, provided for under the Treaty of 1902 and under the Trade Agreement of 1934 and provided for the flat rate agreed under the GATT. The plaintiff contended that the duty on bees' honey had been increased by the suspension or rendering inoperative of the Treaty of 1902, and that this increase in duty had not been authorized by the Congress.

15. The Customs Court held that judgement must be rendered for the United States. Under 350(b) of the Trade Agreements Act (48 Stat. 944, as amended, 19 U.S.C. 1351(b)), the President of the United States was not precluded from modifying any pre-existing preferential customs treatment of any article, provided that duties in force in 1945 were not thereby increased or decreased by more than 50 per cent. Even if the suspended Treaty of 1902 were taken into account, the duty on imported honey was within the 50 per cent adjustment. The Court said:

The rate on honey imported from Cuba, established January 1, 1945, was 0.012 cents per pound, except as it might be reduced by a most-favored nation rate. There is no evidence that it had been reduced. The President proceeded, in exercise of authority conferred on him by Congress, to change the existing duty on bees' honey, product of Cuba, by eliminating the general preferential reduction of 20 per centum through the mechanism of continuing the inoperative status of the 1902 Cuban treaty and proclaiming that status as well as a new rate of 0.01 cent per pound under the General Agreement on Tariffs and Trade, supra. Even if the cited language of section 350(b) means (and this is far from clear) that the Presidential authority to raise or lower duty on Cuban imports must take into account, as the basis for increase or decrease, the temporarily suspended treaty of 1902, the duty on honey imported from Cuba is, nevertheless, within the permitted 50 per centum adjustment...

C. Tennant, Sons and Co. of New York v. Robert W. Dill
United States of America: District Court, Southern District of New York, 16 December 1957
Federal Supplement, vol. 158, p. 63
International Law Reports, 1957, p. 677

16. The plaintiff, an importer of Paraguayan tung oil, sought a preliminary injunction restraining the defendant from denying the entry into the United States of certain tung oil owned by it. On 2 September 1957, 662,540 pounds of tung oil, of a value of approximately $150,000, were shipped to the plaintiff from Asunción, Paraguay, followed by a further shipment of 485,012 pounds on 12 September. On 9 September 1957, the President of the United States, pursuant to the Agricultural Adjustment Act, issued a Proclamation imposing a quota of 96,452 pounds on imports of tung oil prior to 1 October 1957, and of not more than 131,566 pounds per month from October 1957 to January 1958. No reference was made to tung oil en route to the United States. On 7 October, the plaintiff attempted to obtain entry of his first shipment, but the defendant Collector of Customs permitted the entry of only 131,460 pounds being the entire quota for the month of October 1957. The second shipment was similarly rejected. The plaintiff

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14 Information received from the Government of Finland. No further information regarding this case is available.


maintained that under the most-favoured-nation clause of the Agreement between the United States of America and Paraguay relating to reciprocal trade signed at Asunción on 12 September 1946, it was entitled to the benefit of the provision of subparagraph 3 (b) of Article XIII of the GATT concluded at Geneva on 30 October 1947, exempting goods en route at the time of the establishment of import restrictions from the effect of such quotas. Paraguay was not a party to the latter Agreement.

17. The Court held that the motion for a preliminary injunction must be denied. An agreement providing for most-favoured-nation treatment as to duties and customs formalities does not require such treatment as to import restrictions and quotas. The “en route” clause of GATT accordingly had no application to trade relationships between Paraguay (which was not a party to the GATT) and the United States. In any event, the provisions of the Agricultural Adjustment Act would prevail over an inconsistent stipulation in an international agreement. The Court said:

Paraguay was not a signatory to GATT. . . Nevertheless, the plaintiff contends that by reason of the “most-favored-nation” clause contained in Article I of the Paraguayan Trade Agreement, Paraguay is a beneficiary of the en route clause in GATT and that, therefore, the quota restriction here at issue does not apply to plaintiff’s en route tung oil. This contention, in my opinion, lacks merit. Article I, subdivision 1, of the Trade Agreement with Paraguay in effect requires the signatories to grant each other unconditional and unrestricted “most-favored-nation” treatment in all matters concerning:

1. Customs duties and subsidiary charges of every kind;
2. The method of levying such duties and charges;
3. The rules, formalities and charges imposed in connection with clearing goods through customs;
4. All laws or regulations affecting the sale, taxation, distribution or use of imported goods within the country. Subdivision 2 of Article I in substance requires that each of the signatories be accorded treatment equal to that accorded any third country with respect to “duties, taxes or charges” or any rules or formalities.

The subjects covered by subdivisions 1 and 2 of Article I are described with clarity and particularity. The phrase “import restriction” and the word “quota” nowhere appear. Furthermore, those subdivisions do not, in my opinion, contain language from which their applicability to import restrictions involving the fixing of quotas can be implied.

. . .

It is interesting to note that Article I of the Trade Agreement with Paraguay is considerably more explicit and restrictive than are certain other parts of the Trade Agreement. For example, Article III, subdivision 1 of the Agreement employs the language “no prohibition or restriction of any kind” and in Article XII, subdivision 1 the all-inclusive terms “concession” and “customs treatment” are used.

It seems clear, therefore, that the “most-favored-nation” clause contained in the Trade Agreement with Paraguay is not sufficiently broad to entitle Paraguay and, hence, the plaintiff, to the benefits of the en route provision of GATT.

The Presidential Proclamation of September 9, 1957, while it does not expressly mention en route goods, nevertheless, declares “That for the period commencing September 9, 1957, and ending October 31, 1958, the total quantity of tung oil entered shall not exceed 26,000,000 pounds”. (Emphasis supplied.) Since no exception was made as to en route tung oil, the presumption is that none was intended. This is particularly true in the case at bar where a contrary interpretation would seriously impair the effectiveness of the Proclamation by flooding the American market with large quantities of imported tung oil.

Energetic Worsted Corp. v. United States
United States of America : Customs Court, Third Division,
21 October 1963
Federal Supplement, vol. 224, p. 606
International Law Reports, vol. 34, p. 217

18. The United States collector of customs levied countervailing duties on the wool tops exported from Uruguay to the United States on the ground that the multiple exchange rate system in effect in Uruguay amounted to a subsidy for exports and conferred a bounty of grant on wool tops requiring the imposition of a countervailing duty pursuant to Section 303 of the Tariff Act of 1930. This was a proceeding on protest against the decision of the collector of customs. The plaintiff contended that the assessment of countervailing duties violated the “most-favored-nation” clause in a Treaty of 21 July 1942 between the United States and Uruguay, because countervailing duties were not imposed upon wool tops exported from Argentina to the United States, although a multiple exchange rate system was in effect in that country.

19. The Court held that the protest must be overruled and judgement entered for the defendant. The multiple exchange rate system in effect in Uruguay at the time of the exportation conferred such a bounty on wool tops as to require the imposition of countervailing duties pursuant to Section 303 of the Tariff Act. The imposition of countervailing duties did not violate the “most-favored-nation” clause. The Court said:

17 United Nations, Treaty Series, vol. 125, p. 179. Article I of the agreement provides:

“1. The United States of America and the Republic of Paraguay will grant each other unconditional and unrestricted most-favored nation treatment in all matters concerning customs duties and subsidiary charges of every kind and in the method of levying such duties and charges, and, further, in all matters concerning the rules, formalities and charges imposed in connection with the clearing of goods through the customs, and with respect to all laws or regulations affecting the sale, taxation, distribution or use of imported goods within the country.

2. Accordingly, articles the growth, produce or manufacture of either country imported into the other shall in no case be subject, in regard to the matters referred to above, to any duties, taxes or charges other or higher, or to any rules or formalities other or more burdensome, than those to which the like articles the growth, produce or manufacture of any third country are or may hereafter be subject.” (Ibid, p. 180.)

Article III, paragraph 1 of that Agreement provides:

“1. No prohibition or restriction of any kind shall be imposed by the Government of the United States of America or the Government of the Republic of Paraguay on the importation, sale, distribution or use of any article the growth, produce or manufacture of the other country, or on the exportation of any article destined for the territory of the other country, unless the importation, sale, distribution or use of the like article the growth, produce or manufacture of all third countries or the exportation of the like article to all third countries respectively, is similarly prohibited or restricted.” (Ibid, p. 182.)
Plaintiff also claims that the levying of countervailing duties in the instant case was a violation of the most-favored-nation clause of the Trade Agreement with Uruguay, since no countervailing duty was imposed on wool tops from Argentina. First, the record does not establish that Argentina's exchange system resulted in a bounty on wool tops. Second, as stated in defendant's brief:

"Since the application of the countervailing duty statute is dependent upon a determination whether in any given country a grant or bounty has been paid or bestowed directly or indirectly, upon the manufacture, production, or export of any article or merchandise, and since the situation in any given country is unique, any comparisons with action taken or not taken by the United States Government with regard to the imports from any other countries are not relevant."

The General Agreement on Tariffs and Trade, ... under which the regular duties on the present wool tops were assessed, provides that countervailing duties may be imposed if not in excess of the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the product. Furthermore, it has been held that the imposition of countervailing duties does not violate the most-favored-nation clause.

United States v. Star Industries, Inc.
United States of America, Court of Customs and Patent Appeals, 22 June 1972
International Legal Materials, Current Documents, vol. XI, No. 5,18 p. 1093

20. This was an appeal from the decision and judgement of the United States Customs Court, sustaining a protest by Star Industries against the amount of duty assessed on brandy imported from Spain. The brandy had been classified under item 945.16, TSUS ($5 per gal.) according to the Presidential Proclamation No. 3564 which brought item 945.16 into existence.19 The Customs Court ruled that it should have been classified under item 168.20 ($1.25 per gal.) and that the Presidential Proclamation was invalid and void. The Court of Customs and Patent Appeals found that the President did not exceed the authority granted him under section 252 (c) of the Trade Expansion Act of 1962 (19 U.S.C. 1882 (c)) in issuing Proclamation No. 3564. That proclamation was therefore valid and the judgement of the Customs Court was reversed.

21. The statutes specifically relied on for authority in Proclamation No. 3564 read as follows:

Trade Expansion Act of 1962, Section 252 (c) (19 U.S.C. 1882 (c)):
(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President, may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due regard for the international obligations of the United States,

(i) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(ii) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

22. The Court said:

With regard to the reliance stated in Proclamation No. 3564 on Article XXVIII (3) of the GATT, the Customs Court stated:

"As we read paragraph 3 of Article XXVIII of GATT it does not require suspension of trade agreement concessions on a most favored nation basis. In fact, favored nation treatment is not even mentioned or implied in paragraph 3. Under paragraph 3 a country having a principal supplying interest or a substantial interest is permitted to withdraw substantially equivalent concessions initially negotiated with the applicant contracting party. We construe this language merely to authorize reciprocal action on the part of contracting parties to GATT with respect to modification of tariff concessions, following a break down in negotiations and unilateral withdrawal of concessions by a contracting party."

The last two sentences of the above quote, though correct, are not pertinent to the question of whether unilateral withdrawal of concessions under Article XXVIII (3) must be made on a most-favored-nation basis. We are therefore left with the court's observation that that Article does not specifically mention most-favored-nation treatment, and its conclusions that such treatment is not implied or otherwise required by that Article.

Appellant contends that Article XXVIII (3) must be read within the context of the entire agreement and points to Article I of the GATT, which provides in pertinent part:

"Article I. General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation . . . , any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Appellant also argues that:

"The very nature of Article XXVIII requires that actions taken under it be on a most favored nation basis. Such concessions cannot be withdrawn only as to a particular party. If withdrawn, the result is that they are also withdrawn as to all parties, i.e., those who obtained the concessions on a most favored nation basis. Any arrangement whereby the particular concessions are continued as to all such other parties, but not the parties with which they were originally negotiated, is clearly not contemplated by Article XXVIII. In this case, Spanish brandy benefited from the original concession made to France, a member of the EEC, and there is little reason to continue the concession once it has been terminated as to the original contracting party."

Turning to the language of Article XXVIII (3), adverse effects on a plurality of countries from a unilateral withdrawal of concessions were clearly contemplated in this provision. A compensating mech-
Most-favoured-nation clause

The question remains whether 19 U.S.C. 1882 (c) allows the President to take other than selective or discriminatory action, even when he determines that nondiscriminatory action is required by our international obligations. The Customs Court referred to 19 U.S.C. 1881, which provides:

§ 1881. Most-favored-nation principle.

"Except as otherwise provided in this subchapter, in section 1351 of this title, or in section 401 (a) of the Tariff Classification Act of 1962, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this subchapter or section 1351 of this title shall apply to products of all foreign countries, whether imported directly or indirectly."

The court considered that section 1881, when read together with the language in section 1882 (c) specifying action to be taken with respect to "products of such country or instrumentality" or "a trade agreement with such country or instrumentality", created an exception to the most-favored-nation principle in 1882 (c) proceedings. Thus the court did not specifically rule on the provisions of section 1882 (c) which limit the action the President may take "to the extent that such action is consistent with the purposes of section 1801 of this title and having due regard for the international obligations of the United States..."

Thus the use of section 1882 (c) on a nondiscriminatory or most-favored-nation basis would not be inconsistent with the purposes referred to in that section.

With regard to the apparent conflict between our international obligations under the GATT and the statements in section 1882 (c) that action is to be taken against the country or instrumentality which maintains the unreasonable import restrictions, we find the following excerpt from the legislative history of the section most enlightening:

"Subsections (a) and (b) of section 252 of the bill together authorize action against burdensome foreign import restrictions. They do not, however, authorize action against foreign import restrictions which, though they may be legally justifiable, impose a substantial burden upon U.S. commerce. The amendment provides that whenever a country which has received benefits under a trade agreement with the United States maintains unreasonable import restrictions which burden U.S. commerce either directly or indirectly, the President may withdraw existing trade agreement benefits or refrain from proclaiming any negotiated trade agreement concessions on such products. Under this subsection the President may act only to the extent consistent with the purposes of the act and in exercising this authority he must take into consideration the international obligations of the United States. Thus, the amendment would not authorize any indiscriminate breach of international obligations of the United States such as our most favored nation treaties with regard to the products of other countries... [Emphasis added.]

The amendment referred to is the Senate amendment to H.R. 11970 which added subsection (c) to section 252 of the Trade Expansion Act of 1962 (19 U.S.C. 1882).

Appellee relied on other legislative history which indicates an intent to provide the President with strong measures to combat foreign trade discrimination. We are of the opinion that the interpretation of section 1882 (c) embodied in Proclamation No. 3564 fully complies with that intent. Under that interpretation, section 1882 (c) provides for the denial of most-favored-nation treatment where the President decides upon that course "having due regard for the international obligations of the United States..." The proclamation indicates in the present case that the President did not choose that course because it would have been inconsistent with our international obligations. However, the measures taken under the proclamation were sharply focused on the instrumentality which was maintaining the unreasonable import restrictions - the EEC. Thus the legislative intent to take strong measures against those who maintain unreasonable import restrictions was upheld, and at the same time we did not breach our international obligations.

II. The most-favoured-nation clause in matters relating to treatment of aliens, including inheritance rights, taxation and cautio judicatum solvi

Sullivan et al. v. Kidd
United States of America : Supreme Court, 3 January 1921
U.S. Reports, vol. 254, p. 433
Annual Digest, 1919-1922, Case No. 252

23. A British subject residing in Canada claimed as devisee a share in the proceeds of Kansas land. Reliance was placed upon the Treaty of 2 March 1899 between Great Britain and the United States, governing the inheritance of real property within the territories of each of the contracting parties by citizens or subjects of the other, and providing for the sale of such property and withdrawal of the proceeds. Citizens or subjects of each of the contracting parties were assured most-favoured-nation treatment in all that concerned the right of disposing "of every kind of property". As to the Dominion of Canada no notice of accession had been
given. The British Government had interpreted the Treaty as giving British subjects wherever resident the right to inherit property in the United States. According to this interpretation, notice of accession as to Canada was necessary only to give effect to the Treaty as to Canadian lands. The United States Government, on the other hand, had interpreted the Treaty as requiring notice as to Canada in order to bring within its operation either property in Canada or British subjects residing therein. The lower Court held the Treaty applicable. On appeal, it was held that the judgement must be reversed. Regarding the most-favoured-nation clause, the Court said:

That clause has been held in the practice of this country to be one not extending rights acquired by treaties containing it because of reciprocal benefits expressly conferred in conventions with other nations in exchange for rights or privileges given to this Government.

Security for Costs (Treaty of Versailles) Case
Germany: Upper District Court, Frankfurt-on-the-Main, 11 December 1922
Juristische Wochenschrift, 1923, p. 191
Annual Digest, 1919-1922, Case No. 255

24. This was an appeal by a French plaintiff against an order to deposit security for costs in an action brought by him against a German subject. Section 110 of the German Code of Civil Procedure laid down that aliens appearing as plaintiffs before German courts must at the defendant’s request deposit a security for costs. This provision did not apply to aliens whose own State did not demand security for costs from Germans appearing as plaintiffs. A convention concluded at The Hague on 14 November 1896 between a number of States, including Germany and France, exempted the subjects of the contracting parties from the duty to deposit security for costs. This convention was not included in the number of those which, according to article 287 of the Treaty of Versailles, were to be regarded as revived between the Allied Powers and Germany. In article 291 (1) of that Treaty Germany undertook

to secure to the Allied and Associated Powers, and to the officials and nationals of the said Powers, the enjoyment of all the rights and advantages of any kind which she may have granted to Austria, Hungary, Bulgaria or Turkey, or to the officials and nationals of these States by Treaties, conventions or arrangements concluded before August 1, 1914, so long as those treaties, conventions or arrangements remain in force.

The second paragraph of that article provided that: “The Allied and Associated Powers reserve the right to accept or not the enjoyment of these rights and advantages.” There existed between Germany and Bulgaria a treaty providing for the exemption, on the basis of reciprocity, from the duty to deposit security for costs. In a note communicated to Germany in April 1921, the French Government informed the German Government that it wished to avail itself of the relevant provisions of the Treaty between Germany and Bulgaria. The plaintiff did not prove that in France German nationals were exempt from depositing security for costs in actions brought against French nationals.

25. The Upper District Court held that the appeal must be dismissed. Article 291 of the Treaty of Versailles did not oblige Germany to grant to French nationals wider privileges than those granted to the subjects of the former Central Power. The Treaty with Bulgaria was based on reciprocity. As France did not grant such reciprocal treatment, its nationals were not entitled to an exemption from the duty to deposit security for costs.

Dobrin v. Mallory S.S. Co. et al.
United States of America: District Court, Eastern District of New York, 2 April 1924
Federal Reporter, vol. 298, p. 389

26. Thomas Waldron, plaintiff’s intestate, was killed on 30 November 1921, while working as a longshoreman on board the steamship Agwidale, which at the time was discharging cargo at a pier in the port of Seattle, state of Washington. At the time of this death, Thomas Waldron did not leave either a wife, child, or children, but left a father and mother, alleged to be dependent upon said Thomas Waldron for support, and both of whom, at the time of the decedent’s death and at the time of the appointment of plaintiff as administrator, resided in Ireland and not in the United States. The plaintiff claimed that recovery might be had for the benefit of the parents of the decedent, who were residents of Great Britain, because there was in effect at the time of decedent’s death a treaty between the United States and Great Britain which contained the “most-favoured-nation” clause, and a treaty of 25 February 1913, having been subsequently made between the United States and Italy, under which Italians could recover, the same right should be accorded to subjects of Great Britain. The Court disagreed with the plaintiff’s contention and said:

The most favored nation clause, article 5 of the Convention . . ., relied on by the plaintiff herein, reads as follows:

“In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation.”

. . .

It is therefore clear that the “most favored nation” clause in that treaty is limited to all that confers the right of disposing of every kind of property real and personal and does not refer to any right to recover for the death of a relative.

In 1908 there was a statute in the state of Pennsylvania similar to the said statute in the state of Washington, and an Italian was killed through negligence, leaving dependent relatives resident in Italy. The court held that under the treaty then existing they could not recover.

Subsequent thereto a supplemental treaty was negotiated between this country and Italy in 1913, . . . which contained the following provisions:

“The citizens’ or subjects of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection

20 Berlin.

granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals provided that they submit themselves to the conditions imposed on the latter."

This supplemental treaty with Italy did not, under the "most favored nation" clause of the treaty of Great Britain with this country, extend to British subjects the rights conferred by said supplemental treaty on Italian subjects, because, as we have hereinbefore shown, this clause in the treaty was limited by its very words to the right of disposing of every kind of property, real and personal, and did not include any right that might be given by statute to recover in case of the death of a relative, and therefore the statute of the state of Washington is not limited or modified by the treaty existing between this country and Great Britain, and the action should be dismissed.

Zaklady Griotte Lud. Wantoch (Prosecutor) v. Gerner and O. Henigsberg (defendants)
Poland: Supreme Court, Third Division, 1 April 1925
Orzecznictwo Sadow Polkich, VI, No. 465
Annual Digest, 1925-1926, Case No. 293.

27. The prosecutors, a Czechoslovak company, had registered trade-marks in Austria in 1912 and in Czechoslovakia in 1922, but had omitted to register the trade-marks in Poland. It now prosecuted the two defendants for infringement of trade-marks. The court at Stanislawow discharged the defendants. The prosecuting firm appealed to the Supreme Court, which held: Under the Paris Convention of 20 May 1883, citizens of the contracting States enjoyed protection for their trade-marks only on condition of registering them in the State concerned. The provisions of the Treaty of St. Germain-en-Laye (Art. 274) could have no application to the present case, which arose before that Treaty entered into force in Poland. The position of Czechoslovak citizens on Polish territory could therefore, in this respect, be judged only by the municipal law in force in Poland and by the Paris Convention of 1883. Since Polish law did not protect the trade-marks of Polish citizens before registration of such trade-marks, it was not to be presumed to offer protection to foreigners before such registration. It assured to foreigners in this respect only the same protection as to Polish citizens and even the possible granting of the benefits of the most-favoured-nation clause could not be interpreted as affording to foreigners more extensive rights than those enjoyed by Polish citizens.

Betsou v. Volzenlogel
France: Civil Tribunal of the Seine, 23 December 1927
Court of Appeal of Paris (First Chamber), 24 December 1928
Annual Digest, 1927-1928, Case No. 313

28. The brothers Betsou, Greek subjects, in 1917 leased certain premises in Paris for commercial use. The lease expired in 1926. The lessors refused to renew the lease, whereupon the plaintiffs claimed 200,000 francs as damages for eviction. Their claim was based on the provisions of the Law of 30 June 1926, which granted certain privileges to those engaged in business activities. In support of their claim to the privileges of this Law in spite of their foreign nationality, they cited the Franco-Greek Convention of 8 September 1926, and through the operation of the most-favoured-nation clause, the Franco-Danish Convention of 9 February 1910, Denmark being in this regard the most-favoured nation. Article 19 of the Law of 1926 provided that aliens should be entitled to its privileges only subject to reciprocity.

29. The Civil Tribunal of the Seine held for the plaintiffs and said that through the operation of the most-favoured-nation clause, Greek subjects in France enjoyed the same privileges in commerce and industry as Danish subjects. The Franco-Danish Convention stipulated that in the exercise of their commercial activities Danes enjoyed all the privileges granted to French nationals by subsequent legislation. The Law of 30 June 1926 undoubtedly confers privileges upon those engaged in commerce. Although the terms of article 19 of the Convention required reciprocity in legislation as an absolute and imperative rule, and although there was no legislation on commercial property in Denmark, the French law should be interpreted in accordance with the Franco-Danish Convention. Danish subjects could not be deprived of their rights and privileges by subsequent French legislation. "A convention between nations, as a contract between private persons, is a reciprocal engagement which should be observed by both parties so long as the treaty is not denounced or replaced by a new treaty which restricts the effects of the original contract."

30. The Court of Appeal of Paris, reversing the decision of the Tribunal of the Seine, said that the brothers Betsou could not claim a right to the renewal of their lease. The law of 1926 clearly showed that it construed the right of commercial property as un droit civil stricte sensu, that is to say, as a right subject to the provision of article II of the Civil Code which made the enjoyment of rights by foreigners dependent upon the reciprocal treatment of French subjects abroad. In the Franco-Danish Treaty it had been carefully stated that the nationals of the two States would only enjoy the rights and privileges stipulated in so far as those rights and privileges were compatible with the existing legislation of the two States, and Danish legislation did not recognize the rights of foreigners to hold commercial property in Denmark.

Trossy v. Dumortier
Belgium: Brussels Civil Court (Chamber of Rent Restriction Appeals), 31 May 1928
Belgique judiciaire, 1929, columns 60-61; Clunet, vol. 56 (1929), p. 203
Annual Digest, 1927-1928, Case No. 312

31. The special legislation of Belgium regulating the duration of tenancies rendered nationals of countries

22 Journal du droit international (Paris). Referred to hereafter as Clunet.
which were either neutral or allied to Belgium during the First World War eligible to share in its benefits, on condition of reciprocal treatment. The claimant complained that the privilege of the legal extension of her tenancy had been denied her because of her French nationality and of the lack of reciprocal treatment of Belgian nationals in France. The Court held for the claimant. Pursuant to the Franco-Belgian Convention of 6 October 1927, the nationals of each of the High Contracting Parties "shall enjoy the territory of each other most-favoured-nation treatment in all questions of residence and establishment, as also in the carrying on of trade, industry and the professions" (article 1). This privilege was extended to cover the possession, acquisition and leasing of real or personal property (article 2). The Treaty concluded between Belgium and Italy on 11 December 1882 provided (article 3) that the nationals of each of the High Contracting Parties should enjoy within each other's territory full civil rights on an equal footing.

It follows, then, that by virtue of the most-favoured-nation clause, French nationals in Belgium are completely assimilated to Belgian nationals for the purposes of their civil rights, and consequently share in the legislation regulating rents. It is immaterial whether these treaties precede or succeed the legislation in question....

The Franco-Belgian Treaty of 6 October, 1927, was concluded by the Belgian Government in the hope of securing for its nationals in France the benefit of all legislation affecting tenancies and commercial property, in order that the nationals of each country should be treated on an equal footing.

The claimant, as a French national, is therefore entitled to claim a legal extension of her tenancy of the premises by virtue of the Treaty of 6 October, 1927.

Valorisation in Germany Case
Germany: Reichsgericht (Supreme Court of the German Reich), 6 June 1928
Annual Digest, 1927-1928, Case No. 230

32. The appellant, an Italian subject, was the assignee of a Swiss bank, which, in January 1920, deposited with the defendant, a German bank, two million paper marks for a period of three months, renewable for further periods of three months. The deposit was renewed until August 1923 when it became worthless. According to section 66 of the German Valorisation Law, these monies were not subject to valorisation. It was contended on behalf of the appellant that section 66 could not be applied to an alien as, according to international law, which by virtue of article 4 of the Constitution formed part of German law, it was impossible to deny the benefits of valorisation to an alien. It was also contended that that article was contrary to the German-Italian Treaty of Commerce of 31 October 1925, which provided that the subjects of the contracting parties shall, when in the territory of the other contracting party, have full liberty to acquire and own property to the extent to which such right is enjoyed by the subjects of any other State. This Article, it was argued, constituted a most-favoured-nation clause, and the appellant claimed the benefit of the Treaty of Commerce between the United States and Germany of 1925, which laid down that the subjects of the contracting parties should enjoy the protection of the rules of international law, and that they shall not be deprived of their property without due process of law and adequate compensation.

33. The appeal was rejected. The Court said that there was no rule of international law which gave to aliens the right to demand repayment of their loans in gold. Section 66 could not therefore be regarded as contrary to international law. The most-favoured-nation clause was not relevant in that case. Section 66 could not be regarded as constituting expropriation. The plaintiff had renewed the deposit from time to time, and he had to bear the consequences of the ensuing depreciation. He could not complain if the law, in section 66, refused to him certain advantages which it conferred upon creditors in other cases.

Hawaiian Trust Co. v. Smith
United States of America: Supreme Court of the Territory of Hawaii, 18 December 1929
Annual Digest, 1929-1930, Case No. 251

34. A Canadian citizen died in Hawaii leaving a will which gave both real and personal property in Hawaii to non-resident British citizens. The inheritance tax statute of Hawaii prescribed a higher rate of taxation on property passing to aliens, non-residents than on property passing to residents or citizens. It was contended that under the Treaty of 2 March 1899 between Great Britain and the United States, the inheritance could not be taxed at a rate higher than that imposed on property passing to residents citizens. The provisions of this Treaty had been made applicable to Hawaii. Article V of the Treaty of 25 November 1850 between Switzerland and the United States of America contained the following provision:

The citizens of each of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or ab intestato, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves of by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. Similar treaties were in force between the United States and Italy, Brazil and Spain respectively.

35. The Court held that the inheritance could not be taxed at a rate higher than that imposed on property to resident citizens. Since the statute imposed a higher tax on property passing to non-resident citizens, as well as on property passing to non-resident aliens, there was no denial of equal protection within the meaning of constitutional guarantees. Nor was there a discrimination against British citizens contrary to the Treaty. The Court said:

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24 Article V of the Treaty of 2 March 1899 reads as follows: "In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most-favoured-nation."
We are unable to conclude that when non-resident American citizens are taxed at a certain rate it was intended by the treaty to stipulate that non-resident British citizens should be taxed at a lower rate. The expression "in like cases" found in both Article I and Article II of the Treaty of 2 March 1899 between Great Britain and the United States refers to cases that are alike in all their circumstances and not simply in some of them. It refers undoubtedly... to similarity of circumstances with reference to degrees of relationship and with reference to the amounts of principal to be taxed, but it refers also to the facts of residence and non-residence when those facts are made by the statute a reason or basis for classification and discrimination .... The language of the most-favoured nation clause was certainly intended to have some meaning and some application. ... Looking solely to Article II of the treaty with Great Britain and to Article I, if that applies to real estate in all cases, the provision is merely as above held that a British citizen non-resident in Hawaii shall not be taxed more than an American citizen non-resident in Hawaii is taxed...

Comptoir Tchécoslovaque and Liebken v. New Callao Gold Mining Co.
France: Commercial Tribunal of the Seine, 4 March 1930 Annual Digest, 1929-1930, Case No. 234

36. The defendant, an English company, claimed to be exempt from the rule requiring security for costs (cautio judicatam solvi) from a plaintiff domiciled abroad. By the Anglo-French Commercial Treaty of 28 February 1882 British subjects in France were accorded most-favoured-nation treatment. "Interpretative declarations" by the Minister for Foreign Affairs, published in the Journal officiel in July and August 1929, explained that the most-favoured-nation clause gave British subjects the right to avail themselves of French treaties which assimilated the status of foreigners to that of French nationals. The Court held that the interpretative declarations must be read with and as part of the text of the Treaty, and were binding on the courts. Accordingly, British subjects could avail themselves of the Franco-Swiss Convention of 15 June 1869, which permitted Swiss subjects to sue in France without being required to give security for costs.

Lloyds Bank v. de Ricqles and de Gaillard
France: Commercial Tribunal of the Seine, 4 November 1930

Annual Digest, 1929-1930, Case No. 252

37. Lloyds Bank, on bringing an action against the defendants, had been called upon to furnish security for costs, being a foreign company. The Bank invoked article 1 of the Anglo-French Convention of 28 February 1882 which gave to the subjects of each contracting party most-favoured-nation treatment in the territory of the other. For this purpose, the Bank relied on the provisions of the Franco-Swiss Treaty of 15 June 1869, which gave Swiss subjects the right to sue in France without being required to give security for costs. The Tribunal held that this contention must be rejected. It said:

25 Recueil général des lois et des arrêts fondé par J.-B. Sirey, 1931 (Paris). Referred to hereafter as Sirey.

Whereas the most-favoured-nation clause does not exempt the nationals of contracting states from furnishing security for costs where the treaty containing this clause has a particular purpose and does not regulate all the (civil rights of the respective nationals of those States);

Whereas there is no doubt that the Anglo-French Convention of 28 February 1882, on which Lloyds Bank Limited relies, is a convention with a particular purpose in that it is directed solely to the regulation of commercial and maritime relations between the two countries;

Whereas the plaintiff cannot cite any diplomatic treaty concluded between Great Britain and France which expressly provides for exemption from the provision of security for costs, or which is directed either to questions of procedure or to civil rights as a whole and embodies the most-favoured-nation clause in that context;

Whereas Lloyds Bank Limited would further rely, to no purpose, on an interpretation of the Anglo-French Convention of 28 February 1882 given in letters exchanged during May 1929 between the Ambassador of Great Britain in Paris and the Minister for Foreign Affairs and between the Minister and the Garde des sceaux, published in the Journal officiel of 20 July and 13 August 1929;

Whereas, in fact, the interpretation in question merely shows that the most-favoured-nation clause in the said Convention of 28 February 1882 must extend to the laws governing relations between lessors and lessees in England and France;

Whereas, therefore, this interpretation is limited to a particular point of law which is entirely irrelevant to the question of security for costs and it cannot therefore be inferred that it also exempts British subjects who bring suit in France from the provision of such security;

Whereas, furthermore, the interpretation described above presumes the existence of reciprocity;

Whereas, furthermore, under the terms of article 11 of the Civil Code, an alien enjoys in France the same civil rights as are granted to French nationals by treaties of the State of which the alien is a national;

Whereas it has been established that French plaintiffs before English courts are not exempt from furnishing security for costs in respect of cases which they submit for their judgment;

Whereas, in consequence, British subjects have no claim to the enjoyment of a corresponding exemption before French courts, the application for security for costs must be upheld;"
The respondent relied on later treaties concluded by the United States with other States under the terms of which the full benefit without diminution would be received by nationals of those States occupying the position of the respondent.

39. The Court held that the judgement appealed from must be reversed. The “most-favoured-nation” clause in the instant Treaty of Commerce and Navigation was “limited to such matters as are the subject matter of the particular treaty in which the clause is contained”, and its scope was not enlarged by clauses contained in treaties of friendship, commerce and consular rights between the United States and other nations which allowed the right of complete compensation. The Court said:

Considering this clause in connection with the immediate context and the entire treaty now under consideration, we are clearly of the opinion that the treaty refers only to matters of navigation and commerce, trade and industry, and that the favored-nation clause cannot be held to bring into the field of operations, and entitle respondent to the benefit of, treaties of a general nature with other nations which manifestly concern matters not within the purview of the high contracting parties in making the treaty under which respondent claims. The treaty manifestly refers to “commerce and navigation”. Its scope is limited to matters in connection therewith. True, the word “industry” is used, but in the context it clearly appears that this word was employed in connection with commerce and not with labor. Under these circumstances, the “most-favored-nation” provision of the treaty, while drawing within its purview all matters contained in latter treaties germane to the matter of commerce and navigation, does not render Rem. Rev. Stat. § 7684, inapplicable to respondent’s claim under the workmen’s compensation act.

D'Oldenbourg v. Serebriakoff
France: Court of Appeal of Paris, 8 June 1935
Gazette des tribunaux, 21-23 July 1935
Recueil général... 1935,26 part III, p. 85
Annual Digest, 1935-1937, Case No. 221

40. Alexander Serebriakoff, a Russian subject, brought an action against d'Oldenbourg, also a Russian subject, alleging the nullity of a will under which she was a beneficiary. D'Oldenbourg applied for security for costs. This was refused by a judgement of the Civil Tribunal of the Seine of 12 November 1931, on the ground that both parties were of Russian nationality. On 4 May 1932 d'Oldenbourg became a French subject by naturalization. She then obtained an ex parte decision from the Court of Appeal of Paris ordering Serebriakoff to furnish 100,000 francs security. Against this ex parte decision Serebriakoff appealed, claiming: (1) that d'Oldenbourg was not entitled to security for costs seeing that when the proceedings started she was a Russian subject; (2) that he was exempt from furnishing security by the terms of the Franco-Russian Agreement of 11 January 1934. The Court held that the appeal must be dismissed. The Court said:

Whereas it is of little consequence that, at the time when she was summoned and when she made the application, d'Oldenbourg was of foreign nationality;

Whereas, in principle, a writ of summons establishes the subject of the action, and in particular the merits, but does not establish the status of the parties; and whereas, having become a French citizen in the course of the appeal proceedings, d'Oldenbourg is entitled immediately to invoke the prerogatives or remedies vested in that status, and consequently to apply for security for costs in the case at issue;

Whereas the Decree of 23 January 1934 ordering the provisional application of the Trade Agreement concluded on 11 January 1934 between France and the USSR... is not applicable in the current case; and Alexander Serebriakoff is not entitled to claim the benefit of that Agreement; and, while the Agreement does provide, on the basis of reciprocity, free and unrestricted access by Russian subjects to French courts, the privilege thus granted to such subjects is limited strictly to merchants and industrialists; and this conclusion results inevitably from both the Agreement as a whole and from the separate consideration of each of its provisions; and the Agreement in question is entitled “Trade Agreement”; and the various articles of which it is composed confirm that description, and its article 9, on which Serebriakoff specifically relies, in determining the beneficiaries of the provisions in question, begins with the words: “Save in so far as may be otherwise provided subsequently, French merchants and manufacturers, being natural or legal persons under French law, shall be not less favourably treated than nationals of the most-favoured-nation...”.

Société Poulin v. Utilities Improvements Co.
France: Court of Appeal at Amiens, 4 November 1937
Gazette du Palais,27 17 December 1937, part I
Nouvelle Revue du droit international privé,28 4th year, vol. IV (1937), pp. 761-763
Annual Digest, 1935-1937, Case No. 220

41. The Tribunal Civil at Compiègne had rejected the claim of the appellant, the French Company Poulin that the British Utilities Improvements Co., the original plaintiffs, should be ordered to furnish security for costs in accordance with the relevant article 16 of the Civil Code and 166 of the Code of Civil Procedure. Both these articles laid down that the provisions contained therein may be modified by treaties between France and other nations. Article 11 of the French Civil Code provides that aliens shall enjoy in France the same civil rights as are enjoyed by Frenchmen in the country of the alien in question. The Court held that the appeal must be allowed. The Court said:

 Whereas it is established that United Kingdom legislation does not exempt either French nationals, or indeed in certain cases British citizens, from furnishing security for costs; and whereas the application of article 11 of the Civil Code cannot have the effect of extending the benefit of such exemption to British citizens bringing actions in France;

 Whereas it is universally recognized that the provisions of article 16 of the Civil Code and article 166 of the Code of Civil Procedure may be modified by the clauses of treaties concluded between France and foreign States; whereas, however, in order for the express provisions of the law to be set aside, it is necessary that an agreement concluded between the States concerned should so decide expressly and in unequivocal language;

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26 Recueil général périodique et critique des décisions, conventions et lois relatives au droit international public et privé: année 1935 (Paris).
27 Paris.
28 Paris.
Whereas relations between France and Great Britain are governed by the Convention of 28 February 1882, which reserved to nationals of each of the High Contracting Parties the favours, immunities or privileges which might be conceded by them to nationals of a third power with regard to certain aspects of commerce, industry and shipping; and whereas, in an exchange of letters of 21 and 25 May 1929 between the Ambassador of Great Britain and the French Minister for Foreign Affairs, whose provisions, having been approved by decree, must be considered as incorporated in the Convention, it was stated that under the most-favoured-nation clause, which is the basis of the said Convention, British citizens may, subject to reciprocity, be assimilated to French citizens in respect of the legislation concerning leases both for dwellings and for commercial or industrial premises;

Whereas it is true that the aforementioned letters base the decision relating specifically to leases, which is their sole concern, on two broader principles which they also state, namely, that the Anglo-French Convention of 28 February 1882 is not restricted to commercial and maritime matters but also covers establishment, and that the most-favoured-nation clause, which is the basis of that Convention, gives British subjects the right to claim the benefit of French treaties providing for the assimilation of aliens to nationals;

Whereas, however, the clause providing for the assimilation of aliens to nationals, which is held to be equivalent to the most-favoured-nation clause, is not considered, in the practice of the courts or even in legislation, as automatically extending to aliens who benefit from it in France the totality of private rights stricto sensu; and whereas the act of 30 June 1926, which requires reciprocity of legislation concerning aliens, is interpreted in practice as excluding from its benefits foreign lessees, who may invoke only the most-favoured-nation clause;

Whereas the Convention of 28 February 1882, and the letters which extended its application, contain an express provision concerning reciprocity; and whereas it is improbable that the High Contracting Parties would have intended, without clearly stating their purpose, to impugn the principle set forth in article 11 of the Civil Code by a tacit reference to a category of rights in respect of which reciprocity is impossible;

Whereas, if the instruments mentioned above exempted British subjects from furnishing security for costs in all types of proceedings, it would be difficult to understand why a subsequent Convention of 18 January 1934 should have provided for such exemption only in the case of actions for registration and exequatur;

Whereas, consequently, the existence of a diplomatic agreement which would limit the application of the rules of French law with regard to security for costs cannot be presumed from the general but imprecise terms of the letters of 21 and 25 May 1929;

who have made declaration of intention to become citizens of the United States. The motion was attacked on the ground that the New York statute was unconstitutional as being in violation of the Treaty of 3 July 1815 between the United States and Great Britain providing for "a reciprocal liberty of commerce". The Supreme Court (Special Term) held that the motion must be granted. On appeal, the Supreme Court, Appellate Division held that the order must be reversed. The Court said:

In view of the unqualified prohibition of the statute in question against alien chauffeurs it is quite obvious that it conflicts with the terms of the Treaties of 1794 and 1815 between the United States and Great Britain and is therefore unconstitutional and void . . .

The language used in the 1794 treaty that "settlers and traders . . . shall continue to enjoy, unmolested, all their property of every kind" is not to receive a narrow construction. The protection intended to be afforded by the quoted words comprehends vastly more than property ownership. It ensures to a subject of Great Britain the right to engage in commerce, trade, business, or labor on the same terms as our own citizens. The promise contained in the covenant to enjoy property rights carries with it, by necessary implication, the right to every incident essential to the full enjoyment of such property. The enjoyment of such benefits surely is not restricted, as contended by petitioner, to limited areas, namely, within the jurisdiction of posts as that term is used in the treaty. This contention finds no support in the terms of the treaty. It will be noted that Article II which secures the right in question refers to "posts and places within the boundary lines assigned by the treaty of peace to the United States", and then again in speaking of British subjects refers to all those who "reside within the said boundary lines".

The provisions of the Treaty of 1794 are very full and comprehensive, and were intended to cover not only the conditions and problems which existed at the time of its signing but also to meet circumstances and contingencies which were to arise in the future.

. . .

It is equally clear that the provisions of the Treaty of 1794 were intended to embrace all the ordinary occupations and trades.

43. Passing to article I of the Treaty of 1815 which provided that "Generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce", the Court said:

Here again the word "commerce" should be given the broadest meaning consistent with the purposes and aims sought to be attained by the treaty. The rules of interpretation invoked in construing the language of the Treaty of 1794 apply with like effect to the provisions in the later treaty. The broader meaning of the term "commerce" embraces the gainful occupation of driving a motor vehicle for hire. This is particularly true where one intends to operate his motor vehicle under circumstances requiring a licence as a chauffeur.

Under the "most favored nation" doctrine which prevails in our relations with Great Britain, these treaties and the nationals thereunder are entitled to as free a scope in commercial activity as the nations of China, Japan, and Germany, under later and more exclusive treaties. The effect of the order is to deny to the subjects of Great Britain the same freedom in commercial activities which we accord to the nationals of China, Japan and Germany. No such distinction should be made and none is warranted by the language of the respective treaties.

The treaties with Great Britain are the supreme law of the land and supersede all local laws inconsistent with their terms . . .
Lesec v. Luykjesseel
Belgium: Court of Appeal of Brussels, 1 May 1940
Annual Digest, 1919-1942 (Supplementary volume), Case No. 4

44. A Belgian law of 24 July 1939 prohibited, inter alia, the levying of execution against persons who had been called to the colours in accordance with the special provision of article 53 of the Law concerning the Militia. According to article 3 of the Law of 24 July 1939, the benefit of its provisions was to be enjoyed by Belgian citizens only. The appellant, a French subject, who had been called up for military service by the French Army, was adjudged bankrupt by a judgement of the Tribunal de Commerce of Brussels, dated 7 October 1939. He contended that he was entitled to the benefit of the Franco-Belgian Treaty on Residence concluded on 6 October 1927, which granted most-favoured-nation treatment to the national of one party when residing in the territory of the other. The Court held that the appeal must be rejected. The appellant was not entitled to the benefits of the Law of 24 July 1939. The Court said:

This Article 53 [of the law concerning the Militia], like all other rules of the law concerning the Militia [Royal Decree of February 15, 1937] applies only to Belgian citizens. Consequently a French national cannot invoke the benefit of Article 3 of the Law of July 24, 1939. However, the appellant alleges that this law applies to him in virtue of the Convention concerning Residence concluded between Belgium and France on October 6, 1927. Article I of this Convention provides that the nationals of each of the contracting parties shall enjoy in the territory of the other contracting party the benefit of most-favoured-nation treatment in respect of residence and establishment as well as in respect of the exercise of commerce, industry or professional activities. The judgement of the court of first instance ... admits that Switzerland enjoys the most favourable treatment and that on June 4, 1887, a Treaty of Establishment was concluded between Belgium and Switzerland which provided that Swiss citizens in Belgium shall enjoy the same rights as Belgians as regards their person and their property. The respondent and the court of first instance point out with full justification that the Convention concerning Residence of October 6, 1927, should have been approved by both Chambers, but that this was not done. However, Article 68 (2) of the Constitution provides that treaties which may affect Belgian nationals individually are only operative if the assent of both Chambers has been obtained . . .

The Contracting Parties of the Franco-Belgian Agreement of 1927 did not intend to include among the concessions to Belgian subjects the benefits of exceptional measures which the needs of defence permit a nation at war to reserve solely to its own nationals or to a certain category of foreigners restrictively enumerated.

Application of the Treaty of Commerce between Finland and Sweden
Finland: Supreme Court of Administration, 24 March 1943

47. The Finnish-Swedish Commerce Treaty provided that neither Party should impose duties or other revenues other than those imposed on its own nationals on the nationals of the other Party. A licence for establishing the Chambers have ratified it implicitly, it would not follow that the appellant can invoke the benefit of Article 3 of the Law of July 24, 1939, ... this provision only grants relief to Belgians who have been called to the colours . . .

Cie. Internationale des Wagons-Lits v. Société des Hôtels Réunis
France: Court of Appeal of Paris, 29 October 1940
Gazette du Palais, 7 November 1940
Annual Digest, 1919-1942 (Supplementary volume), Case No. 131

45. Article 2 of the Franco-Belgian Convention of 6 October 1927 provided as follows:

The nationals of each of the Contracting Parties shall enjoy, in the territory of the other, most-favoured-nation treatment in all matters concerning the possession, occupation and letting of all property movable or immovable.

By the terms of the Exchange of Letters which took place from 16 to 24 April 1934 the two Governments gave this provision an extensive interpretation, from which it resulted that Belgian subjects in France could invoke unrestrictedly the benefit of various French laws of 1926-1930 and 1933, concerning letting of houses and business or industrial premises. At the outbreak of hostilities the French Government promulgated a decree dated 26 September 1939, concerning the reduction of rents. By article 25 of this Decree, the only foreigners allowed to claim the benefit of this law were the subjects of protected countries or of territories under French mandate, foreigners serving in French or Allied military formations, their issue or their spouses.

The Contracting Parties of the Franco-Belgian Agreement of 1927 and the interpretative Conventions ... of 1934 having neither foreseen nor provided against a state of war, it is clear that they did not intend to include among the concessions to Belgian subjects the benefits of exceptional measures which the needs of defence permit a nation at war to reserve solely to its own nationals or to a certain category of foreigners restrictively enumerated.

48. The Finnish-Swedish Commerce Treaty provided that neither Party should impose duties or other revenues other than those imposed on its own nationals on the nationals of the other Party. A licence for establishing

29 Pasicrisie belge: Recueil général de la jurisprudence des cours et tribunaux en Belgique—année 1941.

30 Information received from the Government of Finland. No further information regarding this case is available.
a firm in Finland was granted to a Swedish national by a Provincial Board, which fixed a stamp duty on the licence. The amount exceeding the stamp duty to be collected from a Finnish national in a similar case was ordered by the Court to be returned to the Swedish national on the basis of the most-favoured-nation clause contained in the Finnish-Swedish Commerce Treaty.

In re the Turkish Inspector of Students
Switzerland: Zürich Tax Appeals Commission, 12 September 1945
Annual Digest, 1946, Case No. 80

48. A Turkish national, employed by his Government as inspector of Turkish students in Switzerland and issued with an official passport, contested his liability to taxation in the Canton of Zürich. Upon his further appeal the Court held that the appeal must fail. The fact that the appellant had a diplomatic passport could not alter the circumstance that in Switzerland he was a private person. The appellant is unable to rely upon any convention for the avoidance of double taxation. For no such convention has been concluded between Switzerland and Turkey. The Double Taxation Treaty of 15 July 1931 between Switzerland and Germany could apply to the appellant—who possessed neither Swiss nor German nationality—only if there were therein a special stipulation excluding double taxation of persons in his position; the most-favoured-nation clause in article I (2) and article 7 of the Treaty of Friendship and Commerce between Switzerland and Turkey of 13 December 1930 excluded the invocation of the Treaty between Switzerland and Germany or any other double taxation treaty. For double taxation agreements apply solely between the parties thereto for the reason that their exclusive aim the delimitation of the jurisdiction of such States in the matter of taxation inter se.

National Provincial Bank v. Dollfus
France: Court of Appeal of Paris, 9 July 1947
Sirey, 1948, part II, p. 49
Annual Digest, 1947, Case No. 79

49. Dollfus, the respondent, had brought an action against the National Provincial Bank on a contract concluded in Britain. The Bank pleaded to the jurisdiction of the Court. The Tribunal de Commerce de la Seine held that it had jurisdiction by virtue of article 14 of the Civil Code, which provided that "aliens who are not resident in France may be summoned before French Courts for obligations contracted abroad towards a French national". The National Provincial Bank appealed. It was contended on its behalf that article 14 did not apply to British subjects, as these enjoyed most-favoured-nation treatment in France. The Court held that the appeal must fail. With regard to the first ground of appeal, the Court held that the most-favoured-nation clause applied only to the subject-matter of the treaty in which it was contained, and that the Franco-British Convention of 1882 did not apply to matters of jurisdiction and procedure. The Court said:

The Anglo-French Treaty of June 28, 1882, provides that British nationals shall enjoy most-favoured-nation treatment in France. The National Provincial Bank invokes that Convention together with the Franco-Belgian Treaty of July 8, 1899. The latter provides that French subjects in Belgium and Belgian subjects in France shall in civil and commercial matters be governed by the same rules of jurisdiction as nationals. The appellant endeavours to prove that Article 14 of the Civil Code does not apply to British subjects as a result of these two Conventions; and that the Tribunal de Commerce de la Seine has no jurisdiction in the case. But a most-favoured-nation clause can only be invoked if the subject matter of the treaty containing it is identical with that of the particularly favourable treaty the benefit of which is claimed. In the Franco-British Convention of 1882 the most-favoured-nation clause is not made applicable in any general manner, but only in regard to the special matters enumerated therein. That enumeration neither expressly nor impliedly includes matters of jurisdiction and procedure. It is true that on May 21 and 29, 1929, further Franco-British agreements were concluded upon which the National Provincial Bank relies. But these new agreements, like the Decree of June 16, 1933, as interpreted by the report to the President of the Republic which accompanied that text, aimed solely at giving British subjects in France and French subjects in Great Britain the benefit of the laws on leases. Their effect was strictly limited to that object. As the Franco-British Convention of 1882 did not deal with questions or jurisdiction and procedure, it cannot permit a British subject, by the application of a most-favoured-nation clause, to claim the benefit of a Treaty between France and a third country relating to these matters.

Verbrigghe v. Bellest
France, Court of Cassation (Chambre Sociale), 11 July 1947
Dalloz hebdomadaire, 1947, "Jurisprudence", p. 396
Annual Digest, 1947, Case No. 76

50. This was an appeal against a decision of the Commission Paritaire d'Arrondissement de Louviers of 19 June 1946, which had held that the benefits of the Ordinance on farm-leases did not apply in the case of the appellant, a Belgian subject, lessee of a farm in France, who had asked for a renewal of the lease under the terms of that Ordinance. The Commission Paritaire held that according to the Ordinance its benefits could only be invoked by aliens whose children had acquired French nationality. The appellant contended that he was entitled to the benefits of the Ordinance in virtue of article 2 of the Franco-Belgian Convention concerning Conditions of Residence of 6 October 1927, as supplemented by an interpretative agreement of 16 and 24 April 1934, based upon an exchange of diplomatic notes. Article 2 of the Convention provided:

The nationals of each of the Contracting Parties shall enjoy most-favoured-nation treatment in the territory of the other as regards the possession, acquisition, occupation and leasing of any movable or immovable property.

The Belgian note of 11 April 1934 stated:

Belgian subjects may invoke in France, like French nationals themselves, the benefit of all provisions which apply to owners or tenants in respect of both residential buildings and buildings destined for commercial, industrial or professional uses.

81 Recueil Dalloz de doctrine, de jurisprudence et de législation (Paris), year 1947. Referred to hereafter as Dalloz hebdomadaire.
The appellant also invoked the Law of 28 May 1943 on the application to aliens of the laws on leases, which assimilated aliens who were protected by a diplomatic convention to Frenchmen in that matter, all restrictive provisions contained in legislation relating to leases notwithstanding. The Court held that the judgement of the lower Court must be quashed. The Court said:

Article 61 of the Ordinance of October 17, 1945, as amended by the law of April 13, 1946, which refuses the benefits of that Ordinance to cultivators of foreign nationality if they do not fulfil certain conditions, does not affect aliens who can invoke an international Convention exempting them from these conditions. This is done, in relation to farm-leases, by the Franco-Belgian Convention of October 6, 1927, as interpreted by the agreement of April 16 and 24, 1934, which provided that the nationals of each of the contracting parties should enjoy most-favoured-nation treatment in the territory of the other, particularly with regard to the leasing of all movable or immovable property, and that Belgian subjects could invoke in France the benefit of all provisions relating to leases like French nationals themselves. That position was, moreover, confirmed by the law of May 28, 1943.

Mandel v. Vatan
France: Tribunal Civil de la Seine, 28 July 1948
Gazette du Palais, 1948 (2e sem.), p. 162
Annual Digest, 1948, Case No. 1

51. This was an action by one Mandel, a Polish citizen, for the ejectment of the defendant, a French national, from a flat. Mandel had been granted possession of the flat by a decision of the same Court of 17 April 1946, in pursuance of an Ordinance of 14 November 1944, which provided that tenants who had been compelled to leave their place of residence as a result of the war should be entitled to recover possession of it. It was now contended on behalf of the defendant that a law of 7 May 1946 laid down that aliens should not be entitled to eject French nationals from flats of which they had been granted possession by judicial decree until they had found an adequate place of residence for them. On behalf of the plaintiff it was contended that the Franco-Polish Treaty of 1937 entitled him to recover possession, as it granted him most-favoured-nation treatment in the matter of owning and occupying property. The Court held that the defendant must be ejected. A municipal law must be so interpreted as not to conflict with an international Convention. The Court said:

A treaty which has been regularly ratified and published is superior in authority to municipal law... The Law of May 7, 1946, which provides that aliens are not entitled to eject French nationals from flats of which they have been granted possession by judicial decree until they have found an adequate place of residence for them, must, accordingly, be considered to exempt from its provisions aliens who are by treaty exempted from the conditions contained in these provisions. Such is the import of the Franco-Polish Convention of May 22, 1937, promulgated by decree of May 31, 1937. Admittedly the contracting parties could not foresee the circumstances which gave rise to the Ordinance of November 14, 1944, and the Law of May 7, 1946. But the Treaty provides that the nationals of either country shall enjoy in the territory of the other most-favoured-nation treatment in the matter of owning, acquiring and occupying movable or immovable property... Polish nationals must, accordingly, by virtue of the most-favoured-nation clause, enjoy the benefit of such rights. The right of “owning” and “occupying” property necessarily includes that of recovering possession of a place of residence from which one has been unlawfully ejected.

Lovera v. Rinaldi
France: Court of Cassation (Plenary Session of all Divisions), 22 June 1949
Daloz hebdomadaire, 1951, “Jurisprudence”, p. 770
Annual Digest, 1949, Case No. 130

52. The appellant, an Italian national, had, on 23 November 1946, submitted a request for the renewal of his lease, in reliance on an Ordinance of 17 October 1945. The Court below rejected his request on the ground that article 61 of that Ordinance, as amended by a Law of 13 April 1946, excluded aliens from the benefits of its provisions. It was now contended on behalf of the appellant that the Franco-Italian Convention of 3 June 1930 provided that Italian nationals should enjoy in France the same treatment as French nationals, or at least as the most-favoured aliens. The Court held that the appeal must be dismissed. The Franco-Italian Treaty lapsed on the outbreak of war between the two countries. The Court said:

Article 61 of the Ordinance of October 17, 1945, does not apply to the case of an alien who can invoke an international Convention exempting him from its restrictive conditions. However, it is necessary that such a Convention should actually be in force. Reciprocal obligations concerning matters of private law assumed in respect of relations in time of peace lapse on the outbreak of war. The state of war between Italy and France was incompatible with the maintenance of the obligations which the Convention of 1930 imposed on the latter with regard to the establishment of Italian nationals on French territory. The armistice suspending hostilities did not end the state of war. At the date when the appellant put forward his request the Treaty had not again been put into effect.

In re X and Mrs. X
France: Conseil d’Etat, 3 February 1950
International Law Reports, 1950, Case No. 99

53. French legislation of 1944 and 1945 provided for the confiscation of profits derived from commercial relations with the enemy. The petitioners, who were Swiss nationals, contended that they were not subject to this legislation, on the ground that they were nationals of a neutral State and that under a Franco-Swiss Treaty of 1882 they were entitled to “most-favoured-nation” treatment, and thus, by application of a Franco-Spanish and a Franco-British Treaty, to exemption from all war levies. The contentions of the petitioners were rejected. The Conseil d’Etat said:

Whereas the petitioners contend that, by virtue of the treaty concluded on 23 February 1882 between France and Switzerland concerning the establishment of French nationals in Switzerland and Swiss nationals in France, article 6 of which provides that: “Any favour which one of the Contracting Parties has granted, or may grant in future, in whatever form, to another Power, in respect of the establishment of citizens and the exercise of industrial occupations shall be applicable in like manner and at the same time to...”

Revue critique de droit international privé (Paris). Referred to hereafter as Revue critique.
the other Party, without it being necessary to conclude a special agreement to that effect", the exemption provided for the benefit of Spanish nationals in article 4, paragraph 2, of the Franco-Spanish Consular Convention of 7 January 1862, and for the benefit of British subjects in article 11 of the Anglo-French Convention of 28 February 1882 in respect of "contributions of war, ... and other contributions leviable under exceptional circumstances", should be granted to Swiss nationals established in France: Considering that the grounds invoked in that plea would necessitate the interpretation of the aforementioned International Conventions, a matter on which it is not for the Conseil d'Etat to rule; and that, in the absence of any special agreement between the Governments concerned, the Minister for Foreign Affairs is alone competent in France to determine the meaning and scope of the provisions in question; and that the interpretation given in the communication dated 6 November 1947 from the Minister for Foreign Affairs to the Minister for Finance provides that Swiss nationals cannot avail themselves of the provisions of the said article 6 of the treaty concerning establishment of 23 February 1882 to claim the exemption provided in favour of Spanish and British nationals and that, therefore, Mr. and Mrs. X are not justified in invoking those grounds to contend that the provisions of the Ordinance of 18 October 1944 and subsequent amendments thereto do not apply to them ... .

Jones-Dujardin v. Tournant and Haussy
France: Tribunal Civil of Arras, 2 February 1951
Dalloz hebdomadaire, 1951, “Jurisprudence”, p. 360
International Law Reports, 1951, Case No. 135

54. A French Law of 1 September 1948 gave tenants security of tenure. It provided, however, that in certain circumstances, such as personal need, the owner of the premises could evict a tenant. The plaintiffs, British nationals, were the owners of a house of which the second defendant was the tenant. They sought to obtain an order for eviction on the ground that they needed the house for their personal use. It was contended on behalf of the defendant that French nationals only were entitled to the exceptional right of evicting a tenant. The Court held that the plaintiffs were entitled to recover possession of the house owned by them. The Court said:

The Anglo-French Convention concerning commercial and maritime relations, of 28 February 1882, contains a most-favoured-nation clause. An Agreement promulgated by Decree dated 16 June 1933, extended the scope of that Convention to leases; ... It is not necessary, in order to enable a British subject to rely on the provisions of the Law on leases of 1 September 1948 and in particular article 19 of that Law, which give special rights to French nationals, that English law should contain analogous provisions, since the Constitution of 1946 affirms the supremacy of treaties over municipal law even if that law is later in date than the treaty.

Asia Trading Co., Limited v. Bilitimex
Netherlands: District Court of Amsterdam, 17 October 1951
International Law Reports, 1951, Case No. 134

55. The Asia Trading Company, of Djakarta, brought an action in the District Court of Amsterdam against the firm of Bilitimex, of Amsterdam. The defendant applied for an order that the plaintiff, being a foreign company, should deposit cautio judicatum solvi. The plaintiffs opposed the application.

The Court held that the order for the cautio must be refused. This followed from Article 24, paragraphs 1 and 2 of the Netherlands-Indonesian Union Statute agreed upon on 2 November 1949, which promised the subjects of each partner to the Union treatment on a footing of substantial equality with the other's own subjects, and in any case most-favoured nation treatment. The latter provision guaranteed to Indonesians exemption from the cautio judicatum solvi, because the Netherlands had previously exempted other foreigners and foreign countries from the cautio under the Hague Convention on Procedure in Civil Cases of 17 July 1905.

Rex v. Hans Beckmann
Norway, Supreme Court, 6 May 1954
International Law Reports, 1954, p. 307

56. The accused had accepted employment as a whaler on board a Dutch whaling ship, which took part in the Dutch whaling expedition during the season 1952/53. He was prosecuted for having violated the Whaling Law of 16 June, 1939, forbidding Norwegian citizens, Norwegian companies and persons domiciled in Norway to participate in any way in whaling expeditions under a foreign flag. The accused contended that the Law was in contravention of international law and, in particular, of treaties concluded with the Netherlands. Paragraph 5 (a) of the Whaling Law provided as follows:

It is forbidden for Norwegian companies, citizens or domiciled persons directly or indirectly to participate in or co-operate in furthering whaling with floating factories under an alien flag.

The King or whom he authorizes thereto may except from this provision foreigners or foreign companies which engaged in whaling in the last antarctic whaling season before September 3, 1939, or a foreign whaling factory which before that date was being used for whaling.

57. His appeal was dismissed. The Court said that it could not.

hold that the legal situation under article 5 (a) of the Whaling Law of 16 June 1939 with the supplementary Law of 24 May 1946, contravenes treaties entered into by Norway or principles which Norway has undertaken in international commitments to respect. This is so as regards treaties entered into both before and after the enactment of the Statutes of 1939 and 1946. In particular, the Treaty of Commerce and Navigation entered into with the Netherlands on 20 May 1912 is not incompatible with Norway's right to introduce a regulation such as that contained in article 5 (a) of the Whaling Law. Neither article 1 of the Treaty which secures reciprocal most-favoured-nation treatment to the respective citizens, nor article 3 which guarantees “national treatment” in the other country, purports to cover such situations as are regulated by article 5 of the Whaling Law. The defence has particularly stressed that the dispensation in the other paragraph of article 5 (a) is a discrimination against the Netherlands in violation of the most-favoured-nation clause in the Treaty of 1912. This argument is without foundation. The provision in question is general in character and puts all countries which did not engage in whaling before 3 September 1939, on the same footing.

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33 Zwolle, IV.V. Uitgeversmaatschappij W. E. J. Tjeenk Willink.
Therefore,

there is no basis for such a restrictive interpretation of article 5 (a) of the Statute as has here been suggested.

Fiscal Exemption Case in Greece
Greece: Conseil d'Etat. 1954
Revue hellénique de droit international, vol. 8 (1955), p. 301
International Law Reports, 1954, p. 305

58. The Convention concerning Establishment and Judicial Protection concluded between Greece and Switzerland on 1 December 1927 provides in article 9 that

in no case shall the nationals of either of the Contracting Parties be subjected on the territory of the other Contracting Party to charges, customs duties, taxes, dues or contributions of any nature different from or higher than those which are or will be imposed on subjects of the most-favoured-nation.

Article 11, which relates to commercial, industrial, agricultural and financial companies, duly constituted according to the laws of one of the Contracting Parties and having their sièges on its territory, provides that the said companies

shall enjoy, in every respect, the benefits accorded by the most-favoured-nation clause to similar companies, and, in particular, they shall not be subjected to any fiscal contribution or charge, of whatever kind and however called, different from or higher than those which are or will be levied on companies of the most-favoured nation.

The appellants in this case, a Swiss Company whose head office was situated in Geneva, claimed exemption from income tax, invoking in support of that claim the Anglo-Greek Convention of 1936 for the Reciprocal Exemption from Income Tax on Certain Profits or Gains Arising from an Agency. Under that Convention, the profits or gains arising in Greece to a person resident, or to a body corporate whose business is managed and controlled in the United Kingdom, were exempted from income tax unless they arose from the sale of goods from a stock in Greece or accrued through a branch or management in Greece or through an agency in Greece where the agent had a general authority to negotiate and conclude contracts. The appellants contended that they had no establishments of that kind in Greece, seeing that their representative there did not have the power to enter into contracts in his own name and for his own account; in consequence, the conditions required by the Anglo-Greek Convention being fulfilled, the appellant ought to be exempted from income tax.

59. It was held that the appellant was entitled to fiscal exemption, irrespective of reciprocity. It was said:

Whereas the original jurisdiction, interpreting the Convention between Greece and Switzerland, recognized that the exemption from income tax of Swiss enterprises in Greece was conditional upon the institution of a corresponding exemption in Switzerland (either directly, or indirectly through the most-favoured-nation clause, by the exemption of the enterprises of any third country) in respect of Greek enterprises operating in Switzerland through an agent, just as the exemption of British enterprises in Greece is conditional upon the exemption in Great Britain of Greek enterprises operating there. Recognizing that no such exemption exists in Switzerland, proof to that effect having been produced, it categorically rejected the corresponding plea of the appeal, having therefore considered that the appellant's contention regarding the limited powers of its representative was irrelevant and should not be examined.

Whereas, in economic treaties in particular, the purpose of the most-favoured-nation clause is to avoid the danger that the subjects of Contracting States might possibly be placed in an unfavourable position compared with subjects of other States in the context of international economic competition. Through the operation of that clause, each of the two contracting States grants to the other the favours which it has already granted to a third State and undertakes to grant it any favour which it may grant to a third State in future, for the duration of the treaty. Provided that there is no stipulation to the contrary in the agreement, such latter favours accrue ipso jure to the beneficiary of the clause, which does not have to furnish any additional compensation, even where the concessions granted to the third State are not unilateral but are subject to reciprocity. When interpreted in that sense, the clause achieves the purposes for which it was designed, namely, assimilation in each of the two States, in respect of the matters to which the clauses relate, of the subjects or enterprises of the other State to the subjects or enterprises of a third and favoured country.

Whereas, in the current case, the most-favoured-nation clause embodied in the Convention between Greece and Switzerland is simply stated without restriction or onerous conditions, and as such confers upon Swiss enterprises operating in Greece the right to fiscal exemption under the conditions under which the same exemption is granted to British enterprises, even if Greek enterprises do not enjoy in Switzerland the favour which they enjoy in Great Britain. Consequently, the impugned decision, having made the exemption of the appellant conditional upon the existence in Switzerland, as compensation, of a similar régime in favour of Greek enterprises established there, interpreted the Convention between Greece and Switzerland erroneously and should for that reason be set aside, in accordance with the second and justified plea of the present appeal, and the case should be referred back to the original jurisdiction for consideration of the question whether the appellant is eligible to benefit under the Convention between Greece and Switzerland, and of the soundness of the contention that the establishment of the appellant in Greece is not of a kind which under the provisions of the said Convention, precludes fiscal exemption.

Crausaz John case
France: Cours d'appel de Paris, 18 March 1955
Clunet, vol. 82 (1955), p. 669

60. The accused pleaded articles 1 and 3 of the Treaty of establishment of 23 February 1882 whereas French nationals in Switzerland and Swiss nationals in France may freely carry on a trade like nationals—and article 6 of the same treaty containing, as regards establishment, the most-favoured-nation clause and consequently the Franco-Saarlander Convention of 3 March 1950. In its judgement the Court said:

Considering that, although the courts are competent to interpret the clauses of international agreements concerning private law relationships between the parties to proceeding, they are not competent, where there is uncertainty, to determine the sense and the scope of such of those clauses which concern public law, the executive power alone being competent to interpret such clauses.

Considering that the Franco-Swiss Treaty of 23 February 1882 establishes the principle of equal treatment, in each of the two
countries concerned, of nationals of the other country, subject to an express obligation for those nationals to comply with the laws and by-laws; and that this latter clause unquestionably relates to public law.

Considering that the Legislative Decree of 12 November 1938, together with the Decree of 2 February 1939 and the other texts cited in the indictment, are laws and by-laws applicable to alien in the exercise of their profession in French territory and that it is for the French Government to determine whether such texts are applicable to Swiss nationals enjoying the benefits of the Convention of 23 February 1882;

Considering, furthermore, that the Treaty of 23 February 1882 is based on the concept of reciprocity of the favours accorded to nationals of either country and that the matter to be determined is whether French nationals established in Switzerland are in effect subject to laws and by-laws in the conduct of their industrial or commercial activities;

Considering, finally, that the question whether article 6 of the Franco-Swiss Treaty of 26 February 1882 has the effect of obliging the French authorities automatically to accord Swiss nationals resident in France the benefits of the provisions in article 8 of the Franco-Saarlander Convention of 3 March 1950, which exempts citizens of the Saar from certain obligations imposed by the Ordinance of 2 November 1945 on aliens in the exercise of various professional activities, is also a matter relating to public law; on those grounds ... suspends judgement.

Lloyds Register of Shipping v. Bammeville France, Tribunal Civil de la Seine, 22 March 1958

International Law Reports 1958-II, p. 599

61. Upon the expiration of a lease of business premises a tenant was entitled, in accordance with the French Decree of 30 September 1953, to call upon the landlord to renew his lease, or, alternatively, to pay compensation in the event of such renewal being refused. Lloyds Register of Shipping, the plaintiffs herein, who in the present action claimed compensation, failing the renewal of their lease, contended that the Law of 28 May 1943, to which article 38 of the Decree referred, provided that the benefit of security of tenure, or alternatively the right to payment of compensation, was available to citizens of countries which granted similar rights to French citizens and that the United Kingdom was such a country because the Anglo-French Treaty of Commerce and Navigation, 1882, contained a most-favoured-nation clause which had been made applicable to the law of landlord and tenant by a Supplementary Agreement of 21 and 26 May 1929.

62. The Court held that the plaintiffs were entitled, by virtue of the Treaty and the Supplementary Agreement, to claim the benefits of the Decree of 30 September 1953, and were accordingly entitled to compensation. In the part of its judgement concerning the most-favoured-nation clause, the Court said:

The plaintiffs are assignees of a lease of premises situate at 26 rue Cambon, Paris, and owned by the defendants. It was stated in the deed of assignment of the lease, to which the owners were also parties, that Lloyds Register was engaged in the registration of shipping.

This lease, which expired on April 1, 1955, was tacitly extended, and on June 13, 1955, the plaintiffs asked for its renewal. The defendants refused to renew the lease, on the ground that the premises in question were only subsidiary premises as far as the tenants were concerned, and not essential for the conduct of the plaintiffs' business. They further contended that the plaintiffs were an English Company [and as such] not entitled to claim the benefit of the law relating to business premises ...

On April 7, 1956, the defendants asked for the action to be dismissed on the ground that the plaintiffs were a foreign Company ...

So far as concerns the defendant's contention regarding the nationality of the plaintiff Company, this court is of opinion that by virtue of article 38 of the Decree of September 30, 1953, the provisions thereof do not apply to foreign traders. On the other hand, the Law of May 28, 1943, to which article 38 of the Decree refers, expressly excepts the case of nationals of countries which grant to French citizens the benefits of similar legislation, as well as the case of foreign nationals who are exempt from this requirement of reciprocity by virtue of an international agreement. This applies to British subjects. The Anglo-French Treaty of Commerce and Navigation of February 28, 1882, contains a most-favoured-nation clause, and the interpretative Agreement of May 21 and 26, 1929, applies this clause in the matter of leases. It follows that in these circumstances the plaintiffs are entitled to claim the benefit of the provisions of the Decree of September 30, 1953.

Corneli case France : Court of Cassation, July 2, 1958
Gazette du Palais, 1958, part II, p. 217

63. The appellant, an Italian citizen, was convicted under article 1 of the Decree of 12 November 1938 for having failed as an alien, to obtain a trader’s permit. He maintained that he was not required to be in possession of a trader’s permit because by virtue of the most-favoured-nation clause contained in the Franco-Italian Agreement of 17 May 1946 he was entitled to rely on the Franco-Spanish Treaty of 7 January 1862, which gave Spanish citizens the right to carry on trade in France. The Public Prosecutor contended that the Franco-Spanish Treaty did not exempt Spanish citizens from the requirement of obtaining a trader’s permit, and that a letter of the French Minister for Foreign Affairs dated 15 April 1957 which stated that foreign nationals entitled to rely on treaties conferring the right to trade in France were not exempt from the requirement of obtaining trader’s permits, was binding on the courts. The appeal was dismissed. The Court said:

The judgement under appeal, in view of the letter of the Minister for Foreign Affairs dated April 15, 1957, finds that the exercise of the right to trade in France which is granted to foreign nationals by international agreements does not exempt foreign nationals from the need to satisfy the necessary—as well as sufficient—requirement, namely, to be in possession of a traders permit, and that this applies in particular to Italian nationals by virtue of the Franco-Italian Agreement of May 17, 1946.

The judgement under appeal thus arrived at a correct decision, without violating any of the provisions referred to in the notice of appeal.

Notwithstanding that international agreements can only be interpreted by the Contracting Parties, the interpretation thereof, as far as France is concerned, is within the competence of the French Government, which alone is entitled to lay down the meaning and
of personal property was as follows:

The most-favoured-nation clause respecting the "nationals and merchandise of each Party applied only to commercial goods and transactions and did not affect legacies. Even if the provisions of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany, signed at Washington on 8 December 1923 and the Treaty of Friendship, Commerce, and Navigation between the United States and Germany, signed at Washington on 29 October 1954. The Supreme Court of Wisconsin reversed the judgement of the County Court and the case was sent back for further proceedings. The most-favoured-nation clause respecting the "nationals and merchandise" clause of each Party applied only to commercial goods and transactions and did not affect legacies. Even if the provisions of the Treaty of Friendship, Commerce, and Navigation between the United States and Japan, signed at Tokyo on 2 April 1953 were to be invoked through the most-favoured-nation clause, the most that could be secured through that treaty would be national treatment, which would not, under the law of Wisconsin, exempt the legacy from taxation. The provisions of the 1954 Treaty regarding national treatment and most-favoured-nation treatment, similarly, did not provide any exemption from taxation for this legacy. Consequently, the legacy was subject to taxation under the law of Wisconsin. Concerning the Treaty with Germany of 8 December 1923, the Court said:

This Treaty was reinstated, as applicable to the present Federal Republic of Germany, by Treaty signed June 3, 1953 and effective October 22, 1954, prior to the testator's death.

The county court based its decision in part on Article IV of the 1923 Treaty of which the pertinent provision relating to disposition of personal property was as follows:

"Nationals of either High Contracting Party may have full power to dispose of either personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legateses and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases. (Italics supplied)"

That provision does not support the claim of exemption . . . .

It is next contended that other provisions of the 1923 Treaty entitled German nationals to national treatment and to unconditional most-favoured-nation treatment with respect to inheritance tax exemption; and that since the Treaty was in effect when testator died on July 1, 1955 it entitled respondent to the benefit of the tax exemption provisions of the Treaty with Japan signed April 2, 1958.

Article I of the 1923 Treaty gave permission to the nationals of each Party to enter, travel and reside in the territories of the other, to do various specified things . . . .

. . . these provisions merely give German nationals the right to carry on specified activities in this country, not including receipt and use of bequests, and while here to be free from taxes other or higher than those exacted of our nationals.

Article VII of the 1923 Treaty guaranteed most-favoured-nation treatment with respect to navigation and to imports and exports and duties thereon. Article VIII was as follows:

"The nationals and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties."

Manifestly those provisions relate only to commercial goods and transactions and are not sufficient to establish the claimed exemption from inheritance tax.

Respondent contends that certain statement of Secretary of State in recommending the 1923 Treaty to the President and Senate disclosed a purpose to give a broad reciprocity which should be extended to such matters as inheritance taxes. A reading of those documents show, however, that the Secretary was concerned with promoting of international trade. Thus he considered the adoption of the unconditional favoured nation policy as "the simpler way to maintain our tariff policy" and thereby to extend our trade abroad, and he referred to "the interest of the trade of the United States in competing with the trade of other countries . . . ."

With regard to the question whether the Treaty with Japan of 2 April 1953 established reciprocity with respect to exemption from inheritance taxes, the Court said:

"Nothing of the kind appears in the Japanese Treaty . . . ."

Paragraph 1 in turn provides that nationals of either Party residing or engaged in gainful or philanthropic activities within the territory of the other Party shall not be subject to the payment of taxes on "means of subsistence, transactions, activities or any other object . . . within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party". [Italics not in original treaty.]

If this applies to inheritance taxes at all, it appears to mean only that the United States shall aim to apply in general the principle that Japanese nationals not resident nor engaged in business shall
not be subject to payment of inheritance taxes “more burdensome than those borne by nationals” of the United States. Doubtless any restriction thereby placed upon the United States operates upon the state of Wisconsin.

Assuming for present purposes that by virtue of the Treaty with Germany Dr. Heuss is entitled to as favorable treatment with respect to inheritance taxation as a national of Japan, and disregarding the precatory tone of the words “it shall be the aim... to apply in general”, we may conclude that at most the bequest to him is exempt by virtue of the Treaties only if it would be exempt were he a resident of Wisconsin and directed by the will to use the money in Wisconsin.

Even if such were the case, however, the bequest would not be exempt. Sec. 72.04(1) of the law would apply. That subsection exempts transfers to individuals residing in this state only where they take “as trustees, in trust exclusively for... charitable... purposes in this state” ....

66. Concerning the Treaty with Germany of 29 October 1954, the Court said:

... Article III provides that nationals of one Party shall be free from molestation and shall receive protection and security in the territories of the other Party, and shall be accorded no less favourable treatment “for the protection and security of their persons and their rights” than is accorded nationals of the other Party or of any other country. We cannot construe this Article to include tax exemption.

Article XXV defines “national treatment” and “most-favoured-nation treatment” as used elsewhere in the Treaty.

Article XI relates to taxation. The first four sections are identical in all material respects with the provisions of Article XI of the Japanese Treaty... They are insufficient to establish the right to the exemption claimed in the present case ...

By section 5 of Article XI, each Party to the Treaty reserves the right to “Apply special provisions in allowing, to nonresidents, exemptions of a personal nature in connection with income and inheritances taxes.” It is unnecessary to decide what that means, for clearly it does not establish mandatory reciprocity...

... It may be observed in conclusion that even if the Treaty in effect on the date of testator's death were to be construed as establishing a rule of reciprocity under which Wisconsin would have to exempt a bequest to a German national if Germany would exempt a comparable bequest in the reverse situation, respondent's case for exemption would still be very doubtful.While it appears that the Federal Republic of Germany would not tax a transfer from a testator residing in that country to a person residing in the United States made under the condition that it must be used solely for charitable purposes, the statement of the German Secretary of the Treasury which appears in the record is careful to add “if such use is assured”. Presumably this means that there must be some assurance enforceable by legal process, that the money will be used for the purpose specified by the testator. Therefore the assumed reciprocity would extend only to a case where the charitable use on which the Wisconsin resident's bequest to a resident of Germany is conditioned, can be enforced in Germany by some legal means.

The trial court found and it appears to be conceded, that the trust device is not available in Germany. The record is barren of any showing that any other judicial or administrative process would be available to control the disbursement of the funds by the recipient in that country. We are not prepared to take judicial notice of the German laws. In pointing out this feature of the case we do not mean to suggest any doubt that the eminent legatee will properly use the bequest for the specified purpose. We have every confidence that he, and if the occasion arises his successor in office, will disburse the funds with the most scrupulous fidelity to the wishes of the testator. Where, however, tax exemption is conditioned on legal assurance that restrictions will be complied with, moral certainty alone is not enough.

Heaton v. Delco Appliance Division, General Motors Corp. United States of America; Supreme Court of New York, Appellate Division, Third Department, 2 December 1958

International Law Reports, 1958-II, p. 482

67. This was an appeal by a British subject from a decision of the Workmen's Compensation Board which directed the payment to him, as an alien, of only one half of the commuted amount of the compensation to which a citizen of the United States would be entitled. The appellant maintained that he was entitled to the same rights as a citizen of the United States under article X of the Treaty of Amity, Commerce, and Navigation between the United States and Great Britain (the Jay Treaty), signed in London on 19 November 1794, and articles II and V of the Convention between the United States and Great Britain relating to the Tenure and Disposition of Real and Personal Property, signed at Washington on 2 March 1899. The Court, which affirmed the decision of the Workmen's Compensation Board, said:

Considering the terms, conditions and circumstances under which Article X became part of the Treaty of 1794 and giving to it the most favorable interpretation, it was never intended by the contracting parties to include our present day form of compensation between employer and employee or anything vaguely similar to it that might have been in effect at the time of the treaty. Its purpose was, by a Treaty of Amity, Commerce and Navigation, to terminate the differences without respect to the merits; to produce mutual satisfaction and understanding; to regulate the commerce and navigation so as to render the same reciprocal to the benefit and satisfaction of both nations. Article X referred to the debts of individuals of both nations and their protection in the event of a war or national differences. It (Article X) was primarily to prevent in the future such unlawful confiscations practiced following the Revolutionary War. The Article was directed to the rights of the individual as such and ineffective to abrogate Section 17 of the Workmen's Compensation Law of the State of New York.

We likewise conclude that Articles II and V of the Convention of 1899 is of no help or solace to the claimant. The wording of Article II is clear that it was intended for the purpose of disposing of personal property by testament, donation or otherwise and it cannot inferentially under any favorable interpretation be construed to have application to the present facts.

There is no language in the Treaty which can be construed to make claim for death or injuries arising out of the relationship of employer and employee. The right to recover without alleging...
negligence or fault is given solely and exclusively by the statute of
which Section 17 is a part. Even though social legislation such as
this is subject to liberal interpretation, it cannot be so interpreted
as to abrogate the wording and intent of the statute.

... as to the Treaty of 1794 and the Convention of 1899 there is
nothing in the language, taking into consideration the time, cir-
cumstances and conditions when they were written and also the
present day circumstances, that can overcome or abrogate Section 17

... It has been necessary to document by way of amendment our
own Constitution through the years and many new and modern
treaties have been executed by this Government and other nations.
Section 17, referred to herein, has been described as a harsh statute
which finds very little justification in any principle of fairness.
However, the forfuitious circumstances here cannot be overcome by
judicial interpretation. Our duty is done when we enforce the law
as written by the legislative branch of the Government.

Recognition v. N.V. Koninklijke Vleeswarenfabriek B. Linthorst
En Zonen
Netherlands: Court of Appeal of the Hague, 4 February
1939
Nederlandse Jurisprudentie 1960, No. 339
International Law Reports, vol. 28, p. 494

68. The appellant, a United States citizen domiciled in
Belgium, owed an acknowledged debt to the respondent.
When in the Netherlands, he was imprisoned for his debt
under an order given by the President of the District
Court of Zutphen. The appellant sought to be released
by the President of the District Court of The Hague, but
his appeal failed. He appealed further to the Court of
Appeal of The Hague, relying, inter alia, on two treaty
provisions by virtue of which, he argued, he should be
set free. The first of these was article 24 of the Convention
relating to Civil Procedure of 17 July 1905.68 The appel-
ellant argued that the benefit of this article should accrue
to nationals of non-signatory States domiciled in the
territory of one of the Contracting Parties as well as to
the nationals of such Parties. The second provision on
which the appellant relied was article III, section I, of the
Netherlands-United States Treaty of Friendship, Com-
merce and Navigation of 27 March 1956.67 The appel-
ellant submitted that he was entitled to benefit from article 24

68 Article 24 reads (as translated from the official French text):
"Civil imprisonment, whether as a means of enforcement or
as a simple preventive measure, may not, in civil or commercial
proceedings, be imposed on aliens who are nationals of one of
the contracting States in cases where it would not be imposed
on nationals of the country. A circumstance which may be invoked
by a national domiciled within the country to secure the ending
of civil imprisonment must produce the same effect for the benefit
of a national of a contracting State, even if that circumstance
arises outside the country".

67 This provision reads:
"Nationals of either Party within the territories of the other
Party shall be free from molestations of every kind, and shall
receive the most constant protection and security. They shall be
accorded in like circumstances treatment no less favourable
than that accorded nationals of such other Party for the protection
and security of their persons and their rights. The treatment
accorded in this respect shall in no case be less favourable than
that accorded nationals of any third country or that required by
international law."

of the Hague Convention on Civil Procedure through
the operation of this most-favoured-nation clause. The
Court, which held that the appeal must be dismissed,
said:

Since the appellant is a citizen of the United States of America and
the United States did not accede to the Convention, it is not open
to him to rely upon the protection of Article 24 of that Convention,
despite his being domiciled in Belgium, a country that did accede... 
The appellant deems his imprisonment to be illegal on account of
its being contrary to Article III, section I, of the Netherlands
United States Treaty of Friendship, Commerce and Navigation,
which was ratified by the (Netherlands) Act of 5 December 1957... 
This provision, assuming it is binding upon everyone, does not
prevent a citizen of the United States from being imprisoned in
this country under Article 768 of the Code of Civil Procedure.
Civil imprisonment, indeed, does not run counter to the protection
of rights which the Kingdom of the Netherlands under the Treaty
owes to citizens of the United States. Moreover, from Article V of
the Treaty, as from Article 5 of the annexed protocol of signature,
it becomes clear that the Treaty is of limited purport only as far as
civil procedure is concerned: civil imprisonment is not referred to,
still less precluded. A more liberal interpretation of Article III,
section I, as sought by the appellant and under which in this country
a citizen of the United States would enjoy the protection of Article 24
of the Convention on Civil Procedure without the United States
having acceded to it, is therefore, unacceptable to the Court.

The Nyugat—Swiss Corporation Société Anonyme Mar-
time et Commerciale v. Kingdom of the Netherlands
Netherlands: Supreme Court, 6 March 1959
Nederlandse Jurisprudentie 1956, No. 141, p. 305; ibid.,

69. On 13 April 1941, the steamship Nyugat was sailing
outside territorial waters of the former Dutch East
Indies. She sailed under the Hungarian flag. The Nether-
lands destroyer Kortenaer stopped her, searched her and
took her into Surabaya, where she was sunk in 1942. The
plaintiffs claimed that the Supreme Court should give a
declaratory judgement to the effect that the Nyugat
had been unlawfully stopped, searched, captured, diverted
from her course, taken into Surabaya and put into use,
and that they were entitled to claim compensation for
any damage arising from these acts and the loss of the
Nyugat. They referred to the Treaty of Friendship,
Establishment and Commerce, concluded with Switzer-
land at Berne on 19 August 1875 and the Treaty of
Commerce, concluded with Hungary on 9 December 1924.
The Supreme Court upheld its first decision and dismissed
the plaintiff's claim. The Supreme Court said:

Shipowners see a direct conflict with the Treaty of Friendship,
Establishment and Commerce, concluded with Switzerland at
Berne on August 19, 1875, and with the Treaty of Commerce,
concluded with Hungary on December 9, 1924. The Supreme
Court said in its first judgment that treaties of this nature deal
with completely different matters. Against this opinion shipowners
advance the argument that application of the régime of the Decrees
to the nationals of certain States would amount to discrimination
against these nationals which would be incompatible with the most-
favoured-nation clause * contained in these treaties. In the view
of this Court this discrimination originates in measures that are
not contested by a most-favoured-nation clause. On the occasion of
the speeches shipowners further alleged that the most-favored-

* Italics added by Secretariat.
judgement for the defendants, and the complainants can be assimilated to a severance of diplomatic relations as it that a rupture of friendly relations, as understood in the year 1829, "is accompanied by such facts and circumstances as to make the invoking of this provisions fails, since it is unacceptable that a rupture of friendly relations, as understood in the year 1829, can be assimilated to a severance of diplomatic relations as it occurred during the second world war; in the present case the determination of the flag was also based upon the assumption by Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in the provisions of the 1829 treaty. From the preceding it follows that shipowners are wrong in their opinion that the Court should not apply the Decrees as being contrary to international provisions.

Guiseppe et al. v. Cozzani et al.
United States of America: Supreme Court of Mississippi, 22 February 1960
International Law Reports, vol. 31, p. 1

70. This was a suit in equity seeking recognition of the alleged rights of the complainants, as tenants in common with the defendants, of property passing under the will of Frank Toney, who had left the balance of his estate to his wife for life and then to his nephews and nieces and sister. Toney's wife died in 1933. The complainants, all of whom were residents of Italy, alleged that they were nephews and nieces or descendants of nephews and nieces of Toney, and descendants of his sister. The defendants alleged that, under the law of Mississippi, aliens were precluded from holding land. The Chancery Court gave judgement for the defendants, and the complainants appealed.

71. The Court held that the judgement of the Court below must be reversed and the case remanded. The statutory prohibition against the ownership of land by aliens was inconsistent with the Treaty of Commerce and Navigation of 1871 between the United States and Italy, which included a most-favoured-nation clause securing to Italian nationals the right to inherit and hold property which was recognized by the Treaty of 1782 between the United States and the Netherlands. In the event of a conflict between a statute of a state of the United States and a treaty, the latter prevailed. The Court said:

There are two pertinent treaties involved in this case: (1) "Treaty between the United States of America and the Kingdom of Italy, Commerce and Navigation" dated February 26, 1871.... That Treaty in Article 22 thereof reads as follows: "As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most-favoured-nation".... In this connection there should be considered the Treaty of 1782 between the United States and the Kingdom of the Netherlands.... (2) The "Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic" dated February 2, 1948, provides among other things that: "Property of nationals... of either High Contracting Party shall not be taken... without due process of law". Article 5, paragraph 2. See also paragraph 2 of Article 7 of the said Treaty in which it is provided in substance that a non-resident alien shall be allowed a term of three years in which to sell or otherwise dispose of property, and that this term is to be reasonably prolonged if circumstances render it necessary. Assuming that the Treaty in question was not intended to have the three-year provision for selling or otherwise disposing of the property of a non-resident alien would have no effect on the instant case since the rights of the complainants, if any, accrued as owners of vested remainder estates on the death of Frank Toney in 1906, and their rights to possession of the property accrued at the death of Emma Toney in 1933...

Kolovrat et al. v. Oregon
United States of America: Supreme Court, 1 May 1961

72. Two Oregon residents died intestate in 1953, leaving personal property there and no heirs except certain residents and nationals of Yugoslavia, who would have inherited the property but for the provisions of Oregon Revised Statutes, (Section III.070 (1963))29. The State of Oregon claimed the right to decedent's property as escheated property and contended that the Yugoslav heirs were ineligible to inherit. The heirs contended that their rights to inherit were secured by article 11 of the Treaty between the United States and Serbia of 14 October 1881 which was recognized to be in force between the United States and Yugoslavia. The Circuit Court entered orders denying the State's petitions for escheat and determining the rights of the alien heirs to take their distributive shares in the estate. It held that United States citizens had the right to receive payments from estates of persons dying in Yugoslavia, and that consequently the challenged condition in the statute was met.

73. On appeal, the Supreme Court of Oregon decided that the decrees of the Lower Court must be reversed. The Supreme Court of the United States held that the Judgement of the Supreme Court of Oregon must be reversed and the cause remanded for further proceedings. Under the Treaty of 1881, with its most-favoured-nation...
clause, non-resident heirs had the same right to inherit as they would have had if they were United States citizens living in Oregon. The assent of the United States to the Articles of Agreement of IMF, with which the Yugoslav exchange controls were consistent, prevented a State from deciding that such controls could be the basis for defeating rights conferred by the Treaty of 1881. The Court said:

The very restrictive meaning given the Treaty by the Oregon Supreme Court is based chiefly on its interpretation of this language: “In all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant . . . in each of these States to the subjects of the most favoured nation.” This, the State Supreme Court held, means that the Treaty conferred a right upon a United States citizen to acquire or inherit property in Serbia only if he is “in Serbia” and upon a Yugoslavian citizen to acquire property in the United States only if he is “in the United States”. The State Court’s conclusion, therefore, was that the Yugoslavian claimants, not being residents of the United States, had no right under the Treaty to inherit from their relatives who died leaving property in Oregon. This is one plausible meaning of the quoted language, but it could just as plausibly mean that “in Serbia” all citizens of the United States shall enjoy inheritance rights and “in the United States” all Serbian subjects shall enjoy inheritance rights, and this interpretation would not restrict almost to the vanishing point the American and Yugoslavian nationals who would be benefited by the clause. We cannot accept the State Court’s more restrictive interpretation when we view the Treaty in the light of its entire language and history. This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.

The 1881 Treaty clearly declares its basic purpose to bring about “reciprocally full and entire liberty of commerce and navigation” between the two signatory nations so that their citizens “shall be at liberty to establish themselves freely in each other’s territory”. Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner “under the same conditions as the subjects of the most favoured nation”. Thus, both paragraphs of Art. II of the Treaty which have pertinence here contain a “most favoured nation” clause with regard to “acquiring, possessing or disposing of every kind of property”. This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connexion we are pointed to a Treaty of this country made with Argentina before the 1881 Treaty with Serbia, and Treaties of Yugoslavia with Poland and Czechoslovakia, all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect the right of these Yugoslavian claimants to inherit property of their American relatives . . .

We hold that under the 1881 Treaty, with its “most favoured nation” clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon; but, because of the grounds given for the Oregon Supreme Court's holding, we shall briefly consider whether this treaty right has in any way been abrogated or impaired by the monetary foreign exchange laws of Yugoslavia.

Oregon law, its Supreme Court held, forbids inheritance of Oregon property by an alien living in a foreign country unless there clearly exists “as a matter of law and unqualified and enforceable right” for an American to receive payment in the United States of the proceeds of an inheritance of property in that foreign country. The State Court held that the Yugoslav foreign exchange laws in effect in 1953 left so much discretion in Yugoslav authorities that it was possible for them to issue exchange regulations which might impair payment of legacies or inheritances abroad and for this reason Americans did not have the kind of “unqualified and enforceable right” to receive Yugoslavian inheritance funds in the United States which would justify permitting Yugoslavians such as petitioners to receive inheritances of Oregon property under Oregon law. Petitioners and the United States urge that no such doubt or uncertainty is created by the Yugoslav law, but contend that even so this Oregon state policy must give way to supervening United States-Yugoslav arrangements. We agree with petitioners' latter contention.

The International Monetary Fund (Bretton Woods) Agreement . . . to which Yugoslavia and the United States are signatories, comprehensively obligates participating countries to maintain only such monetary controls as are consistent with the terms of that Agreement. The Agreement's broad purpose, as shown by Art. IV, para. 4, is:

“to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations.”

Article VI, para. 3, forbids any participating country from exercising controls over international capital movements “in a manner which will restrict payments for current transactions or which will impede or delay transfers of funds in settlement of commitments . . .” Article 8 of the Yugoslav laws regulating payment transactions with other countries expressly recognizes the authority of “the provisions of agreements with foreign countries which are concerned with payments”. In addition to all of this, an Agreement of 1948 between (the United States) and Yugoslavia obligated Yugoslavia, in the words of the Senate Report on the Agreement,

“to continue to grant most-favoured-nation treatment to Americans in ownership and acquisition of assets in Yugoslavia . . . [and] Yugoslavia is required, by Article 10, to authorize persons in Yugoslavia to pay debts to United States nationals, firms, or agencies, and, so far as feasible, to permit dollar transfers for such purpose.”

These treaties and agreements show that this Nation has adopted programmes deemed desirable in bringing about, so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange. These arrangements have not purported to achieve a sufficiently rigid valuation of moneys to guarantee that foreign exchange payments will at all times, at all places and under all circumstances be based on a "definitely ascertainable" valuation measured by the diverse currencies of the world. Doubtless these agreements may fall short of that goal. But our National Government's power has been exercised so far as deemed desirable and feasible toward that end, and the power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution. After the proper governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon of course cannot refuse to give foreign nationals their treaty rights, because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities. Our National Government's assent to these international agreements, coupled with its continuing adherence to the 1881 Treaty, precludes any State from deciding that Yugoslav laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty.

Semon v. Roncallo
France, Cour d'appel de Paris, 6 July 1961
Clunet, vol. 89 (1962), p. 420

74. It follows from the Franco-Colombian Establishment Convention of 16 March 1955 that the nationals

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34 Ibid., p. 17, article VI, section 3.
of both States enjoy most-favoured-nation treatment in the exercise of civil rights, and in particular the right to acquire and possess movable and immovable property. It also follows that there is assimilation to nationals in respect of the leasing of residential accommodation. The Court of Appeal of Paris inferred from this that a Colombian could exercise the right to a premium under art. 19 of the Act of 1 September 1948 without being defeated by the objection that he did not reside in France. In fact, "no provision of the enactment above mentioned imposes on Colombian nationals the obligation to reside in France in order to exercise their rights".

_Doulgeris v. Bambacus_

_United States of America: Supreme Court of Appeals of Virginia, 31 August 1962_

International Law Reports, vol. 33, p. 408

75. In a proceeding by an administrator to determine the distributees of a decedent's estate, the plaintiff, a Greek national, contended that she was the sister by adoption of the deceased having adopted under the law of Greece as the daughter of the decedent's father. The lower Court found that the policy of the adoption laws of Greece was contrary to the public policy of Virginia, and that the plaintiff was therefore not entitled to the status of adopted sister of the decedent and the right under Virginia laws to share in his estate as such. The plaintiff contended, _inter alia_, that the finding of the lower Court failed to recognize and give effect to the Treaty of Friendship, Commerce, and Navigation with Greece of 3 August 1951.

76. On appeal, the decree of the lower Court was affirmed. The Court stated that such refusal to recognize the plaintiff's status as adopted sister did not contravene the terms of a most-favoured-nation clause in the treaty.

There is no substance to the appellant's claim that the refusal of the lower Court to give her the status of an adopted child within the meaning of our statutes violates the rights guaranteed to her under the existing Treaty between the United States of America and the Kingdom of Greece... The decree does not deny the right of inheritance to the appellant under the laws of Virginia. What it denies to her is the right to inherit by virtue of her status as an alleged adoptive relative of the decedent—a status which has been fixed in a proceeding the purpose and object of which are contrary to the public policy of this State. In refusing to recognize a status thus fixed, the courts of Virginia treat alike the proceedings of all other States and foreign countries. We refuse to recognize the proceedings of any State or foreign country which offend our public policy... What the appellant asks here is that we afford to her better treatment than we afford to the citizens of other states or nations, that we recognize her status as an adoptive relative of the decedent although it had been fixed in a proceeding whose purpose and object are repugnant to our laws. The Treaty upon which she relies guarantees to the nationals of Greece no such preferred right.

_In re: Sciama and Soussan_

_France: Tribunal correctionnel de la Seine, 27 November 1962_

Clunet, vol. 90 (1963), No. 1, p. 762-763

77. The Franco-Italian Convention of 23 August 1951 provides that the nationals of both countries shall enjoy

_most-favoured-nation treatment in the exercise of trade. In this case the Tribunal correctionnel de la Seine said:

Whereas Sciama, being of Italian nationality, may legitimately claim the benefit of article 2 of the Treaty of Establishment of 23 August 1951 between France and Italy, which provides: "The nationals of each of the High Contracting Parties shall enjoy in the territory of the other party most-favoured-nation treatment with regard to... the practice of trade...", and whereas, consequently, he is entitled to rely on the provisions of article 1 of the Convention concluded on 7 January 1862 between France and Spain, which provides that: "The subjects of both countries may travel and reside in the respective territories on the same footing as nationals... practise both wholesale and retail trade operations..."

_Christian Dior v. Jackson_

_France: Tribunal de grande instance de la Seine, 17 January 1963_

Clunet, vol. 90 (1963), No. 1, p. 1068

78. A husband was requested to pay for clothes which his wife had ordered from a fashion designer. Domiciled in Switzerland, and of British nationality, he raised the objection of incompetence against the action brought by the French fashion designer as plaintiff. He maintained in the first place that the latter was not entitled to rely on article 14 of the Civil Code relating to the obligations contracted by a foreigner in France towards a French citizen on the ground that he expressly denied having contracted personally with the plaintiff company. He further relied on the Franco-British Convention of 28 February 1882, and, without disregarding the fact that this Convention, on commercial and maritime relations "was not of general effect and did not allow British subjects to rely on the most-favoured-nation clause", he maintained that the exchange of letters of interpretation of 21 and 25 May 1929 had extended the scope of application of the Convention to establishment, so that the most-favoured-nation clause would entitle British subjects to rely on treaties stipulating the assimilation of foreigners to nationals, and thereby on the benefit of Conventions on procedure excluding the application of articles 14 and 15, thus obliging the French plaintiff to sue the foreign subject before the court of his place of domicile. The Tribunal pointed out that the exchange of letters referred to granted most-favoured-nation treatment to British subjects in the matter of leases only and applied solely to British subjects settled in France. The Tribunal said:

Whereas the most-favoured-nation clause, which is entirely appropriate in the context of an economic régime, is much less relevant to matters of procedure and should not be applicable to procedure unless the terms of the treaty declare in sufficiently explicit terms that it is so applicable;

Whereas the agreements of 1929 had a specific object; and whereas they are the consequence of the restrictive effect attributed to the basic Convention of 1882, whereby British subjects have always been held liable for the deposit of security for costs and as ineligible to benefit from the provisions of the Act on Leases of 1 April 1926;

Whereas the purpose of the agreements of 1929 is thus made clear; and whereas their sole purpose is to ensure for British subjects and, reciprocally, for aliens of French nationality in the United Kingdom, the benefit of the Act on Leases;
Whereas, in fact, in the body of the letter of 21 May 1929, from the Ambassador of Great Britain in Paris addressed to the French Minister for Foreign Affairs, it is stated that negotiations were conducted between the High Contracting Parties with regard to the legislation on leases and not on the occasion of its enactment;

Whereas, furthermore, the Decree of 16 June 1935 specifies that it relates to commercial and maritime relations within the sphere of application of the Act on Leases;

Whereas, moreover, according to the commentary which precedes that Decree, the letters of 21 and 25 May 1929 recognize that the most-favoured-nation clause embodied in the Convention of 1882 assures to nationals of both countries the benefit of legislation on leases;

Whereas the specific nature of this purpose would preclude the extension of the agreements to another purpose, the principle of the restrictive interpretation of the diplomatic agreements in question being established;

Whereas, moreover, J., a British national domiciled in Switzerland, may not rely on a treaty of establishment which grants the benefit of the most-favoured-nation clause only to British nationals established in France and therefore entitled to carry on a remunerative activity there on a permanent basis;

Société technique de limonaderie v. Elias Ilya
France: Cour de cassation, 8 March 1953
Bulletin des arrêts... (1963), IV, No. 234, p. 190

79. Under the terms of the Act of 28 May 1943, the ordinary or exceptional laws concerning leases are applicable to aliens who are nationals of countries which have concluded with France diplomatic agreements providing, directly or indirectly, for the assimilation of aliens to nationals in respect of civil rights. It was therefore with good reason that, in the application of such legislative provisions and of the Franco-Egyptian Treaty of Montreux of 8 May 1937, rendered enforceable by the Decree of 17 March 1939, a court of appeal granted the right to recover possession to a landlord who was an Egyptian national. The Court said:

Whereas the appeal is grounded in a complaint that the impugned decision by the Court of Appeal of Dakar allowed a landlord of Egyptian nationality to exercise the right to recover possession prescribed in article 21 of the Decree of 30 June 1952 to Elias Ilya, a landlord of Egyptian nationality, pursuant to both the provisions of the law and the diplomatic agreements specified above; and whereas there are thus no grounds for the appeal;

For these reasons:

Rejects the appeal lodged against the decision issued on 22 February 1957 by the Court of Appeal of Dakar.

Consul General of Yugoslavia at Pittsburgh v. Pennsylvania
United States of America: Supreme Court, 6 January 1964
U.S. Reports, vol. 375, p. 395
International Law Reports, vol. 35, p. 205

80. Belemecich died intestate in Pennsylvania. His heirs were residents of Yugoslavia. The estate was ordered by the Orphan’s Court to be held by the Department of Revenue of Pennsylvania. The Consul General of Yugoslavia appeared at the hearing in the Orphan’s Court. He contended that the beneficiaries would have full control of the property distributed. He also argued that the matter was governed by article II of the Treaty of Commerce with Serbia of 2 October 1881. Therefore, the Court could not invoke state law to prevent the heirs from receiving their inheritance. On appeal, the Supreme Court of Pennsylvania, in affirming the decision of the Orphan’s Court, said:

... The appellant argues also that the order of the Court below offends against the Treaty of 1887 between the United States and Serbia (the predecessor sovereignty of the Republic of Yugoslavia). The point is not well taken. That Treaty provides briefly that there shall be reciprocal rights of inheritance between the citizens of the two nations. Under the decision in this case, there is no denying to the citizens of Yugoslavia the right of inheritance through American relatives. The Act of the Legislature, upon which the Court based its adjudication, is intended, not to breach the sanctity of the treaty mentioned but to guarantee that its provisions are upheld so that the beneficiaries will actually and not only technically or figuratively receive the amounts due them.... Nor does the case of Kolovrat et al. v. Oregon [43] cited by the appellant, help his position. The Oregon statute involved in that litigation was a confiscatory one. The one before us is merely custodial...

81. The Supreme Court of the United States held per curiam that the decision of the Supreme Court of Pennsylvania must be reversed.

Corbett v. Stergios
United States of America: Supreme Court of Iowa, 11 February 1964
International Law Reports, vol. 35, p. 208

82. Nicolas Stergios, a Greek immigrant resident in Iowa, made a will leaving most of his property to his

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41 Bulletin des arrêts de la Cour de cassation en matière civile (Paris). Referred to hereafter as Bulletin des arrêts...

42 See paras. 72-73 above.
wife and the balance to a niece. After executing the will, he adopted through Greek officials and under Greek procedures a Greek child, Constantine Neonakis, who lived in Greece. Stergios died in 1958, several months after the adoption, leaving an estate consisting principally of real estate. His will was proved. The estate was closed and the property was distributed in accordance with the will. In February 1961, Corbett was appointed guardian of the property of Neonakis. He brought an action to reopen the estate and to recover two thirds of the estate from the widow, contending that Neonakis was the heir of Stergios with a right to inherit because the will was made before the adoption. Corbett argued that the child’s right to inherit was secured by article IX, section 2, of the Treaty of Friendship, Commerce and Navigation between the United States and Greece of 3 August 1951. The widow contended that the Treaty did not secure the right of Neonakis to inherit and that under State law Neonakis was not eligible to inherit because it had not been shown that Greece gave reciprocal rights to United States citizens as required under Iowa Code 567.8 (1962). The Trial Court dismissed the petition of the guardian to reopen the estate. On appeal, the Supreme Court of Iowa affirmed this decision. Petitioner had failed to prove the reciprocity required under Iowa law and therefore Neonakis could not inherit. The Treaty did not by its terms displace State law relating to inheritance rights, either through its national treatment or most-favoured-nation clauses.

In connexion with the most-favoured-nation clause, the Supreme Court of Iowa said:

Under brief point 3 appellant contends his ward is entitled to some type of benefits by reason of the most-favoured-nation clause in the Treaty. A peculiar situation pertains to the Treaty as to most-favoured-nation treatment.

The Treaty with Greece provides for most-favoured-nations treatment in regard to only certain subjects in the Treaty. Among the 26 articles of the Treaty providing for most-favoured-nations treatment are only articles II, VI, VII, XII, XVII, XIX and XXI and XXIV.

There is no such most-favoured-nations provision in article IX of the Friendship Treaty with Greece. This is the article which plaintiff-appellant attempts to apply in seeking relief from the Court. The other articles specifically spell out when the most-favoured-nations provision is to apply. Since article IX contains no such provision, we can only assume that Congress did not intend to apply the most-favoured-nations provision to this article.

The German Treaty in article XI specifically refers to the most-favoured-nations treatment in disposing of property. This is different from the Greek Treaty which does not mention such treatment.

Since the Treaties were enacted at approximately the same time, we can only assume that Congress intended that as far as the Greek Treaty is concerned the most-favoured-nations treatment would not apply to article IX.

We have here a different situation from the case of Santo-vincenzo v. Egan, 284 U.S. 30 [1932]… cited in plaintiff-appellant’s brief. There the Treaty specifically contained a most-favoured-nations treaty provision with regard to the subject under consideration. This is different from the Greek Treaty as far as article IX is concerned. It would be wrong to apply the most-favoured-nations treaty clause to the pertinent article of the Greek Treaty when it contained no such provision. This would give it an application broader than intended.

NOTE: On appeal, the Supreme Court of the United States reversed the judgement of the Supreme Court of Iowa. The Court said:

In light of our construction of the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Greece, a construction confirmed by representations of the signatories whose views were not available to the Supreme Court of Iowa, the judgment is reversed. (Corbett v. Stergios, 381 U.S. 124)

Yacoub v. Jean Francis partners

France : Cour de cassation, 24 June 1965


83. Having regard to the principle ejusdem generis, the Decree of 25 April 1935 extending to Syrian and Lebanese nationals the benefit of the most-favoured-nation clause, not having been rendered applicable in Guadeloupe, cannot be relied upon by a Lebanese merchant installed in that Territory to claim the renewal of his commercial lease. The Court said:

Whereas the effect of the impugned confirmative decision (Basse-Terre, 2 February 1959) was that Yacoub, a Lebanese national, having received notice on 26 March 1956 to quit the commercial premises situated at Pointe-à-Pitre (Guadeloupe) which had been leased to him by the Jean Francis partners, was held to have no right to renewal of his lease by reason of his nationality, pursuant to article 38 of the Decree of 30 September 1953;

Whereas an appeal against that decision has been filed stating that it denied a Lebanese national the right to renew his commercial lease on the ground that the most-favoured-nation clause envisaged by the Decree of 25 April 1935 issued in favour of Syrian and Lebanese nationals was limited strictly to certain specific matters, notably the actual practice of trade, even though, on the one hand, in protecting the establishment, residence and practice of trade by such nationals, the Government, according to the contents of the appeal, necessarily intended to protect the instrument by which commercial operations are carried on, namely, the business itself, and on the other hand, by directing the provisions also to possession and occupation of all movable and immovable property, the authors of the said Decree intended to extend its scope to the commercial premises, and the right to lease, to which the right of renewal relates;

Whereas, however, having regard to the principle ejusdem generis, the Decree of 25 April 1935, which was not rendered applicable in Guadeloupe, could not be invoked by Yacoub to claim the renewal of his lease; and whereas therefore the appeal is not justified;

For these reasons:

Rejects the appeal against the decision given on 2 February 1959 by the Court of Appeal of Basse-Terre.

Application of the Treaty of Commerce and Navigation between Finland and Denmark

Finland : Supreme Court of Administration, 19 October 1966 44

84. The Commerce and Navigation Treaty between Finland and Denmark provided that neither Party should impose other of higher revenues than those

44 Information received from the Government of Finland. No further information regarding this case is available.
imposed on its nationals on the nationals of the other Party. A stamp duty had been fixed on the deed as a Danish national sold a piece of real estate in Finland. The amount exceeding the stamp duty to be collected from a Finnish national in a similar case was ordered by the Court to be returned to the Danish national on the basis of the most-favoured-nation clause contained in the Commerce and Navigation Treaty.

Madelrieu v. Linic
France: Cour de cassation, 15 June, 1967
Bulletin des arrêts... , 1967, IV, No. 480, p. 40

85. As a result of the Act of 28 May 1943, nationals of foreign countries may be accorded in France the benefits of ordinary and exceptional laws relating to farming leases where the countries of which they are nationals grant to French nationals the benefits of corresponding legislation, or where such legislative reciprocity has been waived under a diplomatic agreement concluded between their countries of origin and France. This does not apply in the case of the Franco-Yugoslav Convention of 30 January 1929, which grants to nationals of each of the contracting parties the option to possess or rent movable or immovable property in the territory of the other party only on the same conditions as those prescribed in the legislation of that country in respect of nationals of any third State and without their being assimilated to nationals. The court said:

Whereas, in invalidating the notice to quit given on 20 February 1962, to take effect in September 1965, by Madelrieu, the landlord, to Linic Stanko, a tenant-farmer of Yugoslav nationality, the court of appeal ruled that the notice to quit was not in conformity with the regulations concerning tenant farming (statut du fermage), although those regulations were applicable to the case, despite the foreign nationality of the tenant-farmer, since article 4 of the Consular Convention of 30 January 1929 between France and Yugoslavia embodies, for the benefit of Yugoslav nationals, a provision equivalent to the most-favoured-nation clause;

Whereas, in giving a judgement to that effect even though article 4 of the Franco-Yugoslav Convention of 30 January 1929 grants to nationals of each of the high contracting parties the option to possess or rent movable or immovable property in the territory of the other party only on the same conditions as those prescribed in the legislation of that country in respect of nationals of any third State and without their being assimilated to nationals, the Court of Appeal failed to give a legal basis for its judgement;

...For these reasons:

Quashes and annuls the decision given between the parties by the Court of Appeal at Bastia on 2 July 1964.

Application of the Treaty of Commerce and Navigation between Finland and the United Kingdom
Finland: Supreme Court of Administration, 21 January 1969

86. The Commerce and Navigation Treaty between Finland and the United Kingdom of Great Britain and Northern Ireland provided that neither Party should impose taxes or revenues other than those imposed on its own nationals on the nationals of the other Party. A stamp duty had been fixed on the deed of gift, in respect of a piece of real estate bestowed on a British national in Finland. The amount exceeding the stamp duty to be collected from a Finnish national in a similar case was ordered by the Court to be returned to the British national on the basis of the most-favoured-nation clause contained in the Commerce and Navigation Treaty.

Taxation Office v. Fulgor (Greek Electricity Company)
Greece: Council of State, Decision of 28 May 1969

87. This decision concerned the application to a Swiss company operating in Greece of the provisions of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Greece for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed at Athens on 25 June 1953. The Swiss company claimed the application of that Convention pursuant to the most-favoured-nation clause included in the agreement ratified by law 3610/1928 on installation and legal protection concluded between Greece and Switzerland. The Greek Council of State said:

Whereas, as it was considered by this Court... from the rulings of articles 9 and 11, para, two, of this latter treaty, it becomes evident that the tax privileges provided by any one of the contracting parties to the subjects and firms of the... third country are extended to the subjects and firms of the other contracting party de jure and with no... barter provided by the third country... This rightful extension of tax privileges without any barter... [concerning] the subjects of Greece and Switzerland, takes place in any case... [regardless of] whether these privileges are provided to the third nation pursuant to home legislation of Greece or Switzerland or pursuant to [a] multiple to home legislation of Greece or Switzerland or pursuant to [a] multiple or bipartite international treaty with the third country and... [regardless of] the purpose for which they were offered; the more so if this is related to the avoidance of double taxation, since the rulings of above clauses of the Treaty between Greece and Switzerland fail to make any distinction in this respect. Consequently, the application of the rulings of the foregoing Treaty between Greece and Great Britain regarding the income of the Swiss company earned in Greece by virtue of which tax privileges were decreed, was not excluded by the fact that these are included in [the] treaty for the avoidance of double taxation, nor did it depend on the fact... whether Greek subjects or Greek firms enjoy in Switzerland similar tax privileges as in Great Britain... Consequently the grounds supported in contradiction in the petition under consideration should be dismissed as being groundless.

Taillens v. Geinóz
France: Cour de cassation, 9 November 1970
Bulletin des arrêts... , 1970, III, No. 568, p. 413

88. The effect of the provisions of the Franco-Swiss Convention of 23 February 1882, which were recognized in the diplomatic notes dated 11 and 26 July 1929 approved by the Decree of 16 June 1933, as equivalent to those providing for the assimilation of French nationals

45 Information received from the Government of Finland. No further information regarding this case is available.

46 The English text of this decision was furnished by the Government of Greece.
of nationals of the most-favoured nation, is that Swiss nationals may claim in France the benefit of legislation relating to farming leases. The court said:

Whereas the appeal claims that the impugned decision granted the right of pre-emption to Geinoz, a Swiss national, even though this right is expressly reserved to farmers of French nationality and farmers of foreign nationality whose children have acquired or claim French nationality, which was not the case in these proceedings, and even though the Franco-Swiss Convention of 1882, which is based on the principle of reciprocity of rights, cannot be applied in this case since Swiss legislation does not provide for the right of pre-emption;

Whereas, however, article 869 of the Rural Code, which denies to foreign nationals farming rural lands the benefit of the regulations concerning tenant farming unless they satisfy certain conditions, is of necessity without prejudice to their invocation of the provisions of the Act of 28 May 1943 concerning the application to aliens of legislation relating to leases of premises and farming leases; and whereas the Franco-Swiss Convention of Establishment of 23 February 1882 provides, in article 1, that French nationals shall be received and treated in respect of their properties on the same footing and in the same way as the citizens of Canons are or may be in the future, and, in article 2, that Swiss nationals shall enjoy the same rights and benefits as are accorded under article 1 to French nationals in Switzerland and, and, in article 6, that any favour which one of the parties has granted, or may grant in future, in whatever form, to another Power in respect of the establishment of citizens and the exercise of industrial occupations shall be applicable in like manner and at the same time to the other Party, without it being necessary to conclude a special agreement to that effect; and whereas these latter clauses, which were recognized in the diplomatic notes dated 11 and 26 July 1929, approved by the Decree of 16 June 1933, as equivalent to those providing for the assimilation to French nationals of nationals of the most-favoured-nation, it follows that Swiss citizens may claim in France the benefit of the laws relating to farming leases;

Whereas the substitution of these grounds, to the extent that this is necessary, for those challenged in the appeal vindicates the original judgement; and whereas the first plea should be rejected;

For these reasons:

Reject the appeal against the decision rendered, on 4 December 1967, by the Court of Appeal of Lyons.

III. The most-favoured-nation clause in consular matters

In re: Logiorato's Estate
United States of America: State of New York, New York County Surrogate's Court, February 1901
New York Supplement, vol. 69, p. 507

89. The decedent was at the time of his death a resident of New York state. He died intestate. He was a citizen and subject of the Kingdom of Italy, and all of his next of kin were residents of Italy. He left no next of kin residing in the State of New York, and it was alleged in the petition that there were no creditors. The petitioner was the Consul-General of the Kingdom of Italy. The public administrator, though duly cited, made default. The petitioner asserted a right to administration without giving any security, and in preference to the public administrator, and based his claim on the facts as to treaty provisions in the consular treaty of 1878 between the United States and Italy. The letters of administration were granted. The Court said:

Conceding that, under the "most favored nation" clause in the provision of the treaty with Italy relating to the right of pre-emption, the petitioners are entitled to the right of pre-emption.

80. Giuseppe Ghio, a subject of the Kingdom of Italy, died intestate on 27 April 1908, in California, leaving a personal estate. His widow and heirs at law, being minor children, resided in Italy. Plaintiff in error, Salvatore L. Rocca, was the Consul-General of the Kingdom of Italy for California. Upon the death of Ghio, Consul-General Rocca made application to the superior court of California for letters of administration upon Ghio's estate. The defendant in error, Thompson, as public administrator made application for administration upon the same estate under the laws of California. The superior court held that the public administrator was entitled to administer the estate. The same view was taken in the supreme court of California. From the latter decision a writ of error was granted, which brought the case to the Supreme Court. The Consul-General based his claim to administer the estate upon certain provisions of the treaty of 8 May 1878, between Italy and the United States. While article XVI only required notice to the Italian consul or consular agent of the death of an Italian citizen in the United States, article XVII gave to consuls and similar officers of the Italian nation the rights, prerogatives, immunities, and privileges which were or may have been hereafter granted to an officer of the same

(Continued on p. 150.)
grade of the most-favoured nation. It was the contention of the plaintiff in error that this favoured-nation clause in the Italian treaty gave him the right to administer estates of Italian citizens dying in the United States of America, because of the privilege conferred upon consuls of the Argentine Republic by the treaty of 27 July 1853 between that country and the United States. The Supreme Court, which affirmed the judgment of the Supreme Court of California, said:

In this country the right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law. It seems to be so regulated in the state of California, by giving the administration of such property to the public administrator. There is, of course, no Federal law of probate or of the administration of estates, and, assuming for this purpose that it is within the power of the national government to provide by treaty for the administration of property of foreigners dying within the jurisdiction of the states, and to commit such administration to the consular officers of the nations to which the deceased owed allegiance, we will proceed to examine the treaties in question with a view to determining whether such a right has been given in the present instance.

This determination depends, primarily, upon the construction of paragraph 9 of the Argentine treaty of 1853, giving to the consular officers of the respective countries, as to citizens dying intestate, the right "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs". It will be observed that, whether in the possession, the administration of the judicial liquidation of the estate, the sole right conferred is that of intervention, and that conformably with the laws of the country. Does this mean the right to administer the property of such decedent, and to supersede the local laws as to the administration of such estate? The right to intervene at once suggests the privilege to enter into a proceeding already begun, rather than the right to take and administer the property.

Emphasis is laid upon the right under the Argentine treaty to intervene in possession, as well as administration and judicial liquidation; but this term can only have reference to the universally recognized right of a consul to temporarily possess the estate of citizens of his nation for the purpose of protecting and conserving the rights of those interested before it comes under the jurisdiction of the laws of the country for its administration. The right to intervene in administration and judicial liquidation is for the same general purpose, and presupposes an administration or judicial liquidation instituted otherwise than by the consul, who is authorized to intervene.

So, looking at the terms of the treaty, we cannot perceive an intention to give the original administration of an estate to the consul general, to the exclusion of one authorized by local law to administer the estate.

But it is urged that treaties are to be liberally construed. Like other contracts, they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting.

It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty made with Peru in 1887, it was declared in article 33.

...

And in the convention between the United States and Sweden, proclaimed 20 March 1911.

...

The Argentine treaty was made in 1853, and the Italian treaty in 1878. In 1894, correspondence between ... Italian Ambassadour and ... Secretary of State, shows that the Italian Ambassador proposed that Italian consuls in the United States be authorized, as were the American consuls in Italy, to settle the estates of deceased countrymen. It was the view of the Department of State of the United States, then expressed, that, as the administration of estates in the United States was under the control of the respective states, the proposed international agreement should not be made. The Acting Secretary of State adverted to the practical difficulties of giving such administration to consular officers, often remotely located from the place where the estate was situated.

...

It is contended that the right secured to a foreign consul to appoint an executor under this act of 1865 is evidence of the fact that the Argentine Republic is carrying out the treaty in the sense contended for by the plaintiff in error; but in this law certainly no right of administration is given to the consul of a foreign country. It is true, he may appoint an executor, which appointment is provided is to be at once communicated to the testamentary judge.

...

Our conclusion, then, is that, if it should be conceded for this purpose that the most-favored-nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of deceased citizens of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leaves property at the time of decease.

Loewengard v. Procureur of the Republic and Bonvier (Sequestrator)

France: Court of Appeal of Lyon (First Chamber), 13 October 1921
Clunet, vol. 49 (1922), p. 391
Annual Digest 1919-1922, Case No. 273

91. Loewengard, a German national, had been German consul since 1907 at Lyon, where he was engaged in business and owned considerable real property. He left France definitively on 2 August 1914. His property was then sequestered. In 1921, when his property was about to be liquidated, he brought an action against the Procureur of the Republic and the Sequestrator asking...
for a declaration that as he was a consul, his personal property could not be liquidated, and consequently for an order discharging the sequestration. On 8 June 1921, the Tribunal Civil de Lyon declined jurisdiction. On appeal, Loewengard declared that in accordance with the terms of certain diplomatic agreements the consuls of a number of States enjoyed diplomatic immunities in France subject to the condition of reciprocity; he cited in his favour the most-favoured-nation clause included in the Treaty of Frankfurt. The Court held that the appeal must be dismissed and said:

Whereas it is true that under the terms of diplomatic agreements the consuls of a number of States enjoy certain immunities in France, subject to the condition of reciprocity; and whereas Loewengard claims that these immunities are applicable to him because, by the Treaty of Frankfurt, in 1871, the German Empire obtained most-favoured-nation treatment for its nationals; it is, however, sufficient to note, without undertaking a detailed review of the question, that the Treaty of Frankfurt lapsed on the day that war was declared, that its place has now been taken by the Treaty of Versailles and that the French Government has not issued any declaration regulating the immunities to be granted to German consuls by reviving the lapsed pre-war régime;

**Magno Santovincenzo v. James F. Egan**  
*United States of America: Supreme Court, 23 November 1931*

92. Antonio Comincio, a native of Italy, died intestate in New York City in 1925, when letters of administration were issued to the respondent as Public Administrator by the Surrogates' Court of New York County. Upon the judicial settlement of the administrator's account, the appellant, the Consul-General of Italy at New York, presented the claim that the decedent at the time of his death was a subject of the king of Italy and had left no heirs or next of kin, and that, under article XVII of the Consular Convention of 8 May 1878 between the United States and Italy 50 the petitioner was entitled to receive the net assets of the estate for distribution to the Kingdom of Italy. The Attorney General of New York contested the claim. The Surrogates' Court, finding that the domicile of the decedent was in New York City, decreed that the balance of the estate, amounting to $914.64, after payment of debts and the sums allowed as commissions and as expenses of administration, be paid into the treasury of New York City for the use and benefit of the unknown kin of the decedent. The decree was affirmed by the Appellate Division of the Supreme Court of the State, and both the Appellate Division and the Court of Appeals of the State denied leave to appeal to the latter court. The decedent was never naturalized, and at the time of his death was an Italian subject. The Supreme Court said:

The provision of article VI of the Treaty with Persia does not contain the qualifying words "conformably with the laws of the country" (where the death occurred) as in the case of the Treaty between the United States and the Argentine Confederation of [27 July] 1853 (art. IX); or the phrase "so far as the laws of each country will permit" as in the Consular Convention between the United States and Sweden of [1 June] 1910 (art. XVI). The omission from article VI of the Treaty with Persia of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate. In the circumstances shown, it is plain that effect must be given to the requirement that the property of the decedent "shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country", unless a different rule is to apply simply because the decedent was domiciled in the United States.

The language of the provision suggests no such distinction and, if it is to be maintained, it must be the result of construction based upon the supposed intention of the parties to establish an exception of which their words give no hint. In order to determine whether such a construction is admissible, regard should be had to the purpose of the Treaty and to the context of the provision in question. The Treaty belongs to a class of commercial treaties the chief purpose of which is to promote intercourse, which is facilitated by residence. Those citizens or subjects of one party who are permitted under the Treaty to reside in the territory of the other party are to enjoy, while they are such residents, certain stipulated rights and privileges. Whether there is domiciliary intent, or domicile is acquired in fact, is not made the test of the enjoyment of these rights and privileges. The words "citizens" and "subjects" are used in several articles of the Treaty with Persia and in no instance are they qualified by a distinction between residence and domicile.

... It would be wholly inadmissible to conclude that it was the intention that citizens of the United States, making their residence in Persia under this Treaty, would be denied the benefit of article III in case they acquired a domicile in Persia. The provision contemplated residence, nothing is said to indicate that domicile is excluded, and the clear import of the provision is that, so long as they retained their status as citizens of the United States, they would be entitled to the guaranty of article III. The same would be true of Persians permitted to reside here under the Treaty.

Again, the provisions of article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes. It would thwart the major purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia. The test of the application of every paragraph of article V with respect both to citizens of the United States and to Persian subjects, clearly appears to be that of nationality, irrespective of the acquisition of a domicile as distinguished from residence.

We find no warrant for a more restricted interpretation of the words "a citizen or subject of either of the contracting parties" in article VI than that which must be given to the similar description of persons throughout the other articles of the Treaty. The same intention which made nationality, without limitation with respect to domicile, the criterion in the other provisions, dominates this provision. The provision of article VI is reciprocal. The property...
of a Persian subject dying within the United States, leaving no kin, is to be dealt with in the same manner as the property of a citizen of the United States dying in Persia in similar circumstances.

... Our conclusion is that, by virtue of the most-favoured-nation clause of article XVII of the Consular Convention between the United States and Italy of 1878, the Italian Consul General was entitled in the instant case, being that of the death of an Italian national in this country prior to the termination of the Treaty between the United States and Persia of 1856, to the benefit of article VI of that Treaty, and that the net assets of the decedent should be delivered to him accordingly.

Consequently, the decree was reversed and the cause remanded for further proceedings.

**Racca v. Bourjac**

*France: Cour de cassation (Chambre civile, Section sociale), 12 October 1960*

Revue critique... vol. 41 (1961), p. 532

International Law Reports, vol. 39, p. 467

93. On 7 March 1957 Bourjac gave Racca, his tenant farmer, who was an Italian national, notice that he would be dismissed from 8 September 1957. The validity of this dismissal was confirmed on reference to the *Tribunal paritaire des baux ruraux* and on appeal, on the ground that Racca was not entitled to the benefit of the Franco-Italian Convention on Establishment of 23 August 1951 because when the first instance court gave its judgement the decree had not yet been published in the *Journal officiel*. Racca appealed to the Court of Cassation, claiming that the Agreement had retroactive effect so that the most-favoured-nation clause benefited Italians to the extent that nationals of other countries already benefited, by virtue of other diplomatic treaties, from the status of tenant-farmer.

94. The Court held that the Franco-Italian Convention gave the benefit of the most-favoured-nation clause to Italians only for the future. In addition, it did not become enforceable in France until it had been published in the *Journal officiel* on 18 December 1957, i.e., after 8 September, the date on which Racca was dismissed. The Court said:

> Whereas the impugned confirmative judgement validated the notice of dismissal given by Bourjac on 7 March 1957 to his tenant farmer Racca, an Italian national, which was to take effect on 8 September 1957; and whereas the appeal maintains that the *Tribunal paritaire* denied Racca the benefit of the Franco-Italian Convention promulgated by the Decree of 9 December 1957 on the ground that the Decree had not been published in the *Journal officiel* when the first instance judgement was given, even though the Franco-Italian Convention granted to nationals of the two contracting parties the benefit of the most-favoured-nation clause, and that the Convention necessarily had retroactive effect inasmuch as, on the date of the promulgation of the Decree, nationals of other countries already benefited, by virtue of other diplomatic agreements, from the regulations concerning tenant farming, Italian nationals being automatically assimilated to nationals of other countries, and the Decree of 18 December 1957 being applicable thenceforth to all current proceedings.—Whereas, however, the Franco-Italian Convention gave the benefit of the most-favoured-nation clause to Italian only for the future and whereas it became enforceable in France only upon the publication in the *Journal officiel* of 18 December 1957 of the Decree of 9 December 1957, in other words, after 8 September 1957, the date on which the contested notice of dismissal was to take effect; and whereas, since it gave to Italian tenant-farmers the right to rely on the regulations concerning tenant farming, it had no retroactive effect; and therefore there were no grounds for its application in respect of the impugned judgement:

**In re Carizzo’s Estate**

*United States of America: The New York Surrogate’s Court, 23 January 1961*

New York Supplement, Second Series, vol. 211, p. 475

International Law Reports, vol. 32, p. 335

95. The Consul-General of the Italian Republic in New York petitioned for an order directing payment to him in his representative capacity of a fund deposited for the benefit of Carmine Castellano, an incompetent Italian national residing in Italy. The fund was Castellano’s distributive share of a decedent’s estate. The Consul contended that the Consular Convention of 28 May 1878 between the United States of America and the Kingdom of Italy, revived by a notification of 6 February 1948, by the United States Government pursuant to the Treaty of Peace with Italy of 10 February 1947, constituted the Consul as attorney in fact of his absent national. Article IX of the Consular Convention provides in pertinent part:

> Consuls General, Consuls, Vice-Consuls and Consular Agents may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive... in order to defend the rights and interests of their countrymen...

96. The Consul also contended that the “most-favoured-nation” clause in article VII of the Treaty of Friendship, Commerce and Navigation of 2 February 1948 with Italy and in article XVII of the Consular Convention gave him such powers, since the consuls of other nations had this power.

97. The Court held that the application must be granted. The Consul-General had authority to receive funds of a decedent’s estate deposited on behalf of an incompetent Italian national without any special mandate. The Court said:

> Prior to World War II the courts of this State consistently held that under international law as well as the Consular Convention of May 28, 1878, between the United States of America and the then Kingdom of Italy, an Italian Consul was authorized to maintain a proceeding in any court of competent jurisdiction and to demand payment of a distributive share of a nonresident national from a decedent’s estate administered in our courts...

Following the end of World War II the United States of America and other Allied Powers entered into a Treaty of Peace with Italy which was signed February 10, 1947, and went into force September 15, 1947. That Treaty provides that each Power would notify Italy within a period of six months from its coming into effect, of the previously existing bilateral treaties with Italy which any such Power desired to revive, and to enumerate and register them with the Secretariat of the United Nations, and that all such treaties not so enumerated were to be regarded as abrogated. On February 6, 1948, the Department of State in accordance with said provisions notified the Italian Government that the United
States desired to keep in force certain bilateral treaties and other international agreements with Italy, among them being the Consular Convention of May 28, 1878. It was thereby revived and continued in force (see also Treaty of Friendship, Commerce and Navigation signed February 2, 1948, in force July 26, 1949).

The Treaties and Consular Conventions between the United States and Italy contain a "most-favored-nation" clause, under which the Italian Consul General is entitled to exercise such rights and privileges as are granted to other most favored foreign nations.

A review of the applicable authorities leads to the conclusion that petitioner's authority extends to this proceeding on behalf of an incompetent nonresident national, as well as on behalf of a competent or infant nonresident national, without any special mandate from any of them....
CO-OPERATION WITH OTHER BODIES

[Agenda item 8]

DOCUMENT A/CN.4/272

Report on the fourteenth session of the Asian-African Legal Consultative Committee,
by Mr. Abdul Hakim Tabibi, Observer for the Commission

[Original text : English]  
[29 June 1973]

1. In accordance with the decision taken by the International Law Commission at its twenty-fourth session,¹ I was asked by the Chairman of the Commission, Mr. Richard D. Kearney, to attend as an Observer for the Commission at the fourteenth session of the Asian-African Legal Consultative Committee.

2. The Committee met for its fourteenth regular session at New Delhi, India, from 10 to 18 January 1973. The most important question discussed among the members and observers was the law of the sea, in preparation for the forthcoming United Nations Conference on the Law of the Sea. Other subjects considered at the session were: protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, organization of advisory services in Foreign Offices, law relating to international rivers and international sale of goods.

3. The following member States of the Committee were represented: Egypt, Ghana, India, Indonesia, Iran, Iraq, Japan, Jordan, Kenya, Kuwait, Malaysia, Nigeria, Nepal, Philippines, Sierra Leone, Sri Lanka and Thailand. Three countries, namely Burma, Pakistan and Syria, were not represented. Two associate members, Mauritius and the Republic of Korea, were represented. Twelve Asian-African States sent observers and nineteen observers were sent by countries outside Asia and Africa. Observers representing such international organizations as the International Law Commission, the Arab League, the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law also participated in the meeting.

4. The proceedings were conducted in English, which is the working language of the Committee, but facilities for simultaneous interpretation were provided for French-speaking delegates and observers.

5. H.E. Dr. Nagendra Singh of the Indian delegation was elected President of the session. H.E. Hon. Mr. L. A. M. Brewah, Attorney General and Minister for Justice of Sierra Leone, was elected as Vice-President. The session was inaugurated by H.E. Sardar Swaran Singh, the Minister for External Affairs of the Government of India.

6. My statement on behalf of the Commission, in line with the views of Mr. Kearney, is attached as an annex.

7. The Committee decided to hold its fifteenth session in Tokyo in January 1974, and invited the International Law Commission to send an observer to that session, pursuant to the standing invitation already extended to the Commission.

8. In concluding, I take this opportunity to express my warmest thanks to the Secretariat of the Asian-African Legal Consultative Committee and particularly to its able Secretary-General, Mr. B. Sen, for the warm reception given to me personally and for the warm expressions made during the session by the members of the Committee on the achievements of the International Law Commission.

Statement by H.E. Dr. Abdul Hakim Tabibi, Observer for the International Law Commission, at the Fourteenth Session of the Asian-African Legal Consultative Committee

ANNEX

1. It is a source of great pleasure for me to represent the International Law Commission before this august body in a great country, to which I am proud to serve as Ambassador and in a city with which we have great historical attachments and under a Chairman, who himself till a few weeks ago was my colleague in the Commission and now is an elected Judge of the World Court.

2. I am also happy to represent the International Law Commission at the time when India is celebrating its twenty-fifth Jubilee Anniversary this month; by a coincidence the General Assembly this year will observe the twenty-fifth anniversary of the International Law Commission as well.

3. I believe that it is a good tradition that the International Law Commission and the Asian-African Legal Consultative Committee are in close contact with each other by sending observers to each other's session every year following the same noble task of development of international law for the betterment of mankind.

4. Every year the President or a member of the Commission comes before you to report about the progress of its work and in the same manner the Commission receives the Chairman or the Secretary-General of your Committee in Geneva to explain the result of the achievements of this important committee, whose members belong to the two important continents of the world and whose impact on the codification and development of international law is felt strongly in all international conferences.

5. The new look which this Committee has given to the development of international law has been admitted by all, including the International Law Commission. The study of your effort which was made in the field of the law of treaties by your Committee was instrumental in the success of the United Nations Conference on the Law of Treaties at Vienna and I am sure that the discussions at this session and the preparatory work which has been accomplished so far by your Committee in the field of the law of the sea as well as diplomatic protection will be another milestone for the success of the forthcoming Law of the Sea Conference as well as the next General Assembly, which will conclude an international arrangement for diplomatic protection.

6. As an Asian jurist interested in the progress of international law, I have followed with close attention the work of your Committee and its impact on the progressive development of international law and codification in various judicial organs of the United Nations. I have every hope that the close contacts and close cooperation which exist happily between this Committee and the Commission will serve the further progress of international law, in order to govern in a more positive manner the behaviour of nations and create peace and brotherhood among nations.

7. Before introducing, the report of the International Law Commission on the work of its twenty-fourth session, I would like to say in this twenty-fifth anniversary year, as I did when I represented the Commission during the Committee's tenth session in Karachi, a few words about the achievements of the International Law Commission. Among the various achievements of the Commission, we can cite only those works which are now universally accepted or are near to universal acceptance, such as the four Conventions on the Law of the Sea, to which in the last few days you have been referring in relation to the item on the law of the sea, the Convention on the Reduction of Statelessness, the Model Rules on Arbitral Procedure, the Conventions on Diplomatic and Consular Relations, the Convention on the Law of Treaties, and finally the Convention on Special Missions and draft articles on the representation of States in their relations with international organisations. In addition to these works, on the basis of decisions of the General Assembly, other important topics were also dealt with by the Commission; such as the draft Declaration on Rights and Duties of States; Ways and Means for Making the Evidence of Customary International Law More Readily Available; Principles of International law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; international criminal jurisdiction; reservations to the Convention on the Prevention and Punishment of the Crime of Genocide; the question of defining agression; and finally the draft Code of Offences against the Peace and Security of mankind. This is a clear balance sheet in favour of the Commission, in whose work in the last twenty-five years more than sixty elected jurists from forty-three countries have participated, and many of its members including three members of the present Commission one of them our President have been elected as Judges of the International Court of Justice; perhaps now one-half of the Court Judges are former members of the Commission.

8. It was with this background that the International Law Commission met in Geneva from 2 May to 7 July of 1972 and discussed various topics.

9. The agenda that faced the International Law Commission at the first meeting of the twenty-fourth session on 2 May 1972 was a formidable one. The twenty-third session in 1971, despite an extension to fourteen weeks in place of the usual ten, was able to complete work on the draft articles on the topic "Relations of States with international organizations" only by concentrating on that subject to the substantial exclusion of other topics.

10. As a consequence the Commission had not made any real progress on the other active subjects before it, which included State succession in respect of treaties and in respect of matters other than treaties, as divided between two Special Rapporteurs, State responsibility, the most-favoured-nation clause, and treaty law of international organisations. In addition, the Commission had before it another piece of unfinished business, the review of its long-term programme of work in the light of the wide-ranging and thoughtful "Survey of International Law" which had been prepared in 1971 by the United Nations Secretariat at the Commission's request.

11. Despite this formidable array of unfinished endeavours, the Commission in its 1971 report advised the General Assembly that, if requested to do so, it would, during the course of its 1972 session, prepare a set of draft articles to provide greater protection to diplomatic agents and other persons entitled to special protection under international law against such crimes as murder, kidnapping, and grievous assaults.

12. The question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law was also added to the pending list of active topics. The list was completed by the question of what priority the Commission should give to the law of the non-navigational uses of international watercourses, a subject which had been referred to it in 1971 by General Assembly Resolution 2780 (XXVI), and a subject of interest to this Committee.

13. The Special Rapporteurs on the two aspects of State succession, for State responsibility and for the most-favoured-nation clause all had draft articles waiting for discussion by the Commission, and there was also a preliminary paper on treaties and international organisations for consideration. In addition Mr. Kearney, this year's Chairman of the Commission, had prepared a set of draft articles on the protection of diplomatic agents and other specially protected persons, which he had circulated to members prior to the session.

14. Two special circumstances, however, permitted almost immediate agreement on the program of work. The possibility had developed that the Special Rapporteur on succession of States in respect of treaties might not be with the Commission at future sessions. This meant that every effort had to be made to complete the first reading of the draft articles on that subject. Otherwise, the extensive preparatory work and discussions that had gone on during the past five years might well go down the drain.

15. The second circumstance was that some members of the Commission had offered to deal with the protection of diplomats during its 1972 session. It is true that in making its proposal in the 1971 report, the Commission had anticipated the problem, and some discussion had taken place regarding the establishment of a small working group to produce the set of draft articles.

16. The general debate on protection of diplomats revealed a greater variance of views on the subject. First, there was some objection to the narrowness of the topic, coupled with a proposal that terrorist activities in general be taken up. Other objections were directed to the proposed method of work on the ground that the need for urgent action was not sufficient to justify abandonment of the Commission's time-tested practice of appointing a Special Rapporteur who would be able to make a thorough-going investigation of the subject. These objections were expressed principally by members who were concerned with upholding the theory of "political crimes" and the principle of territorial asylum.

17. Some members raised doubts regarding the utility of producing draft articles. In view of the manifold obstacles to curbing terrorist activities, they thought it unlikely that the incidence of violent crimes directed against diplomatic agents as such could be
substantially reduced through the medium of an international agreement.

18. A majority of members favoured an effort by the Commission to produce during the twenty-fourth session a set of draft articles limited to persons entitled to special protection under international law and recognised that a working group afforded the only feasible means to achieve this result.

19. As a result the Working Group produced a set of twelve draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons. These articles were reviewed at Commission meetings from 20 to 27 June 1972. Discussion centered largely upon the fact that the articles did not preserve the principle of territorial asylum for offences prescribed under the articles.

20. A number of members argued strongly that when these prescribed offences constituted "political crimes" a right of asylum should be maintained. A majority of the Commission, however, adhered to the position that the nature of these offences was such that they could not and should not be considered "political crimes".

21. On the basis of the discussion, the Working Group made a number of revisions in the draft articles. After further debate, the revised articles were adopted for submission to the General Assembly and to Governments for comment.* In outlining the considerations that led to the adoption of the articles the Commission pointed out that:

... attacks against diplomatic agents and other persons entitled to special protection under international law not only gravely disrupt the very mechanism designed to effectuate international co-operation for the safeguarding of peace, the strengthening of international security and the promotion of the general welfare of nations but also prevent the carrying out and fulfilment of the purposes and principles of the Charter of the United Nations.

The Commission then went on to state:

Specifically, the draft seeks to ensure that safe-havens will no longer be available to a person as to whom there are grounds to believe that he has committed serious offences against internationally protected persons.*

These internationally protected persons have been broadly defined in article 1 of the draft articles. A head of State or a head of government and accompanying family members are included whenever they are in a foreign State. The Commission makes clear in its commentary that "whenever" includes all types of foreign visits whether "official, unofficial or private". The Commission considered that this broad requirement for protection was called for under customary international law but that the law had not yet reached the point of requiring similar protection for all persons of cabinet rank, even though the law was moving in that direction.

22. In defining other "internationally protected persons", the Commission considered whether to be specific by referring to categories of persons accorded inviolability or protection by various international instruments, such as articles 29 or 37 of the Vienna Convention on Diplomatic Relations and article 40 of the Vienna Convention on Consular Relations, or to adopt a general formula. The decision was in favour of a general formula as affording the broadest coverage.

23. In article 2 the basic acts prescribed are likewise set forth in broad language and in two broad categories: (a) a violent attack upon the person or liberty of an internationally-protected person and (b) a violent attack upon his official premises or private accommodation that is likely to endanger his person or liberty. Article 2 requires each State Party to make "the intentional commission, regardless of motive..." of such attacks "... a crime under its internal law, whether the commission of the crime occurs within or outside of its territory."

24. Possibly the most important feature of article 2 is the requirement that the offences described be made crimes punishable under the law of a State Party regardless of where the crime is committed.

25. Article 6 requires that a State Party which has found an alleged offender in its territory shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

26. Article 7 contains a series of provisions intended to simplify the requirements for extradition among States in respect of crimes covered by the draft articles.

27. Articles 6 and 7 are quite similar to the provisions adopted in the Hague and Montreal Conventions to combat aerial hijacking and other offences against the safety of civil aviation.

28. The draft articles call for a series of notifications beginning in article 4 with a "wanted fugitive" notification to all States Parties if the State in which an article 2 crime has been committed believes that an alleged offender has fled its jurisdiction, followed by the notification that the fugitive has been found under article 5, and completed in article 11 by a requirement that the State party in which proceedings against an alleged offender are carried out shall advise the Secretary-General of the United Nations as to the results of the proceedings for transmission to the other States parties.

29. Also scattered through the articles are a series of provisions to safeguard the rights of the "alleged offender", article 1 of which is the statement of the term, requiring "grounds to believe that he has committed one or more of..." the article 2 crimes. Under article 5 an alleged offender is entitled upon apprehension to communicate immediately with the nearest appropriate representative of his State of nationality and to be visited by a representative of that State. Article 8 is concerned solely with this problem and requires that the alleged offender "... be guaranteed fair treatment at all stages of the proceedings"...

30. The set of draft articles concludes with alternative choices of machinery to settle disputes arising out of the application or interpretation of the articles. These draft articles were considered by the General Assembly at its twenty-seventh session and it was decided that a convention on the line of the International Law Commission draft should be concluded during the twenty-eighth session of the General Assembly.

31. The greater portion of the Commission's twenty-fourth session was devoted to the 31 articles on succession of States in respect of treaties.* So, the Commission considered and finalized the final work of Sir Humphrey Waldock during the last session because of his candidature to the International Court of Justice and we could say that Sir Humphrey, by submitting his last scholarly contribution as Rapporteur after the work on the law of treaties, has indeed served the community of nations as a true scholar and a great jurist. I say this and I bow to him; although my own personal view as an Asian jurist does not coincide with his on some articles of the draft and my views are in the records of the Commission as well as the General Assembly.

32. Article 1 on scope provides that the articles "apply to the effects of succession of States in respect of treaties between States". This formulation has a restriction additional to the assertion of the Vienna Convention on the Law of Treaties* that it "applies to treaties between States" thus excluding subjects of international

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... that had differing treaty regimes before independence. Article 25 requires that any treaty continued in force under articles 12 to 21 should be applicable to the entire territory of the new State, unless restricted to its original area of applicability by the party or parties whose agreement is required or because the broader application would be incompatible with the treaty's object or purpose or, in permutation of the doctrine of rebus sic stantibus, combining the territories radically changes the conditions for executing the treaty.

42. Article 26 deals with the uniting of existing States into one State, a new topic which is more complicated than the combining of territories. The commentary goes into the question of what the act of uniting means and points out that the essential end-product is a State and consequently that such partial or "hybrid" unions as the European Economic Community or Benelux do not meet the requirement. While anticipating the possibility of a substantial number of such unifications in the future, the Commission found the 1958 union of Egypt and Syria and that of Tanganyika and Zanzibar in 1964 as the major modern examples.

43. The reverse of the coin is found in article 27 on dissolution of States. Treaties in force in the original State remain in effect in each State emerging from the dissolution unless the treaty originally applied only to a particular part of the territory of the predecessor State. If that specific territory has become a State, then the treaty applies only in that State. The same qualifications are made as are laid down in articles 25 and 26.

44. Article 28 deals with two distinct problems and might well have been two separate articles. The first problem is a general one: What is the treaty position of a State a part of the territory of which is composed of two or more territories...
48. Both articles 29 and 30 are limited strictly to the effects of a succession of States and have no bearing upon whether a boundary or territorial régime is subject to attack upon other legal grounds, particularly the right of self-determination or the rule of rebus sic stantibus. My own views on these two articles differ from the views of the Special Rapporteur and the same will be found in the records of the Commission and the General Assembly.

49. The set of articles concludes with a provision that they do not prejudge any questions regarding military occupation, international responsibility of States, or hostilities between States.

50. One additional action of the Commission should be mentioned. The subject of uses of international watercourses was referred to the Commission by the General Assembly at its twenty-sixth session. In view of the complexity and urgency of the problems involved in the pollution of such watercourses, the Commission requested the Secretariat to concentrate on preparing studies in this field.

51. In addition, the Commission held a memorial lecture in memory of one of its eldest members, Gilberto Amado, who passed away two years ago, and invited one of the Judges of the International Court of Justice, Judge Eduardo Jiménez de Arechaga, a former member of the International Law Commission, to deliver a lecture which will be printed and sent to the Secretariat of the Committee very soon.

52. The International Law Seminar, as usual, was also held in Geneva with participation of young jurists from all parts of the world, and provided an opportunity for an exchange of views between members of the Commission and young jurists. The Commission was indeed happy to receive Mr. B. Sen as representative of the Committee and to hear his scholarly report. The Commission is looking forward to receiving your representative once more at its next session in Geneva, to benefit from his observations and report.
REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/9010/REV.1

REPORT OF THE INTERNATIONAL LAW COMMISSION
ON THE WORK OF ITS TWENTY-FIFTH SESSION, 7 MAY-13 JULY 1973

CONTENTS

Abbreviations .................................................. 162

Chapter Paragraphs

I. ORGANIZATION OF THE SESSION .............................. 1-11 163

A. Membership and attendance ....................... 2-5 163
B. Officers ............................................... 6 163
C. Drafting Committee ............................... 7 163
D. Secretariat ........................................ 8 164
E. Agenda ............................................. 9-10 164
F. Letter from the Chairman of the International Law Commission to the President of the Economic and Social Council .................. 11 164

II. STATE RESPONSIBILITY .................................... 12-58 165

A. Introduction ......................................... 12-57 165

1. Historical review of the work of the Commission .... 12-35 165

2. General remarks concerning the draft articles .... 36-57 169

(a) Form of the draft .................................. 36 169

(b) Scope of the draft .................................. 37-42 169

(c) Structure of the draft ............................. 43-51 170

(d) Method followed in the preparation of the draft .. 52-57 172

B. Draft articles on State responsibility .............. 58 173

Chapter I. General principles (articles 1-4) .......... 173

Chapter II. The "act of the State" according to international law (articles 5-6) .... 188

III. SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES ........... 59-92 198

A. Introduction ......................................... 59-91 198

1. Historical review of the Commission's work ........ 60-79 198

(a) Division of the question of succession into three separate topics .. 60-61 198

(b) Adoption by the Commission in 1972 of provisional draft articles on succession of States in respect of treaties .................. 62 198

(c) Preliminary work on succession of States in respect of matters other than treaties .. 63-77 199

(d) Preparation of draft articles by the Commission at its twenty-fifth session .... 78-79 201

2. General remarks concerning the draft articles .... 80-91 201

(a) Form of the draft .................................. 81 201

(b) The expression "matters other than treaties" ...... 82-84 201

(c) Scheme of the draft and research to be undertaken .... 85-90 202

(d) Provisional nature of the provisions adopted at the twenty-fifth session .... 91 202

B. Draft articles on succession of States in respect of matters other than treaties .... 92 202

Introduction (articles 1-3) ................................ 203

Part I — Succession to State property (Section I—articles 4-8) .............. 205
IV. THE MOST-FAVOURED-NATION CLAUSE

A. Introduction
   1. Summary of the Commission's proceedings
   2. Scope of the draft articles
   3. The most-favoured-nation clause and the principle of non-discrimination
   4. The most-favoured-nation clause and the different levels of economic development

B. Draft articles on the most-favoured-nation clause (articles 1-7)

V. QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

VI. REVIEW OF THE COMMISSION'S PROGRAMME OF WORK

A. Summary of the Commission's proceedings prior to the present session
   1. Review of the Commission's long-term programme of work
   2. Priority to be given to the topic of the law of the non-navigational uses of international watercourses

B. The work of the Commission during its first twenty-five sessions

C. Consideration of the item by the Commission at its present session

VII. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Succession of States in respect of treaties

B. Organization of future work

C. Co-operation with other bodies
   1. Asian-African Legal Consultative Committee
   2. European Committee on Legal Co-operation
   3. Inter-American Juridical Committee

D. Date and place of the twenty-sixth session

E. Representation at the twenty-eighth session of the General Assembly

F. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session

G. Gilberto Amado Memorial Lecture

H. International Law Seminar

ABBREVIATIONS

GATT General Agreement on Tariffs and Trade
ICJ International Court of Justice
ILO International Labour Organisation
OAS Organization of American States
PCIJ Permanent Court of International Justice
UNCITRAL United Nations Commission on International Trade Law
UNCTAD United Nations Conference on Trade and Development
UNITAR United Nations Institute for Training and Research
Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-fifth session at the United Nations Office at Geneva from 7 May to 13 July 1973. The work of the Commission during this session is described in the present report. Chapter II of the report, on State responsibility contains a description of the Commission’s work on that topic, together with six draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter III, on succession of States in respect of matters other than treaties, contains a description of the Commission’s work on that topic, together with eight draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter IV, on the most-favoured-nation clause, contains a description of the Commission’s work on that topic together with seven draft articles and commentaries thereon, as provisionally adopted by the Commission. Chapter V is devoted to the question of treaties concluded between States and international organizations or between two or more international organizations. Chapter VI deals with the review of the Commission’s long-term programme of work, including the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses. Chapter VII is concerned with the organization of the Commission’s future work and a number of administrative and other questions.

A. Membership and attendance

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy);
Mr. Milan BARTOS (Yugoslavia);
Mr. Mohammed BEDIAOUI (Algeria);
Mr. Suat BILGE (Turkey);
Mr. Juan José CALLE y CALLE (Peru);
Mr. Jorge CASTAÑEDA (Mexico);
Mr. AbdullaH EL-ERIAN (Egypt);
Mr. Taslim O. ELIAS (Nigeria);
Mr. Edvard HAMBRO (Norway);
Mr. Richard D. KEARNEY (United States of America);
Mr. Abdullah EL-ERIAN (Egypt);
Mr. Paul REUTER (France);
Mr. Zenon ROSSIDES (Cyprus);
Mr. José SETTE CAMARA (Brazil);
Mr. Abdul Hakim TABIBI (Afghanistan);
Mr. Arnold J. P. TAMMES (Netherlands);
Mr. Doudou THIAM (Senegal);
Mr. Senjin TSURUOKA (Japan);
Mr. N. A. USHAKOV (Union of Soviet Socialist Republics);
Mr. Endre USTOR (Hungary);
Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);
Mr. Mustafa Kamil YASSEEN (Iraq).

3. At its 1200th meeting, held on 7 May 1973, the Commission paid tribute to the memory of Mr. Gonzalo Alcivar, who had served as a member of the Commission since 1970.

4. On 15 May 1973, the Commission elected Mr. Juan José Calle y Calle (Peru), Mr. Alfredo Martinez Moreno (El Salvador), Mr. C. W. Pinto (Sri Lanka) and Sir Francis Vallat (United Kingdom of Great Britain and Northern Ireland) to fill the vacancies caused by the death of Mr. Gonzalo Alcivar and by the resignations of Mr. Nagendra Singh, Mr. José María Ruda and Sir Humphrey Waldock on their election to the International Court of Justice.

5. With the exception of Mr. Rossides, all members attended meetings of the twenty-fifth session of the Commission.

B. Officers

6. At its 1200th meeting, held on 7 May 1973, the Commission elected the following officers:

Chairman: Mr. Jorge Castañeda
First Vice-Chairman: Mr. Mustafa Kamil Yasseen
Second Vice-Chairman: Mr. Milan Bartos
Rapporteur: Mr. Arnold J. P. Tammes

The Bureau availed itself of the services of two informal working groups, one dealing with the comments on the report of the Ad Hoc Working Group of Experts of the Commission on Human Rights concerning the question of apartheid from the point of view of international criminal law, transmitted by the Economic and Social Council (see below, section F of the present chapter), and the other dealing with the commemoration of the twenty-fifth anniversary of the International Law Commission.

C. Drafting Committee

7. At its 1207th and 1210th meetings held on 16 and 21 May 1973 respectively, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Mustafa Kamil Yasseen;
Members: Mr. Roberto Ago, Mr. Taslim O. Elias, Mr. Richard D. Kearney, Mr. Alfredo Martinez Moreno, Mr. C. W. Pinto, Mr. Paul Reuter, Mr. Senjin Tsuruoka, Mr. Nikolai Ushakov, and Sir Francis Vallat.
Mr. Mohammed Bedjaoui took part in the Committee's work on State succession in respect of matters other than treaties in his capacity as Special Rapporteur for that topic. Mr. Endre Ustór took part in the Committee's work on the most-favoured-nation clause in his capacity as Special Rapporteur for that topic. Mr. Arnold J. P. Tamnes also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

8. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 1244th meeting, held on 9 July 1973, and represented the Secretary-General on that occasion. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko and Mr. Santiago Torres-Bernárdez acted as Deputy Secretaries to the Commission and Mr. Eduardo Valencia-Ospina and Mr. Larry Johnson served as Assistant Secretaries.

E. Agenda

9. The Commission adopted an agenda for the twenty-fifth session, consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. State responsibility.
3. Succession of States in respect of matters other than treaties.
4. Question of treaties concluded between States and international organizations or between two or more international organizations.
5. (a) Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General (A/CN.4/245);
(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)).
7. Organization of future work.
8. Co-operation with other bodies.
9. Date and place of the twenty-sixth session.
10. Other business.

10. In the course of the session, the Commission held 50 public meetings (1200th to 1249th meetings) and one private meeting (on 15 May 1973). In addition, the Drafting Committee held 10 meetings. The Commission considered all the items on its agenda.

F. Letter from the Chairman of the International Law Commission to the President of the Economic and Social Council

11. At its 1818th meeting, on 2 June 1972, the Economic and Social Council, having considered the report of the Commission on Human Rights, endorsed the request of that Commission and decided inter alia to transmit to the International Law Commission for its comments the report of the Ad Hoc Working Group of Experts concerning the question of apartheid from the point of view of international penal law. The Chairman of the International Law Commission replied to the foregoing request by a letter, dated 13 July 1973, addressed to the President of the Economic and Social Council. The text of the letter, approved by the Commission, was as follows:

At its present session, held at Geneva from 7 May to 13 July 1973, the International Law Commission was formally seized of the decision taken by the Economic and Social Council at its 1818th meeting on 2 June 1972 to transmit to the Commission, for its comments, the report of the Ad Hoc Working Group of Experts of the Commission on Human Rights concerning the question of apartheid from the point of view of international criminal law, submitted under resolution 8 (XXVI) of that Commission.

The International Law Commission shares the concern of the United Nations regarding the serious consequences of the policy of apartheid. Although this policy and its implementation are a matter falling primarily within the competence of other expert organs of the United Nations, the Commission has followed with great interest and continuous attention the various efforts being made in this sphere by such organs.

With reference, in particular, to the study of the Ad Hoc Working Group of Experts, the Commission will limit itself, as it has been requested to do and as is only appropriate in view of the work accomplished by so highly qualified a group of experts, to making some observations of a general character. Besides, the Commission wishes to indicate that it would not have enough time at its disposal to consider in depth such an elaborate study and, furthermore, that such a task would not easily fall within either the rules that determine its statutory competence or those which govern its methods of work.

In connexion with the conclusion of the Ad Hoc Working Group concerning the relationship between international criminal law and public international law in general, the Commission deems it appropriate to recall the fact that various meanings have been attributed to the expression "international criminal law" in practice and in doctrine. The Commission has in several instances of its past work concerned itself with questions such as the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribaln, the elaboration of the draft code of offences against the peace and security of mankind, and the submission of conclusions regarding the desirability and possibility of establishing an international criminal jurisdiction.

The Commission remains aware of the possible relevance that the work of the Ad Hoc Working Group concerning the policy of apartheid may have to the development of rules of international law in the context of State responsibility, a topic the study of which is being carried out at present by the Commission.

The Commission notes with deep interest the recommendation of the Ad Hoc Working Group to the effect that inhuman acts resulting from apartheid should be made subject to sanctions by means of an international convention.

The Commission warmly supports all efforts by organs of the United Nations to bring about wider participation in humanitarian conventions and a stricter observance of their provisions and of the rules of customary international law applicable in the matter.

(Signed) Jorge CASTAÑEDA
Chairman of the International Law Commission

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Chapter II

STATE RESPONSIBILITY

A. Introduction

1. HISTORICAL REVIEW OF THE WORK OF THE COMMISSION

12. At its first session, in 1949, the International Law Commission included the question of State responsibility in the list of fourteen topics of international law selected for codification. In 1955, following the adoption by the General Assembly of resolution 799 (VIII), dated 7 December 1953, the Commission appointed Mr. F. V. Garcia Amador Special Rapporteur for the topic. Between 1956 and 1961, Mr. Garcia Amador submitted to the Commission six successive reports on State responsibility. Being occupied throughout those years with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able to undertake the codification of the topic of State responsibility, although from time to time, particularly in 1956, 1957, 1959 and 1960, it held some general exchanges of views on the question.3

13. In 1960 the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. It was considered in 1961 and 1962 by the Sixth Committee and by the International Law Commission in the context of the programme of future work in the field of the codification and progressive development of international law. The discussion brought out differences of opinion regarding the approach to the subject, in particular as to whether the Commission should begin by codifying the rules governing State responsibility as a general and separate topic, or whether it should take up certain particular topics of the law of nations, such as the status of aliens, and at the same time, within this context, should set out to codify the rules whose violation entailed international responsibility, as well as the rules of responsibility in the proper sense of the term. Finally it was agreed, both in the General Assembly and in the International Law Commission, that it was a question not merely of continuing work already begun but of taking up the subject again ex novo, that State responsibility should be included among the priority topics, and that measures should be taken to speed up work on its codification. As Mr. Garcia Amador was no longer a member, the Commission agreed in 1962 that it would be necessary to carry out some preparatory work before a special rapporteur was appointed, and it entrusted this task to a Sub-Committee on State Responsibility of ten members.4

14. At its session in January 1963, the Sub-Committee on State Responsibility 5 decided unanimously to recommend that, with a view to the codification of the topic, the Commission should give priority to the definition of the general rules governing the international responsibility of the State. It was also agreed, first, that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, especially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law might have had on State responsibility. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by its Chairman, Mr. Ago, and decided to give the Commission some indications as to the main points to be taken into consideration in connexion with the general aspects of the international responsibility of the State, so as to guide the work of the special rapporteur to be appointed by the Commission. The indications or recommendations of the Sub-Committee related particularly to the definition, origin and forms of the international responsibility of the State.

15. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th meeting, during its fifteenth session (1963), on the basis of the report submitted by the Chairman of the Sub-Committee, Mr. Roberto Ago.6 All the members of the Commission who took part in the discussion agreed with the general conclusions formulated by the Sub-Committee. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the questions listed in the programme. In this connexion, it was pointed out that the list of questions was intended merely to assist the Special Rapporteur in his substantive study of the various aspects of the formulation of the general rules governing the international responsibility of States.

16. After having unanimously approved the report of the Sub-Committee, the Commission at the same session appointed Mr. Roberto Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that

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4 Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tunkin, Mr. Tsuruoka and Mr. Yasseen.

5 The Sub-Committee had before it memoranda prepared by Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1), by Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7), by Mr. Gros (A/CN.4/SC.1/WP.3), by Mr. Tsuruoka (A/CN.4/SC.1/WP.4), by Mr. Yasseen (A/CN.4/SC.1/WP.5) and by Mr. Ago (A/CN.4/SC.1/WP.6).

6 The report was reproduced as an annex to the report of the Commission on the work of its fifteenth session Yearbook... 1963, vol. II, pp. 227-228, document A/5509, annex I). The summary records of the second to the fifth meetings of the Sub-Committee and the memoranda submitted by its members were reproduced in the Yearbook... 1963, vol. II, pp. 228-259, as appendices I and II to annex I mentioned above.
the Secretariat should prepare a number of working papers on the topic.\(^7\)

17. In 1964 the Secretariat prepared and circulated, in accordance with the Commission’s request, a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions,\(^8\) and a digest of the decisions of international tribunals relating to State responsibility.\(^9\) A supplement to each of these two documents, bringing them up to date, was published by the Secretariat in 1969.\(^10\)

18. Owing to the fact that the term of office of the members of the Commission was to expire at the end of 1966, and that it was desirable to complete, by that date, the study of the topics which were already at an advanced stage, the Commission decided to devote its sixteenth, seventeenth and eighteenth sessions to the completion of its work on the law of treaties and special missions, and not to begin the consideration of the substance of the question of State responsibility until it had completed its study of those other topics.\(^11\)

19. In 1967, at its nineteenth session, the Commission had before it a note on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur. Since the membership of the Commission had been altered as a result of the election in the General Assembly in 1966, the Special Rapporteur expressed the wish that the Commission, as newly constituted, would confirm the instructions given to him in 1963. The Commission confirmed these instructions and noted with satisfaction that Mr. Ago was to submit a substantive report on the topic at its twenty-first session.\(^12\)

20. In 1969, at the twenty-first session of the Commission, Mr. Roberto Ago, Special Rapporteur, submitted his first report on the international responsibility of States.\(^13\)

The report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of earlier codification work, both individual and collective, official and unofficial.\(^14\)

21. As the Special Rapporteur explained when presenting it at the 1011th meeting of the Commission,\(^15\) his report was intended to provide the Commission with a prospectus of what had been done so far, by studying which it could derive the maximum benefit for its future work, and at the same time avoid committing the errors which in the past had stood in the way of codification of this important branch of international law.


\(^14\) These texts were as follows: (1) Project on “diplomatic protection”, prepared by the American Institute of International Law in 1925 (Yearbook... 1956, vol. II, p. 227, document A/CN.4/96, annex 7); (2) Draft code of international law, adopted by the Japanese branch of the International Law Association and the Kokusai Gakkai (International Law Association of Japan) in 1926 (Yearbook... 1969, vol. II, p. 141, document A/CN.4/217 and Add.1, annex II); (3) Draft on “international responsibility of States for injuries on their territory to the person or property of foreigners”, prepared by the Institute of International Law (1927) (Yearbook... 1956, vol. II, pp. 227-229, document A/CN.4/96, annex 8); (4) resolution on the rule of the exhaustion of local...
responsibility, and to bring out the reasons for those difficulties as they emerge from an examination of the various earlier attempts at codification under the auspices of official bodies, including the League of Nations and the United Nations itself. In concluding his analysis, the Special Rapporteur reviewed the ideas which had guided the International Law Commission since the time when, having been forced to recognize that its previous efforts had led nowhere, it decided to take up the study of the topic of responsibility again, but from a fresh viewpoint; in particular, he summarized the plan adopted by the Sub-Committee on State Responsibility set up in 1962, and confirmed by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the strength of which the Commission had decided to try to give a fresh impetus to the work of codification and reach some positive results, in pursuance of the recommendations of the General Assembly in resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

23. The Commission discussed the Special Rapporteur's first report in detail at its 1011th to 1013th and 1036th meetings. The debate revealed a considerable identity of views in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to undertake. The Commission's conclusions in that regard were subsequently set out in its report on the work of its twenty-first session.

24. The conclusions reached by the Commission at its twenty-first session were favourably received at the twenty-fourth session of the General Assembly. The over-all plan for the study of the topic, the successive stage for the execution of the plan and the criteria for the different parts of the draft, as laid down by the Commission, met with the general approval of the Sixth Committee. In the light of the Committee's report, the General Assembly, in resolution 2501 (XXIV) of 12 November 1969, in which it referred to its resolution 2400 (XXIII), recommended that the Commission should continue its work on State responsibility.

25. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission, at its twenty-second session, in 1970, a second report on State responsibility, entitled "The origin of international responsibility". The introduction to the report contained a detailed plan of work for the first phase of the study of the topic, in which attention is to be focused on the subjective and objective conditions for the existence of an internationally wrongful act. The introduction was followed by a first chapter dealing with a number of general fundamental principles governing the topic as a whole. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission. At the same time, he submitted a questionnaire listing a number of points on which he wished to know the views of members of the Commission for the purposes of the continuation of his work.

26. Because of the limited time at its disposal, the Commission was unable at its twenty-second session to do more than discuss the Special Rapporteur's report in a general manner by way of a first broad review, and postponed more detailed consideration of specific points till a later session. The discussion took place at the 1075th, 1076th, 1079th, and 1080th meetings. At the 1081st meeting, the Special Rapporteur replied to the questions raised during the discussion and summarized the main conclusions to be drawn from the Commission's broad review. The Commission's conclusions, which concerned questions of method as well as points of substance and problems of terminology, are summarized, in its report on the work of its twenty-second session.

27. At the close of its discussion on the second report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of draft articles. It was agreed that his third report should deal primarily with the part that had been examined provisionally at the twenty-second session, revised in the light of the discussion, and the broad conclusions to which it had led. That third report and those to follow it would contain a detailed analysis of the various conditions which must be met for a State to be regarded as having committed an internationally wrongful act and as having thereby incurred international responsibility.

28. At the twenty-fifth session of the General Assembly, the Sixth Committee found that the conclusions reached by the Commission at its 1970 session were generally acceptable. In resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the views and considerations referred to in its resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII).

29. At the twenty-third session of the Commission, in 1971, the Special Rapporteur submitted his third report, entitled "The internationally wrongful act of the State, source of international responsibility". This report began with an introduction setting out the various conclusions reached by the Commission following its
consideration of the second report. The introduction was followed by a first chapter ("General principles"), divided into four sections (articles 1-4). In this chapter the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission at its twenty-second session, namely: the principle that any internationally wrongful act of the State involves the State's international responsibility; the conditions for the existence of an internationally wrongful act; the subjects which might commit internationally wrongful acts; and the irrelevance of municipal law to the characterization of an act as internationally wrongful. The report ended with sections 1 to 6 (articles 5 to 9) of chapter II of the draft ("The 'act of the State' according to international law"); in all, this chapter is to include ten sections dealing with the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility. Sections 1 to 6, included in the third report, present some considerations on the subject matter of the chapter and on questions concerning the attribution to the State of the acts of its organs; the irrelevance of the position of an organ in the distribution of powers and in the internal hierarchy of the State; the attribution to the State of acts of organs of public institutions separate from the State; the attribution to the State of acts of private persons in fact performing public functions or in fact acting on behalf of the State; and the attribution to the State of the acts of organs placed at its disposal by another State or by an international organization.

30. Consideration of the conditions for attributing to the State, as a subject of international law, an act which might constitute a source of international responsibility was continued and completed in the fourth report by the Special Rapporteur, which was submitted in 1972 at the Commission's twenty-fourth session. This report contains sections 7 to 10 (articles 10 to 13) of chapter II of the draft ("The 'act of the State' according to international law"). These sections deal with problems relating to the attribution to the State of acts or omissions of organs acting outside their competence or in contravention of the rules of municipal law concerning their activity; and with problems which arise in the same context with regard to the conduct of private individuals acting in that capacity, the conduct of organs of another subject of international law, and the conduct of organs of an insurrectional movement whose structures have subsequently become, in whole or in part, the structures of a State.

31. Being occupied with the preparation of draft articles on the representation of States in their relations with international organizations, on the succession of States in respect of treaties and on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable, for lack of time, to consider the topic of State responsibility either at its twenty-third session (1971) or at its twenty-fourth session (1972). The Commission included in its reports on those sessions, however, a brief statement of the position with regard to the work on State responsibility, in order to inform the General Assembly of the progress made in the study of the topic as a result of the third and fourth reports submitted by the Special Rapporteur. 27

32. At the General Assembly's twenty-sixth session (1971), it was considered in the Sixth Committee that the Special Rapporteur's third report to the International Law Commission was a valuable contribution likely to facilitate the latter's work and speed up the preparation of draft articles on the subject. 28 In its resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the views and considerations referred to in its resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII), with a view to making in 1972 substantial progress in the preparation of draft articles on the topic.

33. At the General Assembly's twenty-seventh session, in 1972, a number of representatives in the Sixth Committee said that the International Law Commission should give the highest priority to the study of State responsibility. 29 In its resolution 2926 (XXVII) of 28 November 1972, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the resolutions mentioned in its resolution 2780 (XXVI), with a view to the preparation of a first set of draft articles on the topic.

34. At its twenty-fifth session, the Commission continued its study of State responsibility and began the preparation of a set of draft articles on the subject, in accordance with the General Assembly's recommendations. At its 1202nd to 1213th and 1215th meetings it considered chapter I, and also chapter II, sections 1 to 3 of the third report by the Special Rapporteur, and referred to the Drafting Committee the articles contained in these sections. At its 1225th and 1226th meetings it considered the report of the Drafting Committee with the draft articles proposed by that Committee and adopted articles 1 to 6 of the draft on first reading.

35. These articles and the commentaries thereto, as adopted by the Commission, are reproduced in the present chapter for the information of the General Assembly. The Commission wishes to draw attention to the fact that these articles are only the first provisions of the draft on State responsibility which it is preparing, the basic structure of which is outlined below. 30 With the adoption of articles 1 to 4, the first reading of chapter I ("General principles") of the draft is now completed. With regard to chapter II ("The act of the State according to international law"), articles 5 and 6, which are included

29 Ibid., Twenty-seventh Session, Annexes, agenda item 85, document A/8892, para. 195.
30 See section B below.
31 See paras. 43-51.
in the present report, will be followed by others completing the provisions concerning the conditions for the attribution to the State, as a subject of international law, of an act which may constitute a source of international responsibility. Since in his third and fourth reports, the Special Rapporteur has covered the whole of chapter II, the Commission now has all the elements necessary to complete the study of this chapter.

2. General remarks concerning the draft articles

(a) Form of the draft

36. The final form to be given to the codification of State responsibility is obviously a question which will have to be settled later, when the Commission has completed the draft. The Commission, in accordance with the provisions of its statute, will then formulate the recommendation it considers appropriate. Without prejudging this recommendation, the Commission has decided to give to its study on State responsibility the form of a set of draft articles, as expressly recommended by the General Assembly in resolutions 2780 (XXVI) and 2926 (XXVII). The Commission, too, feels that the preparation of a set of draft articles is the most effective method of discerning and developing rules of international law concerning State responsibility. The articles now being prepared are drafted in a form which will permit their being used as a basis for concluding a convention, if that is eventually decided.

(b) Scope of the draft

37. As with other topics it has undertaken to codify in the past, the Commission intends to limit its study of international responsibility, for the time being, to State responsibility. It does not underrate the importance of studying questions relating to the responsibility of subjects of international law other than States. The overriding need for clarity in the examination of the topic and the organic nature of the draft, however, clearly make it necessary to defer consideration of these other questions.

38. The draft articles under consideration relate to the responsibility of States for internationally wrongful acts. The Commission fully recognizes the importance, not only of questions relating to responsibility for internationally wrongful acts, but also of those concerning liability for possible injurious consequences arising out of the performance of certain lawful activities; especially those which because of their nature give rise to certain risks. The Commission takes the view, however, that questions in this latter category should not be dealt with jointly with those in the former category. Owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp. Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is habitually used to designate both. In the light of these considerations and in order to avoid any misunderstanding, the Commission wishes to emphasize that the expression "State responsibility" which appears in the title of the draft articles is to be understood as meaning solely "responsibility of States for internationally wrongful acts".

39. The limitation of the present draft articles to the responsibility of States for internationally wrongful acts should not, of course, prevent the Commission from undertaking, at the appropriate time, a study of that other form of responsibility, which is the protection against the hazards associated with certain activities that are not prohibited by international law. What the Commission should not do is to deal in one and the same draft with two matters which, though possessing certain common features and characteristics, are quite distinct. If it is thought desirable—and views to this effect have already been expressed in the past both in the International Law Commission and in the Sixth Committee of the General Assembly—the International Law Commission can undertake the study of the so-called responsibility for risk after its study on responsibility for wrongful acts has been completed, or it can do so simultaneously but separately. It is for reasons of this kind that the Commission considered that it was particularly necessary to adopt, for the definition of the principle stated in article 1 of the present draft, a formulation which, while indicating that the internationally wrongful act is a source of international responsibility, does not lend itself to an interpretation which might automatically exclude the existence of another possible source of "responsibility".

40. International responsibility bears some very different aspects from the other topics of which the Commission has hitherto undertaken the codification. In its previous drafts, the Commission has generally concentrated on defining the rules of international law which, in one or another sector of inter-State relations, impose specific obligations on States, and may, in a certain sense, be termed "primary". In dealing with the topic of responsibility, on the other hand, the Commission is undertaking to define other rules, which, in contradistinction to those mentioned above, may be described as "secondary" inasmuch as they are concerned with determining the legal consequences of failure to fulfil obligations established by the "primary" rules. In preparing the present draft, therefore, the Commission intends to concentrate on determining the rules which govern responsibility, maintaining a strict distinction between this task and that of defining the rules which impose on States obligations the violation of which may be a source of responsibility. This strict distinction seemed to the Commission...
to be essential if the topic of international responsibility was to be placed in its proper perspective and viewed as a whole.

41. In order to be able to assess the gravity of an internationally wrongful act and determine the consequences attributable to that act, it is doubtless necessary to consider the different categories of obligations of States under international law and to establish a distinction between those obligations according to their importance to the international community (particularly in regard to the maintenance of peace). This is a matter which will be referred to at the appropriate time. But it must not be allowed to obscure the essential fact that it is one thing to define a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate any hope of successful codification. That is clear from past experience.

42. In the present draft articles, the Commission is proposing to codify the rules governing the responsibility of States for internationally wrongful acts in general, and not only in regard to certain particular sectors such as responsibility for acts causing injury to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of any international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the general rules of the international responsibility of the State for internationally wrongful acts, that is to say, the rules which govern all the new legal relationships which may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.

43. In broad outline, and subject to any decisions which the Commission may take later, the structure of the proposed draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission at earlier sessions on the basis of the proposals of the Special Rapporteur. The preparation of the draft will therefore comprise two distinct main phases. Speaking generally, the first will deal with the origin of international responsibility, and the second with the content of the responsibility. More precisely, the first will determine on the basis of what facts and in what circumstances there exists on the part of a State an internationally wrongful act which, as such, is the source of international responsibility. The second will determine the consequences attached by international law to an internationally wrongful act in the various cases, in order to derive therefrom a definition of the content, form and degree of the international responsibility. Once these two essential tasks have been accomplished, the Commission may possibly decide whether a third should be added, namely, to consider certain problems concerning what has been termed the “implementation” (“mise en œuvre”) of the international responsibility of the State, and questions concerning the settlement of disputes arising out of the application of the rules relating to responsibility.

44. Within this general framework, the first task before preparing a set of draft articles to cover the question of the responsibility of the State for internationally wrongful acts—a task with an apparently limited objective but singularly delicate because of the many possible implications—is to formulate the basic general principles. Once these principles have been established, the next step will be to deal with all the questions relating to the subjective element of the internationally wrongful act, that is to say, questions concerning the possibility of attributing particular conduct (act or omission) to the State as subject of international law, and hence of considering this conduct as an act of the State in international law. It will then be necessary to solve the problems which arise in regard to the objective element of the internationally wrongful act, in other words, to establish in what circumstances the conduct attributed to the State must be considered as constituting a breach of an international legal obligation. In this way it will be possible to bring together the conditions for an act of the State to be characterized as an internationally wrongful act giving rise, as such, to State responsibility at the inter-State level. This will be followed by a consideration of the questions which arise in regard to the various circumstances whose existence may possibly exclude any wrongfulness of the conduct attributed to the State. It will then be possible to pass on to the second phase of the work, that relating to the content, forms and degrees of international responsibility.

45. In the light of the foregoing considerations, chapter I of the draft articles is devoted to “general principles”. It contains, first, a definition of the fundamental principle attaching responsibility to every internationally wrongful act of the State (article 1). Next, it states the principle, closely linked to the first, that every State is capable of being considered, according to international law, as having committed an internationally wrongful act involving its international responsibility (article 2). This is followed logically by the principle which states the two elements, subjective and objective, for the existence of a wrongful act of the State according to international law (article 3). The chapter ends with the definition of a fourth general principle—namely, the principle of the irrelevance of the municipal law of a State to the characterization of an act by that State as internationally wrongful (article 4). The text of these provisions was adopted provisionally during the present session. The Commission has thus completed, on first reading, the determination of the basic general principles of the draft and their formulation (for the text of the articles and the commentaries thereto, see section B of the present chapter).

46. Chapter II of the draft (“The ‘act of the State’ according to internationa law”) is devoted to the subjective element of the internationally wrongful act and, therefore, to the determination of the conditions in which a particular act must be considered as an “act of the State” according to international law. After an intro-
47. During the present session, the Commission considered the introduction to chapter II and the first two articles of the chapter, which thus relate only to a part (acts of organs of the State) of the first group of questions mentioned. The first article of the chapter (article 5) defines the rule which, in this sphere, constitutes the starting point—the rule that an act or omission may be taken into consideration for the purposes of attribution to the State as an internationally wrongful act if it has been committed by an organ of the State, that is to say, by an organ possessing that status according to the internal legal order of the State and acting in that capacity in the case in question. As a corollary to this rule, the second article of the chapter (article 6) states that for purposes of attribution, it is immaterial whether the organ in question is part of any of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position in the organization of the State (for the text of these two articles and the commentaries thereto, as also for the introductory commentary, see section B of this chapter).

48. The Commission will continue its study of those questions which come within the framework of chapter II of the draft on the basis of the relevant sections, which it has not yet considered, of the Special Rapporteur's third and fourth reports, and will resume from the point where it left off at the present session, which means that it will begin by examining first chapter II, section 4, which appears in the Special Rapporteur's third report. This section deals with the question whether or not it is possible to take into account, for the purposes of attribution to the State as a subject of international law, the conduct of organs not of the State itself but of separate public institutions—autonomous national public institutions or local public authorities (States members of a federal State, cantons, regions, departments, municipalities, autonomous administrations of certain territories or of dependent territories, and so on). Section 5 deals with the possibility of considering as attributable to the State—again with a view to establishing its international responsibility—the acts of individuals or groups which, although not formally having the status of organs, have in fact acted in that capacity (de facto organs, State auxiliaries, private individuals who occasionally perform public functions, and so on). Lastly, section 6 discusses the question of the possibility of attributing to a State the act or omission of an organ placed at the disposal of that State by another State or by an international organization.

49. In chapter II, section 7, contained in his fourth report, the Special Rapporteur passes on to the second group of questions which arise in the context of chapter II of the draft. This section deals essentially with the highly controversial question of the attribution to the State of the conduct of an organ which has exceeded its authority or acted contrary either to specific instructions or to the general requirements of the exercise of its activity. An effort is also made to clarify the situation which may arise when a person has continued to act as an organ when, in fact, even if not formally, he has lost that status.

50. The third group of questions in chapter II of the draft is also dealt with by the Special Rapporteur in his fourth report. In principle, for the purposes of State responsibility, section 8 excludes the possibility of attributing to the State, under international law, the conduct of private individuals who have acted as such, and it then examines the circumstances in which the existence of an internationally wrongful act by the State can nevertheless be contemplated in connexion with certain conduct of private individuals. Section 9 considers whether it is possible to attribute to the State acts or omissions of subjects of international law (States, international organizations, insurrectional movements possessing international personality) acting in its territory, or whether these acts or omissions should be attributed only to the other subject of international law in question. In the same context, the Special Rapporteur deals in section 10 (article 13) with the specific question of the retroactive attribution to a State of the acts of organs of a successful insurrectional movement.

51. At this point, the examination of the requirements for the characterization of specific conduct as an "act of the State" may be considered completed. It will then be necessary to consider, in another chapter of the draft devoted to "breach of obligation" in international law, the various aspects of what has been called the objective element of the internationally wrongful act, the breach of an international obligation. These questions will be the subject of further reports by the Special Rapporteur. It will first be necessary to examine whether the source of the international legal obligation (customary, treaty or other) has any implication when it comes to determining whether the breach is an internationally wrongful act. Next will be considered the problems relating to the determination of distinct categories of breaches of international obligations. An essential question which will arise at this point is whether in these days it is necessary...
to recognize the existence of a distinction based on the importance to the international community of the obligation involved, and accordingly whether contemporary international law should acknowledge a distinct and more serious category of internationally wrongful acts, which might perhaps be described as international crimes. Another question which will arise in connexion with each of the points specifically requiring a certain act or omission or is one which require generally that a certain result shall be ensured, without specifying the means by which the result is to be obtained. Another matter which will be examined in this context is the force of the rule that local remedies must be exhausted before the breach of certain obligations relating to the treatment of aliens can be established. Next will be examined the different questions relating to the determination of tempus commissi delicti, both in relation to the requirement that the obligation whose breach is complained of shall have been in force at the time the conduct resulting in the breach took place, and in relation to cases where the act of the States takes the form of a continuing situation or the sum of a series of distinct and successive acts of conduct. Once these points have been settled (and the above list is not intended to be either exhaustive or indicative of a final order of priority), there will still remain some special problems to consider: for example, the possibility of attributing an internationally wrongful act simultaneously to more than one State in respect of one and the same situation, and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, detailed consideration of various circumstances excluding wrongfulness—force majeure or act of God, consent of the injured State, legitimate application of a sanction, self-defence, state of emergency, and so on, as well as possible mitigating circumstances, will bring to an end the first phase of the study of State responsibility for internationally wrongful acts. The next step will be to move on to the second phase, concerning the content, form and degree of international responsibility.

(d) Method followed in the preparation of the draft

52. The members of the Commission signified their agreement with the method followed by the Special Rapporteur in the preparation of his reports, and a number of representatives in the Sixth Committee of the General Assembly also signified it expressly. The Special Rapporteur therefore proposes to continue to follow the same method. This method consists in prefacing each draft article by a full explanation of the reasoning behind a particular formulation, and the practical and theoretical data on which the supporting arguments are based. The Special Rapporteur will continue to indicate the various questions which arise in connexion with each of the points successively considered, and will note the differences of opinion which have appeared regarding them and the ways in which they have in practice been settled in international life.

53. The Commission and the Special Rapporteur thus display their preference for an essentially inductive method, rather than for deduction from theoretical premises, at least whenever considerations of State practice and judicial decisions make it possible to follow such a method for determining the content of the rules relating to State responsibility. It must, however, be pointed out once more that the precedents offered by practice and by judicial decisions are not equally distributed over the different questions, being abundant on some and relatively scarce on others. It is also necessary to take due account of a very large number of opinions of writers. The topic of international responsibility, particularly in some of its aspects, is one of those on which a great deal has been written, and these opinions of writers have inevitably had their effect on judicial decisions, so that a knowledge of them can be an essential tool for the interpretation of specific decisions. Moreover, in order to be able to define in clear and simple terms the problems to be solved, it is sometimes essential to clear the ground of certain controversies and artificially introduced complications which have become embedded in doctrinal polemics. At the same time, it is important to take full account of the various trends, especially the most modern, in order to be able to identify and harmonize the approaches adopted in the different legal systems, and to pick out from these trends those which enjoy the support of the majority of writers as compared with those which merely represent individual views.

54. In order to simplify matters for the General Assembly and in view of the method followed by the Special Rapporteur, the Commission proposes to refer in the commentaries to the articles not only to diplomatic practice and international judicial precedents but also to the opinions of writers. So as not to overburden its reports to the General Assembly, however, it intends as far as possible to confine these references to the most important cases and statements of position relating specifically to the points in question.

55. The Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important, especially—as the Special Rapporteur has shown—with regard both to the distinction between different categories of breaches of international obligations and to the content and degree of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot result from a pre-established plan. It must emerge in concrete terms from the pragmatic solutions adopted on the various points.

56. The Commission felt that it would be better to postpone until later any decision concerning the desirability of prefacing the draft with a definitions article or with an article indicating what matters would be excluded from its scope. When solutions to the different
problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general economy of the draft. It is essential to avoid definitions or initial formulations which might prejudge solutions to be adopted later. The first part of the draft will be based on a general notion of responsibility, that term being taken to mean the set of new legal relationships to which an internationally wrongful act by a State may give rise in the various cases. Later it will be for the Commission to say whether, for example, such relationships may arise only between the State concerned and the State whose own rights have suffered injury, or also between the State concerned and other subjects of international law, or possibly even with the international community as a whole. For the time being the Commission will confine itself to explaining, in the commentaries to the articles, the meaning of expressions used, whenever that is necessary for an understanding of the provision in question. That has been done, for instance, in the commentary to article 1 with regard to the expression “internationally wrongful act”, and in the commentary to article 3 with regard to the use of the verb “to attribute”.

57. Lastly, the Commission wishes to point out that, while the determination of so-called “primary” rules of international law often involves drafting a great many very long articles, responsibility on the other hand involves relatively few rules which can often be formulated very concisely. But it does not follow from concise formulation that the subject-matter is simple. On the contrary, every point raises a host of complex questions, all of which must be considered, since they affect the formulation to be adopted. It should come as no surprise, therefore, to find articles relatively few in number and sometimes consisting of only a few lines, followed by extensive commentaries.

B. Draft articles on State responsibility

58. Articles 1 to 6 and the commentaries thereto, as adopted by the Commission at the twenty-fifth session on the proposal on the Special Rapporteur, are reproduced below for the information of the General Assembly.

CHAPTER I

GENERAL PRINCIPLES

Commentary

Chapter I of the draft, which comprises four articles (articles 1-4) is devoted to certain principles of law which apply to the draft as a whole and provides the basis on which subsequent chapters will be constructed. After considering several suggestions, the Commission decided to give this chapter the heading “General principles”. The expression “general principles” is used in this context as meaning rules of the most general character applying to the draft articles as whole. Other expressions, such as “fundamental rules” or “basic principles” appear in other chapters of the draft articles as meaning rules of a less general character but still of fundamental importance. The Commission deemed it unnecessary to add the words “of State responsibility” after the expression “general principles”. The title of the draft articles shows that the reference can only be to State responsibility.

**Article 1. Responsibility of a State for its internationally wrongful acts**

Every internationally wrongful act of a State entails the international responsibility of that State.

**Commentary**

1. The principle that any conduct of a State which international law characterizes as a wrongful act entails the responsibility of that State in international law is one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law.

2. The Permanent Court of International Justice applied this principle on 17 August 1923 in its judgment, No. 1, in the S.S. “Wimbledon” case, and in its judgments in the Case concerning the factory at Chorzów. In 1938, in its judgment in the Phosphates in Morocco case, the Permanent Court held that when a State was guilty of an internationally wrongful act against another State international responsibility was established “immediately as between the two States”. The International Court of Justice, too, applied the principle in its judgment in the Corfu Channel case, in its Advisory Opinion of 11 April 1949 on Reparation for Injurious Suffered in the Service of the United Nations and in its Advisory Opinion of 18 July 1950 on the Interpretation of peace treaties with Bulgaria, Hungary and Romania (Second Phase), in which it stated that “refusal to fulfill a treaty obligation involves international responsibility”. Arbitral awards have repeatedly affirmed the principle set forth in the present article. We need only recall the awards rendered in 1901 concerning Claims of Italian subjects residing in Peru (Réclamations des sujets italiens résidant au Pérou) in 1931 in the Dickson Car Wheel Company case by the Mexico-United States General Claims Commission set up under the Convention of 8 September 1923, and in the International Fisheries Company case, in 1925 by Max Huber in the British
establishing responsibility would then be the necessary corollary (Florence, Lumachi, 1902), reprinted in Handbuch des Volkerrechts (Berlin, Springer, 1964), vol. III, part one, pp. 4 et seq.). Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States (see for example, Ch. de Visscher, "La responsabilité des États", Bibliotheca Visseriana (Leyden, Brill, 1924), vol. II, p. 90; C. Eagleton, The Responsibility of States in International Law (New York, New York University Press, 1928), pp. 5-6.

writers recognize that any internationally wrongful act of a State entails the international responsibility of that State, in other words, that it gives rise, as far as that State is concerned, to new international legal relations characterized by subjective legal situations distinct from those which existed before the act took place. The fact that the legal relations between States established as a result of an internationally wrongful act are new relations has been pointed out both by jurists whose writings are now legal classics, and by authors of more recent works.

(5) The Commission is fully aware that, notwithstanding the unanimous recognition of the general principle which, under the name of international responsibility, links the emergence of new legal relations with the commission by a State of an internationally wrongful act, there are serious differences of opinion over the definition of the legal relationships created by an internationally wrongful act and the legal situations resulting from these relationships. One approach which may be regarded as traditional in international law writings—it is supported by Anzilotti, Ch. de Visscher, Eagleton, and Strupp, among others—describes the legal relations deriving from an internationally wrongful act in one single form: that of a binding bilateral relationship established between the offending State and the injured State, in which the obligation of the former State to make reparation—in the broad sense of the term, of course—is set against the subjective right of the latter State to require the reparation. This view does not admit of the possibility of a sanction in the proper sense of the term—i.e. having a punitive purpose—which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Another view, whose most illustrious supporters are Kelsen and Guggenheim, leads to a position almost diametrically opposed to that just described. It, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees the authorization according to the injured State to apply coercion to the offending State by way of sanction precisely as the sole legal consequence flowing directly from the wrongful act. Accordingly, general international law would not regard the wrongful act as creating any binding relationship between the offending State and the injured State. The obligation to make reparation would be nothing more than a subsidiary duty which in municipal law the law itself, and in international law an agreement, interposes between the wrongful act and

claims in the Spanish zone of Morocco case (Récablions britanniques dans la zone espagnole du Maroc); and in 1953 in the Armstrong Cork Company case by the Italian-United States Conciliation Commission set up under article 83 of the Treaty of Peace of 10 February 1947.

(3) With regard to State practice, the opinion of States is most significantly expressed by the positions adopted by Governments in connexion with the attempt by the League of Nations during the period 1924-1930 to codify the topic of State responsibility, limited to the case of damage to the person or property of aliens. Belief in the existence of the general rule that responsibility attaches to any internationally wrongful act by a State was clearly expressed in Point II of the request for information addressed to Governments by the Preparatory Committee for the 1930 Hague Conference for the Codification of International Law. The same opinion is discernible both from the replies of Governments and from the positions taken by representatives at the Conference. At the end of the discussion, the Third Committee of the Conference unanimously approved article 1, which laid down that

International responsibility is incurred by a State if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner on the territory of the State.

(4) Despite the diversity of the arguments they put forward to justify this fundamental principle, all the
the application of coercion. Lastly, there is a third view, upheld by, among others, Lauterpacht, Eustathides, Verdross, Ago, and the Soviet authors of the *Kurs mezhunarodnogo prava*, according to which the consequences of an internationally wrongful act cannot be limited simply either to “reparation” or to a “sanction”. In international law, as in any system of law, the wrongful act may, according to that view, give rise, not to just one type of legal relationship, but to two types of relationship, each characterized by a different legal situation of the subject involved. These legal consequences amount, according to the case, either to giving the subject of international law whose rights have been infringed by the wrongful act the right to claim reparation—again in the broad sense of the term—from the author of the act, or to giving that same subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. The term “sanction” is used here to describe a measure which, although not necessarily involving the use of force, is characterized—i.e., in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfillment of the obligation, or the restoration of the right infringed, or reparation, or compensation.

(6) The Commission noted that the opinions of writers also differ on another point with regard to the definition of the new legal relations which arise from an internationally wrongful act of a State; this is the question what subjects are involved in these relations. According to one view, which may be regarded as the traditional view, an internationally wrongful act committed by a State against another State gives rise to new legal relations between those two States exclusively. In other words, only the injured State may enforce the responsibility of the State which has committed the wrongful act. Some internationalists, on the other hand, hold today that in addition to these relations others may be created in certain cases either between the offending State and an international organization or between the offending State and other States.\(^{(52)}\)

(7) Lastly, the Commission did not fail to note that the unanimity found in State practice, in judicial decisions and in the international legal literature as regards the existence of the principle that any internationally wrongful act of a State involves, in international law, the responsibility of that State, relates only to the normal situation produced as the result of a wrongful act. For the accepted view expressed in many scientific works, as well as in a number of international decisions and statements of position by Governments, is that there are exceptional cases in which this responsibility devolves, not upon the State which committed the wrongful act, but on another State. These cases—in which the reference is usually to indirect responsibility or responsibility for the act of another—occur, particularly when the State is placed in a position, in relation to another State, in which it controls the actions and limits the freedom of that State.

(8) The differences of opinion mentioned in paragraphs (5) to (7) of the commentary to this article, and the questions to which they relate, will certainly have to be considered and settled at the appropriate time. But, in the Commission's view, there is no need to take a position on them in defining the general basic rule of the draft. On the contrary, the Commission believes that the definition of that rule should be as comprehensive as possible; it should state a principle which is capable of attracting unanimous assent and is, above all, really a basic principle, that is to say, is capable of encompassing in itself all the various possible cases. In formulating this principle, therefore, it would be wrong to distinguish between various categories of wrongful acts and the effects of their different character on the new relationships which are established as a result of those acts; it would be equally wrong to list possible exceptions of which the principle might admit in marginal situations. Other articles of the draft will deal with these questions. They have been mentioned in this commentary only in order to assure the reader that the Commission had them quite clearly in mind when it chose the wording for article 1 of the draft. For what that article must carefully avoid is, precisely, prejudging in any way the solution to problems which will arise later.

(9) First, therefore the Commission took the view that the basic rule should not be encumbered with any theoretical “justification” of the existence of the fundamental principle. Its existence is fully proved by an examination of the facts of international life; there is no need to seek confirmation by deduction from other principles, such as the “legal” character of the international order or the sovereign equality of States.

(10) Secondly, the Commission rejected any idea of mentioning, in article 1, either the various forms which international State responsibility may take, or the subjects which may be involved in the attribution of responsibility. But it must be clear that, by using the term “international responsibility” in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a state, whether such relations are limited to the offending State and the directly injured State or extend also to other subjects of international law, and whether they are centered on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law. In other words, the formulation adopted for article 1 must be broad enough to cater for all the necessary

\(^{(52)}\) In connexion with this last point, attention must be drawn to the growing tendency of a group of writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are so grave and so injurious, not only to one State but to all States, that a State committing them ought to be automatically held responsible to all States. It is tempting to relate this view to the recent affirmation of the International Court of Justice, in its Judgment of 5 February 1970 in the case concerning the *Barcelona Traction*, *Light and Power Company, Limited*, that there are certain international obligations of States which are obligations *erga omnes*, that is to say, obligations to the international community as a whole (I.C.J. Reports 1970, p. 32).
developments in the chapter which is to be devoted to the consent and forms of international responsibility.

(11) Thirdly, it is clear that the Commission refers in article 1 to the normal situation, which is that the offending State incurs international responsibility. Most members of the Commission recognized that there may be special cases in which international responsibility devolves upon a State other than the State to which the act characterized as internationally wrongful is attributed. These cases, too, will be covered later in the draft. But in view of their exceptional character, the Commission did not consider that they should be taken into account in formulating the general rule on responsibility for wrongful acts, since that might detract from the basic force of the general principle stated at the outset.

(12) Fourthly, the Commission felt unable to accept the idea of some writers that the rule that any internationally wrongful act of a State involves the international responsibility of that State should allow of an exception in the case where the wrongful act was committed in any of the following circumstances: force majeure or act of God, consent of the injured State, legitimate exercise of a sanction, self-defence or emergency. If any of those circumstances were present in a particular case, that would preclude the international responsibility of the State which had committed the wrongful act. As stated in the introduction to this chapter of the report, the Commission intends to take these circumstances, and their consequences in different situations, specifically into consideration in the chapter to follow that dealing with breach of obligation. For the time being, in the Commission’s view, it is only necessary to say that the true effect of the presence of such circumstances is not, at least in the normal case, to preclude responsibility that would otherwise result from an act wrongful in itself, but rather to preclude the characterization of the conduct of the State in one of those circumstances as wrongful. There is therefore no reason to provide for an exception to the rule laid down in this article.

(13) Lastly, the Commission endeavoured to find a formula which would not prejudge the existence of liability for “lawful” acts. It is true that the Commission, as stated in the introduction to this chapter of the report, decided to confine the draft to responsibility arising from wrongful acts; but it is no less true that it recognized that there are cases in which States may incur “internationally responsibility”—if that is the right term—for the harmful consequences of certain activities which are not, at least for the moment, prohibited by international law. The growing number of activities which create hazards lends special emphasis to the importance of this form of “responsibility”. The Commission accordingly agreed that it was important not to reverse the order of the wording adopted for the article. Formulations such as “International responsibility results from any internationally wrongful act by a State” or “International responsibility exists whenever there is an internationally wrongful act by the State” could, in fact, be interpreted to mean that international responsibility results exclusively from a wrongful act.

(14) As for the terminology used in article 1, first, the Commission considered the French term “fait internationalement illicite” to be preferable to “délit” or other similar expressions, which can sometimes take on a special meaning in certain systems of internal law. For the same reason, it decided not to use, in English, such words as “delict”, “delinquency” and “tort”; or in Spanish the word “delito”. Next, the French term “fait internationalement illicite” appeared more correct than “acte internationalement illicite”, primarily for the reason that wrongfulness often results from inaction, and that is hardly indicated by the term “acte” which, etymologically, suggests the idea of action. In addition, particularly from the point of view of legal theory, “fait” would seem to be the obvious choice, because the term “acte” should technically be reserved in law to designate a manifestation of will intended to produce the legal consequences determined by that will, and that is certainly not the case with wrongful behaviour. For the same reason, the term “hecho internacionalemente ilícito” was adopted in the Spanish text. In the English text, however, it was decided to maintain the expression “internationally wrongful act”, since the French word “fait” has no true equivalent in English legal terminology and the English term “act” does not have the same meaning as its counterpart in the legal terminology of Latin countries. Similarly, the adjective “wrongful” was considered preferable to the adjective “illicit”. Finally, the term “internationally wrongful act” was preferred to “international wrongful act” from a formal point of view, even though the two expressions mean substantially the same thing. For the sake of uniformity, the terms “fait illicite international” and “hecho ilícito internacional” in the French and Spanish texts respectively were rejected in favour of “fait internationalement illicite” and “hecho internacionalemente ilícito”.

**Article 2. Possibility that every State may be held to have committed an internationally wrongful act**

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

**Commentary**

(1) The purpose of article 1 of this draft is to establish that any State which commits an act characterized as internationally wrongful incurs international responsibility. The purpose of article 2 is to supplement the provision in the preceding article by stating further that any State whatever which engages in certain conduct will find that conduct characterized as an “internationally wrongful act” if it meets the conditions required for such characterization. In other words, this provision is intended to ensure that a State shall not escape its international responsibility by claiming that the rules according to which conduct must be considered inter-
nationally wrongful if committed by any State do not apply to it.

(2) The concept referred to in article 2 corresponds in a way to that often termed in internal law "delictual capacity" or "capacity to commit wrongful acts". In many national legal systems, there are subjects which do not have this "capacity"—minors, for example. In other words, there are subjects which the legal order does not regard as having committed a "wrongful" act and which it therefore does not hold responsible, even when their conduct exhibits the features normally required for it to be characterized as wrongful, and thus even though the same conduct, if engaged in by another subject (an adult, for example), would have been regarded as an act entailing that subject's responsibility. There is no provision, however, for similar situations in international law. In particular, there is no possible parallel between the status of a newly constituted State in international law and that of a minor or in general of any person not possessing delictual capacity in internal law. States establish themselves as equal members of the international community as soon as they achieve an independent and sovereign existence. If it is the prerogative of sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations. The principle that no State which by its conduct has committed a breach of an international obligation can escape the consequence, namely, to be regarded as having committed an internationally wrongful act which entails its responsibility, is the corollary of the principle of the sovereign equality of States.

(3) State practice and international judicial decisions leave no doubt about the existence of this principle, even though it has not generally been expressly stated in international awards or diplomatic correspondence. It can be said that writers on international law also are explicity or implicit in agreement on this point.

(4) The principle having been established, the question arose whether there should or should not be any exceptions to it. While it was recognized that no State can claim that the rules under which its conduct could be characterized as internationally wrongful are in no case applicable to itself, it was suggested that there might nevertheless be special situations in which a State could in fact, as an exception, escape the application of those rules.

(5) The first special situation considered was that of States members of a federal union, where such States have retained, within limits, a measure of international personality. It was with reference to such cases that the question was raised whether they should perhaps be recognized as constituting an exception to the principle formulated in article 2. It was argued that international practice seemed to indicate that even when it was the member State which, within the limits of its international personality, had assumed an obligation towards another State, it was still the federal State and not the member State which bore the responsibility for a breach of that obligation by the member State. Without wishing to take a position at the present stage on the validity of this argument, the Commission noted that, even if it proved to be well-founded, the breach of an international obligation committed by the member State possessing international personality would still constitute an internationally wrongful act by that member State. There would thus be no exception to the principle that every State is subject to the possibility of being held to have committed an internationally wrongful act.

(6) Another special situation considered was that where, on the territory of a given State, one or more other subjects of international law act in place of that State. The one or more other subjects of international law may sometimes, to a greater or lesser extent, entrust to elements of their own organization certain activities normally carried out by organs of the territorial State. The organs of the territorial State which normally fulfill certain international obligations of the State are no longer present or at all events are prevented from carrying out some of their duties. In other words, the territorial State is shorn of a part of its organization, a part which had previously provided the physical means of fulfilling certain international obligations as well as of violating them. Here the Commission agreed that if in such circumstances the organs of the foreign State which had replaced those of the territorial State render themselves guilty of an act or omission in breach of an obligation of the territorial State, that act or omission could conceivably constitute an internationally wrongful act of the foreign State, but could not constitute a wrongful act of the territorial State. The Commission

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67 If the States members of a federal union have no international personality, the question considered here obviously cannot arise. Not being subjects of international law, these "States" manifestly cannot be regarded as the authors of internationally wrongful acts. The only problem to be resolved in this case is that of attributing to the federal State, as an act of that State, the conduct of organs of the member State; this problem will be dealt with in chapter II of the present draft.

68 This situation may occur when there is a legal relationship of dependence, such as a protectorate; but it may also occur in other cases, particularly a military occupation. The situation that arises when the organization of the "suzerain" State or the occupying State replaces the organization of the dependent or occupied State in certain sectors should not be confused with that which may occur when the organs of the dependent State remain in existence and retain their functions, but act only under the control of the suzerain State. In such a case, as has been pointed out, the result may be that one State is responsible for the internationally wrongful act of another State.
pointed out that, even in this case, there was no real limitation of the principle stated in article 2. If there was no internationally wrongful act of the territorial State, it was because, under the rules for determining what is an act of the State, the conduct in question could not be attributed to the territorial State.

(7) The Commission also recognized that the existence of circumstances which might exclude wrongfulness, already mentioned in the commentary to article 1, did not affect the principle stated in article 2 and could not be deemed to constitute an exception to that principle. When a State engages in certain conduct in circumstances such as self-defence, force majeure, or the legitimate application of a sanction, its conduct does not constitute an internationally wrongful act because, in those circumstances, the State is not required to comply with the international obligation which it would normally have to respect, so that there cannot be a breach of that obligation. Consequently, one of the essential conditions for the existence of an internationally wrongful act is absent. This case certainly cannot be claimed as an exception to the rule that no State can escape the possibility of having its conduct characterized as internationally wrongful if—and this is the point—its conduct meets all the conditions. Still less could be possible existence of circumstances which would have the effect, not of precluding any wrongfulness of the act of the State but of diminishing the responsibility of the State, be put forward as an exception to this rule. When, in any particular case, such circumstances arise, the existence of an internationally wrongful act by the State is not an issue. It is the consequences attaching to the act that may be affected by such circumstances, and that is why this question will be dealt with when the extent of responsibility comes to be considered.

(8) Consequently, the members of the Commission concluded not only that the principle laid down in article 2 is unchallenged, but that there is in reality no exception to it. Since the principle may be described as “obvious” and one that “goes without saying”, doubts were expressed as to the need to include in the convention a rule stating such a principle. It was suggested that it was sufficient that the principle should be explained in specialized works on international law. The opinion that prevailed, however, was that it was not sound practice in codification to refrain from stating a principle simply because it was “too obvious”. It is not uncommon for a State to deny the existence of an “obvious” rule, or while recognizing its existence, to affirm that this “obvious” rule admits of exceptions which make it inapplicable to that State. The Commission accordingly considered that it was better to include the rule in the draft, even if it did not seem absolutely indispensable, than to leave any possible doubt as to the applicability to all States without exception of rules whereby an act of a State is characterized as internationally wrongful and as such entailing the international responsibility of that State.

(9) With regard to the choice of wording to express the principle in question, some members of the Commission argued that the purpose of the article was essentially to prevent a State, by invoking a particular subjective condition, from claiming to escape its international responsibility. They therefore considered it desirable to emphasize that, in international law, there is no subjective condition which could justify a claim of this kind, and also that in international law, all States are equal as regards the possibility of their international responsibility. They proposed a formula expressing the idea that every State is responsible for its internationally wrongful acts. Most members of the Commission, however, were of the opinion that such a formula would not provide an effective safeguard against the possibility of a State attempting to escape its international responsibility by invoking a particular subjective condition. A State could always contend that the existence of such a condition ruled out the possibility of characterizing its conduct as internationally wrongful, and consequently of holding it responsible under articles 1 and 2. Furthermore, the suggested formula would in reality merely repeat in another form the principle already laid down in article 1 that any internationally wrongful conduct of a State, whatever State it may be, entails the international responsibility of the State. What the principle to be laid down in article 2 must indicate is that whatever State it is which has acted in a particular way, the conduct of the State will be characterized as an internationally wrongful act if it meets the conditions laid down for such characterization in these articles. It is the combined effect of this principle and of the principle stated in article 1 that precludes the possibility of any State escaping its international responsibility by invoking an alleged special subjective condition. Thus, agreement was reached in the Commission on a formula which expresses the equality of States in respect both of the possibility of being considered as having committed an internationally wrongful act and of the possibility of being held responsible for it.

(10) Still on the subject of terminology, the Commission considered it preferable not to use the expression “capacity to commit wrongful acts”, although that is the expression generally used by writers to express the underlying notion in article 2. If the term “capacity” were used, there would be a temptation to draw an analogy between the principle that in international law every State has the capacity to commit wrongful acts and the rule in article 6 of the Vienna Convention on the Law of Treaties, which provides that “Every State possesses capacity to conclude treaties”. But capacity to conclude treaties and capacity to commit internationally wrongful acts are two entirely separate notions. Capacity to conclude treaties, which is the

58 Such circumstances might be present, for example, in the case of a State which has just become independent or which has been ravaged by war or civil war or has suffered grave natural disasters, etc.

Article 1 states the basic general principle that obligation of the State.

attributable to the State under international law; and

held to have committed an internationally wrongful acts.

the intention in article 2 was to affirm that States alone may be committed only by States or whether it may be committed by other subjects of international law to determine whether an internationally wrongful act. The responsibility of States. In this context there is no need present draft is concerned only with the international law may well engage in conduct contrary to a legal obligation incumbent on it, and thereby fulfil the requisite conditions for being held to have committed a wrongful act. Furthermore, if article 2 were worded so as to specify that “every State possesses the capacity to commit internationally wrongful acts”, it might be thought that international law authorizes its subjects to contravene the legal order established by it. For similar reasons it was also considered preferable not to say, in French, “Tout Etat est susceptible de commettre un fait internationalement illicite”, in order to avoid the permissive colouring which the English translation would have if it stated that “Every State may commit internationally wrongful acts”. The wording adopted seemed to the Commission to be the best way of avoiding any misinterpretation.

(11) In drafting article 2, the Commission was careful to adopt a formula which does not prejudice the possibility that subjects other than States may be held to have committed an internationally wrongful act. The present draft is concerned only with the international responsibility of States. In this context there is no need to determine whether an internationally wrongful act may be committed only by States or whether it may be committed by other subjects of international law also. To avoid any misunderstanding on this point, the Commission preferred not to use for article 2 a title such as “Subjects of international law capable of being held to have committed an internationally wrongful act”. This might have given a false impression that the intention in article 2 was to affirm that States alone are liable to commit such acts.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic general principle that every internationally wrongful act of a State entails its international responsibility, while article 2 states the principle that every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its responsibility. Article 3 supplements these two principles by laying down the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of an internationally wrongful act. For that purpose, the following two elements, both of which must be present, are traditionally distinguished: (a) an element, generally called a subjective element, consisting of conduct that must be capable of being attributed not to the human being or group of human beings which actually engaged in it, but to the State as a subject of international law; and (b) an element, generally called an objective element, which indicates that the State to which the conduct in question is attributed has failed, by that conduct, to fulfil an international obligation of the State.

(2) Disregarding questions of terminology and more generally of the degree of precision of the expressions sometimes used, there is no doubt that the two elements mentioned above are clearly discernible in, for example, the passage in its judgement in the Phosphates in Morocco case in which the Permanent Court of International Justice explicitly links the creation of international responsibility with the existence of an “act being attributable to the State and described as contrary to the treaty right[s] of another State”. They are also to be found in the decision in the Dickson Car Wheel Company case, given in July 1931 by the Mexico-United States General Claims Commission established by the Convention of 8 September 1923, where the condition required for a State to incur international responsibility is stated to be the fact “...that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard”. With regard to State practice, attention may be drawn to the terms in which the Austrian Government replied to Point II of the request for information addressed to Governments by the Preparatory Committee of the 1930 Conference: “There can be no question of a State’s international responsibility unless it can be proved that the State has violated one of the international obligations incumbent upon States under international law.”

(3) In the literature of international law, the facts that certain conduct is attributable to a State as a subject of international law and that such conduct constitutes a breach of an international obligation of that State are together generally considered to be the essential elements for recognition of the existence of a wrongful act giving rise to international responsibility. Among the older formulations, that of Anzilotti remains a

59 Phosphates in Morocco case (Preliminary Objections), 14 June 1938 (P.C.I.J., Series A/B, No. 74, p. 28). (Italics supplied by the Commission.)

61 United Nations, Reports of International Arbitral Awards, vol. IV (op. cit.), p. 678. (Italics supplied by the Commission.)

62 League of Nations, Bases of Discussion... (op. cit.), p. 21. (Italics supplied by the Commission.)
classic; 63 among the more recent, those by Sereni, 64 Levin, 65 Amerasinghe, 66 Jiménez de Aréchaga 67 and that given in the “Restatement of the Law” by the American Law Institute 68 are the clearest. Generally speaking, it may be said that most writers are substantially in agreement on this point, irrespective of their nationality or period. 69 The are reservations expressed by some writers concerning the necessity or utility of what has been called the subjective element of the internationally wrongful act are sometimes prompted by the idea, isolated and clearly invalidated by judicial decisions and practice, that the State would never answer for “its own” acts but only for the acts of individuals, whether having the status of organs or private persons. 70 In other cases, for the sake of being logically consistent with the premises adopted, some writers have felt bound to deny the existence of a normative operation whereby an action which is in fact performed by an individual is attached to a collective entity. Thus, for example, there are writers who maintain that, since the only conceivable “legal imputation” is that which consists in attributing the legal effects of an act to a given entity, the attribution of the act as such to the said entity cannot be anything other than a factual or psychological imputation. 71 There are still other writers who believe that the need to replace the idea of legal imputation by that of recognition of a link of factual causality must of necessity arise from the “real” character of collective entities, and of the State first and foremost. 72 More often, however, the reservations expressed are simply the reflection of the uneasiness caused by the habitual use in this context of the terms “imputability” and “imputation”, which only lead to confusion, and which the Commission, as mentioned below, 73 decided to reject and replace by others less likely to give rise to misunderstanding. 74

(4) As regards the subjective element, and more particularly the determination of conduct susceptible of being considered as State conduct, what can be said generally is that it can be either active (action) or passive (omission). It can even be said that cases in which the international responsibility of a State has been invoked on the basis of an omission are perhaps more numerous than those based on an action by a State, and whenever an international tribunal has found a wrongful omission to be a source of international responsibility, it has done so in terms just as unequivocal as those used in a case of active conduct. 75 Similarly, those States which replied to point V of the request for information submitted to them by the Preparatory Committee for the 1930 Conference for the Codification of International Law expressly or implicitly recognized the principle that the responsibility of the State can be entailed by the omissions as well as by the actions of officials, 76 and this principle is confirmed in the articles adopted by the Conference on first reading. 77 Finally, it can be said that the principle has been accepted without question by writers 78 and explicitly or implicitly adopted in all the private codification drafts.

(5) Secondly, it is important to bring out the fact that in stipulating that for some particular conduct to be liable to be characterized as an internationally wrongful act, it must first and foremost be conduct attributable to the State, the sole purpose is to indicate that it must be possible for the action or omission in

63 Responsibility arises from the wrongful violation of the right of another and generates the obligation to make reparation in so far as it is linked, i.e. attributable, to an acting subject.” (Teoria ... (op. cit.), vol. II, p. 83). (Translation by the United Nations Secretariat.)


65 Olivetti, Gonnaderovsky v sovershennym mezhunarodnom prave (Moscow, Miroshnye otnoshena, 1965), p. 51.


67 International Responsibility ... (op. cit.), p. 534.


70 A. Soldati, La responsabilité des Etats dans le droit international (Paris, Libraire de jurisprudence ancienne et moderne, 1924), pp. 75 et seq.


73 See para. (15) below.

74 V. N. Elynychev, “Problema vmenenia v mezhunarodnom prave”, Pravovedenie (Leningrad), 1970, No. 5, pp. 83 et seq.

75 The international responsibility of the State for an internationally wrongful omission was explicitly affirmed by the International Court of Justice in its judgment of 9 April 1949 in the Corfu Channel case (Merits) (I.C.J. Reports, 1949, pp. 22-23). See also the arbitral award of 10 July 1924 in the Affaire relative à l’acquisition de la nationalité polonaise (United Nations, Reports of International Arbitral Awards, vol. I (United Nations publications, Sales No. 1948.V.2) p. 425).

76 League of Nations, Minutes for Discussion ... (op. cit.), pp. 70 et seq., and Supplement to Volume III (op. cit.), pp. 2-3, 12 et seq.


question to be considered in international law as an "act of the State". The State is a real organized entity, but to recognize this "reality" is not to deny the elementary truth that the State as such is not capable of physical action. In the last analysis, therefore, conduct regarded as an "act of the State" can only be some physical action or omission by a human being or group of human beings. Hence the necessity of establishing when and how an "act of the State" can be discerned in a given action or omission. In other words, it is a question of determining by whom and in what circumstances these actions or omissions must have been performed for them to be attributable to the State. This is what the articles in chapter II of the draft set out to do.

(6) It should first of all be made plain, however, that the attribution of conduct to the State cannot be based on simple recognition of a link of factual causality (causalité naturelle). It is sometimes— but not always— possible to speak of factual causality in reference to the relationship between particular conduct and the result of that conduct, but not in reference to the relationship between the person of the State and the action or omission attributed to it. There are no activities of the State that can be called "its own" from the point of view of factual causality (causalité naturelle), either in internal law or in international law. By the very nature of the State, the attribution of conduct to the State is of necessity a normative operation. It must also be emphasized that the State to which particular conduct is attributed is the State seen as a person, as a subject of law, and not the State seen as a legal order or system of norms. It should be added that in speaking of attribution to the State as a subject of law, what is of course meant is as a subject of international law, not as a subject of internal law. Lastly, it must be made clear that the attribution of conduct to a State for the purpose of establishing the possible existence of an internationally wrongful act by that State can take place only in accordance with international law. The operation of attaching an action or omission to a subject of international law in order to draw conclusions therefrom in the sphere of international legal relations cannot be performed in any other framework than that of international law itself. It is thus an entirely separate operation from attribution of the same conduct to the State as a subject of internal law, and on the basis of internal law, without prejudice to any possible consideration by international law, for its own purposes, of the situation in internal law. The concrete difficulties sometimes met with in this connexion are frequently due to an insufficiently clear grasp of these different aspects.

(7) The second condition laid down for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach by the State of an international obligation of the State. This is what is called the objective element of the internationally wrongful act, the specific element which distinguishes it from the other acts of the State to which international law attaches legal consequences. The contrast between the State's actual conduct and the conduct which juridically it ought to have observed constitutes the very essence of the wrongfulness.

(8) It is widely acknowledged in judicial decisions, practice and authoritative literature that the objective element which characterizes an internationally wrongful act is the breach of an international obligation of the State. In its judgement of 26 July 1927 on jurisdiction in the Case concerning the Factory at Chorzow, the Permanent Court of International Justice used the words "breach of an engagement". It employed the same expression in its judgement of 13 September 1928 on the merits of the case. The International Court of Justice referred explicitly to the Permanent Court's words in its advisory opinion of 11 April 1949 on Reparation for Injuries Suffered in the Service of the United Nations. In its advisory opinion of 18 July 1950 on the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) the Court held that "refusal to fulfil a treaty obligation" involved international responsibility. In arbitration decisions, the classic definition is the one referred to above, given by the Mexico-United States General Claims Commission
in its decision in the *Dickson Car Wheel Company* case.\(^8^8\) In State practice, the terms “non-execution of international obligations”, “acts incompatible with international obligations”, “breach of an international obligation” and “breach of an engagement” are commonly used to denote the very essence of an internationally wrongful act, source of responsibility. These expressions recur frequently in the replies by Governments, particularly on point III, to the request for information addressed to them by the Preparatory Committee for the 1930 Conference.\(^8^9\) Moreover, the article 1 unanimously adopted on first reading by the Third Committee of the Conference contains these words: “any failure . . . to carry out the international obligations of the State”.\(^9^0\) The same consistency of terminology is to be found in the literature and private draft codifications of State responsibility.

(9) It should be noted that in international law the idea of breach of an obligation can be regarded as the exact equivalent of the idea of infringement of the subjective rights of others. The Permanent Court of International Justice, which normally uses the expression “violation of an international obligation”, spoke of an act “... contrary to the treaty right of another State” in its judgement of 14 June 1938 in the *Phosphates in Morocco* case.\(^9^1\) The correlation between legal obligation on the one hand and subjective right on the other admits of no exception; unlike the situation in municipal law, there are no obligations on a subject which are not matched by an international subjective right of another subject or subjects, or even, for those who share the view referred to in the commentary to article 1, of the totality of other subjects of international law.

(10) It is sometimes asked whether there should not be an exception to the principle that what is characteristic of an internationally wrongful act is that it consists in a breach by the State of an international obligation of the State. The question is prompted by the idea that, in certain cases, the *abusive exercise* of a right could constitute internationally wrongful conduct thereby entailing international responsibility. The Commission is of the opinion that the answer to this question has no direct bearing on the determination of the elements of an internationally wrongful act. It is a question of substance which concerns the existence or non-existence of a “primary” rule of international law—a rule whose effects is to limit the exercise by the State of its rights, or, as some writers would put it, its capacities, and to prohibit their abusive exercise. If it is agreed that a limitation and a prohibition of this kind are accepted by international law in force, then the abusive exercise of a right by a State will necessarily constitute a breach of the obligation not to exceed certain limits in exercising that right, and not to exercise it with the sole intention of harming others or encroaching on their competence. If the existence of an internationally wrongful act were to be recognized in such a case, the constitutive element would still be the breach of an obligation and not the exercise of a right. Accordingly, in defining in principle the conditions for the existence of an internationally wrongful act, it was considered that the reference to breach of an international obligation would also cover the case where the obligation in question was specifically an obligation not to exercise certain of the State’s own rights in an abusive or unreasonable manner. It should be added, however, that in taking this view the Commission did not definitely exclude the possibility that it might have to deal with the question of abuse of right in connexion with other provisions of the present draft. Again, it may in due course decide to deal separately with the codification of this particular matter, which concerns the framing of certain “primary” rules rather than the rules governing responsibility.

(11) Having thus concluded that there was no exception to the principle that two conditions must be met for the existence of an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation incumbent upon the State—the Commission considered whether those two necessary conditions were also sufficient. The first problem considered in this connexion was whether there should not sometimes also be a third condition for the existence of an internationally wrongful act—the occurrence of a certain external event as a result of the State’s conduct.\(^9^2\) In certain cases—for example, failure by the State’s legislative organs to pass a law which the State, by treaty, has specifically undertaken to enact, or refusal by a coastal State to permit innocent passage through its territorial waters in peacetime to ships of another State—the conduct as such is itself sufficient to constitute a breach of an international obligation incumbent upon the State. That is what may be called an internationally wrongful act of conduct alone. There are however, other cases in which the situation is different. For a State to be said to have failed in its duty to protect the premises of a foreign embassy against injurious acts of third parties, it is not sufficient to show that the State was negligent in not providing adequate police protection; some injurious event must also have taken place as a result of that negligence, such as damage by hostile demonstrators or an attack on the embassy premises by private individuals. In a case of that kind, and in general in cases where the purpose of the international obligation is precisely to prevent the occurrence of certain injurious events, negligent conduct of the organs of the State does not become an actual breach of the international obligation unless the conduct itself is combined with a supplementary element, an external event, one of those events which the State should specifically have endeavoured to prevent. The Commission

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\(^8^8\) See paragraph 2 of the commentary. See also the decision given on 10 July 1924 in the *Affaire relative à l'acquisition de la nationalité polonaise* (United Nations, Reports of International Arbitral Awards, vol. I (op. cit.), p. 425).

\(^8^9\) *League of Nations, Bases of Discussion . . . (op. cit.),* vol. III, pp. 25 et seq., 30 et seq., and 33 et seq.; *Supplement to Volume III (op. cit.),* pp. 2, 6 et seq.


\(^9^1\) *P.C.I.J.* Series A/B, No. 74, p. 28.

does not think, however, that this distinction directly affects the formulation of the rule stating the conditions for the existence of an internationally wrongful act. Even if, in some cases, it has to be concluded that there is no internationally wrongful act so long as a particular external event has not occurred, that does not imply that the two conditions for the existence of an internationally wrongful act—conduct attributable to the State, and breach by that conduct of an international obligation—are no longer sufficient by themselves. If there is no internationally wrongful act so long as the event has not occurred, the reason is that until then the State’s conduct has not resulted in the breach of an international obligation. It is really the objective element of the internationally wrongful act that is missing. In other words, the occurrence of an external event is a condition for the breach of an international obligation, and not a new element which has to be combined with the breach for there to be a wrongful act. The Commission will be able to consider the distinction made above between two different types of internationally wrongful acts when it takes up the various questions arising with regard to the breach of an international obligation.

(12) The second problem considered by the Commission in this connexion was whether before concluding that an internationally wrongful act existed, it was not also necessary to establish the presence, in the particular case under consideration, of a third constituent element, namely, damage, caused as a result of the State’s conduct, to the detriment of the subject whose subjective right has been impaired. Some writers are of this opinion, even if the way they commonly use the word “damage” does not necessarily indicate that they are referring to the same phenomenon or the same aspect. Even setting aside the opinions of those who by “damage” mean something else, or at all events something different from an injury caused by one State to another State at the international level, it should be noted that the word “damage” is sometimes used by international lawyers to refer specifically to damage to economic or patrimonial interests. Where such damage has occurred, it may indeed be a decisive factor in determining the consequences of a wrongful act. As such, it will be considered in the part of the draft devoted to the forms and extent of reparation. But it seems clear that, in this sense, “damage” is not an essential condition for the existence of an internationally wrongful act, not an individual constituent element of that concept. More often it is maintained that “damage” should be understood to mean not just damage to economic interests but also to moral interests. It is in fact in this sense that the term is generally used when it is said that it constitutes an essential element of the internationally wrongful act. The expression “moral damage”, moreover, is not free from ambiguity, either. It may refer specifically to the injury constituted by a slight to the honour or dignity of a State. But even the combination of “moral” damage as thus understood, and strictly “economic” damage is obviously not enough to introduce an element which must be present for there to be an internationally wrongful act, and what the Commission is trying to do in article 3 is precisely to determine the constituent elements without which there can in no case be an internationally wrongful act. International law today lays more and more obligations on the State with regard to the treatment of its own subjects. For examples we need only turn to the conventions on human rights or the majority of the international labour conventions. If one of these international obligations is violated, the breach thus committed does not normally cause any economic injury to the other States parties to the convention, or even any slight to their honour or dignity. Yet it manifestly constitutes an internationally wrongful act, so that if we maintain at all costs that “damage” is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of “injury” to that other State. But this is tantamount to saying that the “damage” which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation. Reference to the breach of an international obligation thus seemed to the Commission fully sufficient to cover that aspect as well, without the addition of anything further. The Commission was thus able to conclude that the two elements respectively described as the “subjective” element and the “objective” element are the only necessary components of any internationally


94 Some writers who maintain that there must be damage for there to be an internationally wrongful act are really thinking more of the occurrence of the external event which, as just noted, must sometimes accompany the actual conduct of the State for that conduct to result in a breach of an international obligation. The occurrence of such an event, however, is only characteristic of a particular category of internationally wrongful acts, and where it is required, it does not represent a “third” constituent element of the internationally wrongful act; it is only a condition for the existence of the objective element of the violation. Other writers, when they refer to “damage”, often have in mind not an injury caused to a State at the international level, but rather an injury caused to an individual at the municipal level. This is clearly so, for example, in the case of C. F. Amerasinghe, op. cit., p. 55. The importance accorded to the element of damage is thus a consequence of the fact that only cases of State responsibility for injuries to individual aliens have been considered, and that consideration of the rules relating to responsibility has been combined with that of the substantive rules relating to the treatment of aliens. Injury to individuals, which is precisely what the rule concerning the treatment of aliens is designed to prevent, has nothing in common with damage at the strictly international level, which some consider must occur in addition to the breach of the obligation for an internationally wrongful act to exist. Such damage can only be damage suffered by a State.

95 Thus, for example, E. Jiménez de Aréchaga, after referring to damage as a condition for international responsibility, adds that “in inter-State relations the concept of damage does not, however, have an essential material or patrimonial character” (op. cit., p. 534).

96 D. Anzilotti, Corso... (op. cit.), p. 425, brings out the fact that damage is often equated in international law with the breach of an obligation.

97 To refer to “damage” as a constituent element of the internationally wrongful act separate from the breach of an obligation could even be dangerous, because it might give the impression that in the Commission’s opinion, where there was breach of an international obligation without “damage”, there was no wrongful act and no responsibility.
wrongful act. Other elements may be present in any particular case, or even in most cases, but are not indispensable.

(13) With regard to the wording of the rule, the Commission adopted a formula which, though it may seem a little schematic, at least establishes clearly the relationship between the questions dealt with in article 3 and those dealt with in subsequent chapters of the draft. **Sub-paragraph (a)**—which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act—corresponds to chapter II of the draft (on the “act of the State”), which establishes what kinds of conduct are attributable to the State under international law. **Sub-paragraph (b)**—which states that such conduct must constitute a breach of an international obligation—corresponds to chapter III (which will deal with the “international breach of obligation”), which will indicate what conditions must be met for conduct to constitute such a breach and what different cases of breach of obligation are covered. As regards the order in which these two elements appear, it seemed more logical to mention the subjective element before the objective element, because it is necessary to determine whether State conduct exists before it can be determined whether or not it constitutes a breach of an international obligation. In the introductory phrase, the words “of a state” after the words “internationally wrongful act” follow from what was said in the introduction to this chapter of the report, namely, that the draft is not concerned with the international responsibility of subjects of international law other than States.

(14) In **sub-paragraph (a)**, the Commission chose the term “attribution” to denote the operation of attaching a given action or omission to a State. This term seemed preferable to others frequently used in international practice and judicial decisions, such as “imputation”, although writers continually stress the fact that when the terms “imputability” or “imputation” are used in relation to the international responsibility of States, they do not have the same meanings as, for example, in internal criminal law, where “imputability” sometimes indicates an agent’s state of mind, ability to understand and to will as the basis of responsibility, or in criminal procedure, where “imputation” may mean the charging of a subject of internal law by a judicial authority. At all events the term “attribution” is more likely to prevent misinterpretations. In addition—and again in order to avoid any false analogy between the notion referred to here and that of a subsequent operation corresponding in some measure to a charge by a judicial organ in internal law, the Commission preferred to say “conduct... is attributable to the State under international law” rather than “conduct... is attributed to the State under international law”.

(15) The Commission considered it more appropriate to refer in **sub-paragraph (b)** of the article to “breach of an international obligation” rather than “breach of a rule” or of a “norm of international law”. “Breach of an obligation” is not only the expression commonly used in judicial decisions and State practice, it is also the most accurate. A rule is the objective expression of the law; an obligation is a subjective legal phenomenon and it is by reference to that phenomenon that the conduct of a subject of international law is judged, whether it is in compliance with the obligation or whether it is in breach of it. Furthermore, an obligation the breach of which is a constituent element of an internationally wrongful act does not necessarily and in all cases flow from a rule, in the true sense of the term. It may very well have been created and imposed upon a subject by a particular legal instrument or by a decision of a judicial or arbitral tribunal. The term “obligation” was chosen by the Commission in preference to others that may be considered synonymous in international law, such as, for example, “duty” or “engagement”, because it is the term most commonly used in international judicial decisions and practice and in the literature. Finally, in the French version, the term “violation” was preferred to other similar terms, such as “manquement”, “transgression” or “non-exécution”, in particular because this term is used in Article 36, paragraph 2 (c), of the Statute of the International Court of Justice. For the same reason, the term “breach” is used in the English version and the term “violación” in the Spanish.

**Article 4. Characterization of an act of a State as internationally wrongful**

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

**Commentary**

(1) This article states in explicit form a principle which is already implicit in article 3, namely, the principle that the characterization of a given act as internationally wrongful is independent of any conclusion as to whether that act conforms or not to the provisions of the internal law of the State which committed it. The first sentence of the article implies, first, that an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State’s internal law. Secondly, it follows from the same sentence that an act of a State must be characterized as internationally wrongful even if it does not contravene any of the obligations imposed by the State’s internal law and even in the extreme case in which, under that law, the State was actually bound to adopt such conduct. The second sentence brings out very clearly the most important aspect of the principle stated in the first sentence, namely, that a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law if it constitutes a breach of an obligation imposed by international law. Furthermore, the combination of the rule laid down in article 1, that every internationally wrongful act of a State entails...
the responsibility of that State, with the rule laid down in article 4 involves the conclusion that the international responsibility of the State ensuing from a particular act arises irrespective of whether that act conforms or not to the provisions of the internal law of the State concerned.

(2) The first conclusion to be drawn from article 4, namely, that there is no internationally wrongful act so long as there is no breach by a State of an international obligation but merely a failure on its part to fulfil an obligation imposed by its own legal system, needs no lengthy proof. It is expressly affirmed in international judicial decisions and practice and in the literature.

(3) The clearest judicial decision on the subject is to be found in the Advisory Opinion of the Permanent Court of International Justice of 4 February 1932 in the case concerning the Treatment of Polish Nationals and other persons of Polish origin or speech in the Danzig Territory.100 The Court denied the Polish Governments the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law...

The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law. However, in cases of such a nature, it is not the Constitution and other laws as such, but the international obligation that gives rise to the responsibility of the Free City.

(4) In practice, States which considered themselves wrongfully accused of international responsibility for what was in fact nothing more than failure to observe a provision of internal law have successfully resisted the charge by relying on the above principle. The request for information submitted to States by the Preparatory Committee for the 1930 Codification Conference at the Hague drew a distinction between the international responsibility of the State flowing from the breach of an international obligation, and the purely internal responsibility flowing from the breach of an obligation established by the constitution or laws of that State. The Governments which replied to the request for information were in agreement on that point.101 At the Hague Conference, article 1 of the draft Convention on State responsibility, which was approved unanimously on first reading, implicitly confirmed the same conclusion.102

(5) In the Commission's opinion, the essential importance of the principle relating to this aspect of the relationship between international law and internal law comes out particularly in the converse proposition to that stated in the above paragraphs: the fact that some particular conduct conforms to the provisions of internal law, or even is expressly prescribed by those provisions, in no way precludes its being characterized as internationally wrongful if it constitutes a breach of an obligation established by international law. As has been clearly stated, "the principle that a State cannot plead the provisions (or deficiencies) of... its constitution as a ground for the non-observance of its international obligations... is indeed one of the great principles of international law, informing the whole system and applying to every branch of it."103 Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject.

(6) It has been said that the Permanent Court of International Justice "affirmed this rule and elaborated it into one of the cornerstones of its jurisprudence."104 The Court expressly recognized the principle in its first judgement, that of 17 August 1923, in the case of the S.S "Wimbledon"105 and subsequently reaffirmed it on several occasions. Among its most explicit formulations are the following:

... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty;106

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations;107

... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.108

101 Sir Gerald Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", Recueil des cours... 1957-II, vol. 92 (Leyden, Sijthoff, 1958), p. 85.
103 The Court rejected the argument of the German Government that the passage of the ship through the Kiel canal would have constituted a violation of the German neutrality orders, observing that:

... a neutrality order, issued by an Individual State, could not prevail over the provisions of the Treaty of Peace... under Article 380 of the Treaty of Versailles, it was her [Germany's] definite duty to allow it [the passage of the Wimbledon through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article" (P.C.I.J., Series A, No. 1, pp. 29-30).

102 This principle is also set out very clearly in Part IV of Restatement of the Law by the American Institute (para. 167) (Yearbook..., 1971, vol. II (Part One), pp. 193-194, document A/CN 4/217/Add.2).
100 P.C.I.J., Series A/B, No. 44, pp. 24-25. In this connexion, see also the opinion expressed by the Permanent Court in its judgement of 7 September 1927 in the Lotus Case (P.C.I.J., Series A, No. 10, p. 24).
101 League of Nations, Bases of Discussion (op. cit.), pp. 16 et seq. and Supplement to Volume III, pp. 2 et seq. The principle in question was clearly set out in the reply of the German Government:

"International responsibility—the sole form of responsibility under consideration—can only become involved when a rule of international law has been broken... when a law is infringed to the detriment of a foreigner, there can never be any question of a request put forward under international law by a foreign State." (League of Nations, Bases of Discussion, op. cit., p. 16).
The same principle, viewed from a different angle, is also affirmed in the Advisory Opinions of 21 February 1925 on the Exchange of Greek and Turkish Populations and 3 March 1928 on the Jurisdiction of the Courts of Danzig.

(7) The existence of a principle of international law that a State cannot escape its international obligations by pleading its internal law is confirmed by an examination of the decisions of the International Court of Justice. Even though the decisions of this Court may not provide affirmations of this principle as explicit as those to be found in the decisions of the Permanent Court, it is nevertheless true that the principle in question was recognized expressly in the Advisory Opinion concerning Reparation for injuries suffered in the service of the United Nations and implicitly in several other judgements. It is interesting to note that several judges of the Court have seen fit to state explicitly, in their separate or dissenting opinions from these same judgements, the principle which the majority of members of the Court had implied.

(8) Arbitral awards are no less categorical in this respect. As early as the period between the First and Second World Wars, there were many on these lines. Among the most important were the arbitral award of 1922 concerning the Norwegian Shipowners' Claims, the award rendered by the arbitrator Taft in 1923 in the Aguilar-Amory and the Royal Bank of Canada Claims [Tinoco Case] (Great Britain v. Costa Rica), and the award rendered in 1930 in the Shirreff Case by an Arbitral Tribunal established by the United States and Guatemala. The last-mentioned award stated that:

... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject.

With regard to more recent years, mention must be made of the decisions of the Italian-United States Conciliation Commission, established under article 83 of the 1947 Treaty of Peace and particularly the decision in the Wollemberg Case, rendered on 24 September 1956. The Commission stated:

... one thing is certain: the Italian Government cannot avail itself, in the international court, of its domestic law to avoid fulfilling an accepted international obligation. Judicial decisions of the Permanent Court of International Justice are all identical on this point.

(9) The principle that a State cannot invoke its internal law to show that it has not violated an international obligation has been affirmed no less frequently in State practice than in international judicial decisions. It is sufficient to recall in this context the positions taken by States with regard to the disputes discussed in the League of Nations or submitted to the Permanent Court or the International Court of Justice, as well as the work on the codification of international law undertaken under the auspices of the League of Nations and the United Nations. In the aforementioned disputes, the plaintiff States firmly supported the principle that conformity to internal law did not exclude international responsibility. Moreover, it should be noted that the defendant States, too, generally agreed with that view. Examples of this kind are the attitude adopted by Danzig and Poland in the dispute concerning the Jurisdiction of the Courts of Danzig, by Hungary and Romania in the dispute concerning the Expropriation by the Romanian Government of the immovable property of Hungarian optants, by Switzerland in the dispute concerning Reparation for damage suffered by Swiss citizens as a result of events during the war, by Switzerland and France in the Case of the Free Zones of Upper Savoy and the District of Gex by Yugoslavia in the

110 P.C.I.J., Series B, No. 15, pp. 26-27: In the same connexion we may recall the observations by Lord Finlay on the Advisory Opinion of 15 September 1923 on the Question Concerning the Acquisition of Polish Nationality (P.C.I.J., Series B, No. 7, p. 26). These observations are particularly interesting because they refer to a case in which the actual absence of provisions of municipal law is shown not to be an excuse for the non-fulfilment of international obligations.
112 In this context, reference should be made to the Judgement of 18 December 1951 in the Fisheries Case (I.C.J. Reports 1951, p. 132), with the individual opinion of Judge Alvarez (ibid., p. 152) and the dissenting opinion of Judge McNair (ibid., p. 181); the Judgement of 18 November 1953 in the Nottebohm Case (Preliminary Objections) (I.C.J. Reports 1953, p. 123), with the declaration of Judge Klaestad (ibid., p. 125); and above all the Judgement of 28 November 1958 in the Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (I.C.J. Reports 1958, p. 67), with the separate opinions of Judge Badawi (ibid., p. 74), Judge Lauterpacht (ibid., p. 83) and Judge Spender (ibid., especially pp. 125-126 and 128-129), and the dissenting opinions of Judge Winiarski (ibid., pp. 137 and 138) and Judge Cordova (ibid., p. 140).
113 Award rendered on 13 October 1922 by the Arbitral Tribunal established under the agreement of 30 June 1921 between Norway and the United States of America (United Nations, Reports of International Arbitral Awards, vol. I (op. cit.), p. 331).
114 Award of 18 October 1923, rendered by the Arbitral Tribunal established under the Convention of 12 January 1922 (ibid., p. 386).
115 Award of 24 July 1930 rendered by the Tribunal established by the Agreement of 2 November 1929 (ibid., vol. II (op. cit.), p. 1098).
117 United Nations, Reports of International Arbitral Awards, vol. XIV (op. cit.), p. 289. See also in the same connexion the decision in the Flegelson Case of 20 September 1958, rendered by the same Commission (ibid., especially p. 360).
118 During the dicussion in the Permanent Court of International Justice, Mr. Gidel, representing the Danzig Government, stated: "It is a universally accepted principle that the provisions or deficiencies of municipal law cannot be invoked by a State to avoid fulfilling international obligations or to evade the responsibilities flowing from the non-fulfilment of those obligations" [Translation from French] (P.C.I.J., Series C, No. 14-I, p. 44). Mr. Limborg, representing the Polish Government, replied: "My adversary, the eminent Professor, is quite right: generally speaking, a State can never plead in an international court that its laws are defective." [Translation from French] (Ibid., p. 59).
120 Ibid., 15th year, No. 11 (November 1934), pp. 1438, 1486 and 1494-1495. The other parties to the dispute did not question the soundness of the position taken by Switzerland in that connexion.
Pleadings, prepared by the Secretary-General of the United Nations) (United Nations publication, Sales No. 1949.V.4), pp. 82, 86-87, on the draft of the International Law Commission (Official Records of the General Assembly, Sixth Session, Annexes, agenda item 48, documents A/1338 and Add.1 and A/1850), and in the debate in the General Assembly on the Committee's report (ibid., Fourth Session, Sixth Committee, 168th-173rd and 175th-183rd meetings, and ibid., Plenary Meetings, 270th meeting).

The States which spoke in favour of the principle in the debate included the Byelorussian Soviet Socialist Republic, Chile, France, Israel, Italy, Turkey, the USSR, the United Kingdom and the United States of America. The United States delegation indicated that in its view the principle would be more appropriately placed in a convention on State responsibility (Official Records of the United Nations Conference on the Law of Treaties, First Session—Summary records of the plenary meetings and of the meetings of the Committee of the Whole (United Nations publication, Sales No. E.68.V.7), pp. 150 et seq., 28th meeting of the Committee of the Whole, paras. 49-70 and 29th meeting.

The text was approved at the 72nd meeting of the Committee of the Whole (ibid., pp. 427-428, 72nd meeting of the Committee of the Whole, paras. 29-48).

Ibid., Second Session, Summary records of the plenary meetings and of the Committee of the Whole (United Nations publication, Sales No. E.70.V.6), pp. 53-54, 13th meeting, paras. 30-40. The representative of Venezuela declared that article 27 was simply a repetition of article 46, paragraph 1 of which provides that: "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance." The representative of Iran considered that article 27 contradicted article 46.


(10) The same identity of view was apparent in the work undertaken under the auspices of the League of Nations on the codification of the topic of State responsibility, and in the subsequent work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility, a distinction was drawn between the responsibility incumbent on a State under international law and the responsibility which might be incumbent on it under its municipal law, and it was stated:

In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law.

In their replies, States agreed expressly or implicitly with this principle. During the debate at the Conference, States expressed general approval of the idea embodied in point I and the only matters for discussion were, first the advisability of inserting in the convention a rule expressing that idea and then the choice of the most appropriate wording. At the close of the debate, the Third Committee of the Conference adopted on first reading the following article (article 5):

A State cannot avoid international responsibility by invoking the state of its municipal law.

(11) The International Law Commission of the United Nations, at its first session, in 1949, adopted a draft declaration on rights and duties of States. Article 13 of the draft, the contents of which were approved by all the members of the Commission, reads as follows:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform its duty.

(12) At the first session of the United Nations Conference on the Law of Treaties, held at Vienna in 1968, the delegation of Pakistan proposed in the Committee of the Whole that a clause specifying that no party to a treaty might invoke the provisions of its internal law to justify the non-observance of a treaty should be inserted in the draft Convention. That proposal was adopted on first reading by 55 votes to none, with 30 abstentions, and referred to the Drafting Committee. On second reading, the Committee of the Whole approved without a formal vote the text submitted by the Drafting Committee. In 1969, at its second session, the Conference adopted by 72 votes to 2, with 24 abstentions, the text proposed by the Committee of the Whole, which became article 27 of the Vienna Convention on the Law of Treaties, and reads as follows:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

(13) The principle thus sanctioned by international judicial decisions and State practice is, further, expressly confirmed by writers belonging to different legal systems. It is also included in most of the draft codifications.
fictions of State responsibility prepared by individuals or private institutions.183

(14) There is no exception to the principle that it is only by reference to an international legal obligation binding a State that an act of that State can be characterized as internationally wrongful. The rule that the characterization given by international law cannot be affected by the characterization of the same act in internal law makes no exception for cases where rules of international law require the State to conform to the provisions of internal law, for instance by applying to aliens the same treatment as to nationals. It is true that in such a case once the State has applied the provisions of internal law, there can be no internationally wrongful act; but even then, it is not the fact of keeping conduct in conformity with internal law that precludes its international wrongfulness, but the fact that conduct which thus conforms to internal law constitutes, by the very fact of its conformity, the performance of the international obligation. Conversely, if a State has, by its act or omission, contravened provisions of internal law, there will be an internationally wrongful act inasmuch as the violation of internal law constitutes at the same time a breach of the international legal obligation.

(15) As regards the wording of the rule, the Special Rapporteur had proposed: "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law". A formulation of that kind, which is to be found in much the same terms in most draft codes on State responsibility, including article 5 of the draft adopted on first reading at The Hague Conference of 1930 and article 27 of the Vienna Convention on the Law of Treaties, has the merit of making the true purpose of the rule immediately and clearly apparent, namely, that States cannot use their municipal law as a means of escaping international responsibility. However, the majority of the Commission took the view that such a formulation sounded too much like a rule of procedure and would be inappropriate for a statement of principle designed to appear in chapter I of the draft. Moreover, in the opinion of some members, the proposed wording was open to misunderstanding. They referred to cases in which the international responsibility of the State consists essentially in the requirement that its conduct shall be consistent with that required by municipal law. It was observed that in such cases it would not be incorrect to say that "municipal law can be invoked" to show that there has been no internationally wrongful act. Other members pointed out that, even in such cases as those, it was not municipal law as such which was invoked but the international law which referred to municipal law. Moreover, the purpose of the article was to take account of cases in which there would be a contradiction between the provisions of municipal law and the requirements of international law. In any event the Commission, in its concern to avoid any possible doubt, preferred to use a formulation which on the one hand, like those adopted for the three previous articles, avoids all resemblance to a rule of procedure and, on the other, refrains from mentioning the possibility or impossibility of "invoking municipal law".

(16) The question was raised in the Commission whether the article ought to refer just to the case where an act must be characterized as internationally wrongful because it is found to be such by international law even though lawful under internal law, or whether it ought also to mention the case where an act is lawful under international law even though a violation of internal law. The first sentence of article 4 covers both aspects of the principle. The second sentence stresses the aspect which the Commission considers the more important, namely, the need to prevent the State from attempting to use its internal law as a device for escaping its international responsibility.

(17) With regard to terminology, for the French version the Commission preferred the expression "droit interne" to such other expressions as "législation interne" and "loi interne", first because it balances the expression "droit international" used in the same article, and secondly because it covers, without any possible doubt, all valid provisions of the internal legal order, whether written or unwritten, constitutional or legislative rules, administrative decrees, judicial decisions, etc.184 For the English version, the term "internal law" was preferred to "municipal law", first because the latter is sometimes used in a narrower sense, and secondly because the Vienna Convention on the Law of Treaties speaks of "internal law".

Chapter II

The "Act of the State" According to International Law

Commentary

(1) The purpose of article 3 of chapter I of these draft articles, dealing with general principles, is to formulate the two essential conditions for the existence of an internationally wrongful act, the first being the presence of conduct consisting of an action or omission attributable to the State under international law, and the second, the fact that such conduct constitutes a breach of an international obligation. The possibility of attributing a given conduct to the State, or, in other words, of

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183 Cf. article 5 of the draft code prepared by the Japanese branch of the International Law Association and the Kokuin Gakkwa; article 1, second paragraph of the draft prepared by the Institute of International Law at Lausanne in 1927; article 2 of the draft prepared by the Harward Law School in 1929 and article 2, paragraph 2 of the draft prepared in 1961; article 7 of the draft prepared by the Deutsche Gesellschaft für Völkerrecht in 1930; article 4, third paragraph of the draft prepared by Strupp in 1927; and article 4 of the draft prepared by Roth in 1932. (See foot-note 14 above.)

184 The Third Committee of the 1930 Codification Conference preferred for the French text the expression "droit interne" to the expression "disposition de sa loi interne" used by the Preparatory Committee in the Bases of Discussion. Similarly, at the United Nations Conference on the Law of Treaties, the Drafting Committee generally preferred to speak of "internal law" ("droit interne", "derecho interno") rather than "constitution" ("constitution", "constitución") or "laws" ("législation", "leyes").
considering the conduct as "an act of the State", has been advanced as the subjective element of the internationally wrongful act. The next step is to determine when, in what circumstances and in what conditions such an attribution can be made, in other words, to determine what "conduct" is regarded by international law as an "act of the State" for the purpose of establishing the possible existence of an internationally wrongful act.

(2) The operation that consists of "attributing", for this purpose, an act to the State as a subject of international law is clearly one which is based on criteria determined by international law and not on the mere recognition of a link of factual causality (causalité naturelle). Though itself a normative operation, "attribution" does not imply any juridical characterization of the act to be attributed, and it must be clearly distinguished from the subsequent operation, which consists of ascertaining whether that act is wrongful. It is solely concerned with establishing when there is an act of the State, when it is the State which must be considered to have acted.

(3) Since the State can act physically only through actions or omissions by human beings or human collectivities, the problems posed by this fundamental notion of the "act of the State" which have to be resolved in the present chapter have a common denominator. The basic task is to establish when, according to international law, it is the State which must be regarded as acting; what actions or omissions can in principle be considered as conduct of the State, and in what circumstances, such conduct must have been engaged in, if it is to be actually attributable to the State as a subject of international law. In that connexion, it must first of all be pointed out that, in theory, there is nothing to prevent international law from attaching to the State the conduct of human beings or collectivities whose link with the State might even have no relation to its organization; for example, any actions or omissions taking place in its territory could be considered acts of the State. In practice, however, we find that what is, as a general rule, attributed to the State at the international level are the acts of members of its "organization", in other words, the acts of its "organs" or "agents". This is the basic principle. The purpose of the present chapter of the draft will, in fact, be to define and complete this principle, to determine its scope and limitations and the derogations to which it is subject.

(4) From this point of view, once the basic rule has been laid down which attributes to the State the acts of its organs, the question arises whether the activities of certain categories of organs should be excluded from the "acts of the State". Another point to be considered is whether or not, in addition to the conduct of organs which form part of the State machinery, it is appropriate to attribute to the State, at the international level, the conduct of organs of public institutions other than the State itself, or of persons who, though not "organs" in the proper sense of the term, engage in what are in fact public activities, or of organs of another subject of international law placed at the disposal of the State in question. Attention will then be given to the question whether or not it is appropriate to regard as "acts of the State" the conduct of organs or, more generally, of persons whose activities are in principle attributed to the State, when such conduct is adopted in circumstances which cast doubt on the legitimacy of that attribution. This question arises, for example, where an organ exceeds its competence or acts contrary to the requirements of internal law concerning its activities. We next have to consider the treatment to be accorded to the conduct of private individuals acting solely in that capacity, and the basis on which the conduct of State organs in connexion with acts by private individuals may be regarded as a source of responsibility. Lastly, consideration will be given to the case of the conduct of organs of other subjects of international law acting in the territory of the State and to problems relating to the retroactive attribution to a State of acts of a victorious insurrectionary movement.

(5) The first point to be stressed in connexion with the problems to be dealt with in this chapter is the need to avoid identifying too closely the situations referred to here with others that are basically different despite certain common general features. International law takes the machinery or "organization" of the State into consideration for purposes which greatly exceed those of the attribution to the State of an internationally wrongful act. All activities of the State, including activities which consist of performing "acts" properly so called, i.e. producing manifestations of will with a view to attaining legal consequences, raise the problem of the attribution to the State of certain conduct. Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty is, however, in no way identifiable with the operation which consists of attributing to the State particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility. It would be wrong to adopt the same criteria in these two cases and to propose an identical solution based on a general and common definition of "act of the State". In the context of the responsibility of States for internationally wrongful acts, the "act of the State" has its own specific character and must be defined according to particular criteria. The title of this chapter must therefore be understood in relation to the object and scope of the draft articles as a whole.

(6) If the substance of the problem is to be understood and appropriate rules formulated, it is also desirable to avoid a double confusion which is at the root of the difficulties encountered by writers. In the first place, a clear distinction must be drawn between the operation of attributing to the State, for any particular purposes, the conduct adopted in certain circumstances by its "organs", i.e. by those which belong to its "organization", and the operation which consists of actually establishing that "organization", i.e. determining what are the individual and collective "organs" which, taken as a whole, make up the State machinery. In the second place, the necessary distinction must be drawn between the attribution of an act to the State as a subject of
international law and to the State as a subject of internal law. Failure to take this double distinction sufficiently into account explains why some of the best-known trends in legal literature have led to an impasse.135

(7) The “organization” of the State does not and cannot mean anything but the organization which the State autonomously gives itself. It follows that the “organs” of the State can only be those which the State considers as such within its own legal system and whose action it regulates for its own purposes. This regulation, which can be established only by the State, is obviously a prerequisite for the operation of attributing to the State the conduct of a member of its “organization”. It is not by attributing to the State a certain action or omission that one gives the authors of that action or omission the status of organs of the State. The attribution can be made because they have that status, because they have the legal capacity to act on behalf of the State. In other words, the status of organ possessed by the author of the conduct being examined is the premise or condition, and not the effect, of treating that conduct as an “act of the State”.

(8) This statement is even more valid when a certain conduct is attributed to the State as a subject of international law and not as a subject of internal law. The formation and regulation of the organization of the State are not governed by the international order. The organization of the State is not created but presupposed by international law.136 In other words, the fact of forming part of the organization of the State is regarded in international law merely as a premise. That does not in any way mean that in international law it is not sometimes necessary to interpret or apply internal law; it is nevertheless true that international law merely presupposes the organization which the State has adopted within its internal legal order and regards it simply as a condition on which it bases some of its findings.137

(9) Three main conclusions emerge from what has been said above. The first concerns the meaning which should be given to the statement that, in international law, the conduct of the “organs” of the State subject of that law is attributed to the State in order to impose responsibility upon it, if appropriate. This proposition simply means that, in international law, the conduct of those who have the status of “organs” in the internal legal order, and solely in that order, is in principle considered as an “act of the State” and is attributed to the State.138 It does not in any way mean that their status becomes an “international” status by virtue of such attribution.

(10) The second conclusion is that international law remains free when it takes into consideration the situation existing in the internal legal order. The attribution of an act to a State in international law is wholly independent of the attribution of that act in national law.139 The treatment of certain acts as “act of the State” in international law may be based on criteria which are both wider and more limited than the corresponding treatment in internal law. In international practice, for example, the conduct of organs of public institutions other than the State and the conduct engaged in by organs of the State in excess of their competence is treated as an act of the State subject of international law. But the independence of international law in attributing an act to a State does not in any way mean that international law intends to introduce into the State machinery “organs” which the State itself has not designated as such in its own legal system.

(11) The third and last conclusion flows automatically from the acknowledged freedom international law possesses with regard to the determination of the conditions in which it considers some particular conduct as an “act of the State” at the international level. This determination has to be made solely on the basis of an examination of what actually happens in the life of international society, independently of the positions adopted at the national level and the theoretical examples drawn from national experience, on which so many jurists have focused their attention.

(12) The Commission has thus set itself the task of determining what conduct international law actually attributes to the State, basing itself primarily on the findings which result from an examination of State practice and the decisions of international tribunals. It is this method by which the Commission will mainly be guided in drawing up the provisions of chapter II of this draft. The solutions derived from practice and judicial decisions will be supplemented, where necessary, by elements of progressive development. As indicated in the introduction to this chapter,140 the Commission has only been able to consider and adopt the first two

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135 For a detailed analysis of these trends, the solutions proposed and the difficulties they raise, see the preliminary considerations in chapter II of the Special Rapporteur’s third report (Yearbook... 1971, vol. II (Part One), p. 233, document A/CN.4/246 and Add.1-3).


137 One must not be misled by the use of the term “referential” (“renvoj”) which is sometimes employed to describe this phenomenon. The structures of the State are not “received” into the international legal system and do not acquire the character of legal structures in it, even if international law takes them into consideration for its own purposes.

138 From this point of view the situation remains the same in the exceptional cases in which international law limits the freedom of the State to establish its organization. In such cases, the limiting international rule does not itself in any way establish the machinery of the State or part of that machinery. It merely imposes on the State an obligation which the State respects in choosing to adopt one type of organization rather than another. The organs established in conformity with such an international obligation are not organs of international law.


140 See para. 35 above.
articles of chapter II, i.e. articles 5 and 6 of the draft, at the twenty-fifth session. It intends to complete the adoption of the articles in the chapter after considering the relevant proposals by the Special Rapporteur in his third and fourth reports.

_Article 5. Attribution of the State of the conduct of its organs_

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

_Commentary_

(1) Observation of what actually happens in international life makes it possible to say at the outset that the acts of “organs” of the State, that is, of all the individual or collective entities which have the status of organs of the State under its internal law, are, as a general rule at least, considered as “acts of the State”: that is to say, they are attributed to the State in international law for the purpose of being characterized, where appropriate, as internationally wrongful acts. Article 5 propounds the rule which flows from that statement.

(2) This rule is clearly a fundamental one, a point of departure; it is not absolute and, above all, not exclusive. It should not lead automatically to far-fetched conclusions. There is no _a priori_ implication that all acts of the “organs” of the State should be automatically considered as “acts of the State” under international law. More especially, there is no implication that, when one attributes to a State, as a subject of international law, the conduct of what are considered its “organs” according to its internal legal order, one exhausts the list of types of conduct to which international responsibility may attach. Taken a stage further, an analysis of the facts can and indeed does show that certain acts of individual or collective entities which do not have the status of “organs” of the State may likewise be attributed to the State in international law and thus become a source of responsibility to be borne by that State.

(3) The principle that the State is responsible for breaches of obligations committed by its own organs has long been unequivocally recognized in international judicial decisions. In most cases, the principle has simply been presupposed and taken for granted. In addition, however, to the very numerous cases in which the principle has been reaffirmed implicitly, there are others in which it has been expressed in clear and explicit terms. In the _Moses_ case, for example, decided on 14 April 1871 by the Mexico-United States Mixed Claims Commission set up under the Convention of 4 July 1868, the umpire Lieber made the following statement: “An officer or person in authority represents _pro tanto_ his government, which in an international sense is the aggregate of all officers and men in authority”. An even clearer assertion is to be found in seven arbitral awards made at Lima on 30 September 1901 in the _Affaire des réclamations des sujets italiens résidant au Pérou_, concerning the damage suffered by Italian subjects during the Peruvian civil war of 1894-1895. Each of these awards reiterates that: “... a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents” [translation from French]. The principle of attributing to the State, for the purposes of international responsibility, the acts of its “organs”, “leaders” and “agents” is also confirmed in several other arbitral awards.

(4) In State practice, we should note the positions adopted in connexion with specific disputes, and also the replies by Governments to points III, IV and V of the request for information addressed to them by the Preparatory Committee for the 1930 Conference. These replies unanimously convey, explicitly or implicitly, the juridical conviction that the actions or omissions of organs of the State which give rise to a failure to fulfil an international obligation must be attributed to the State and be characterized as internationally wrongful acts of the State. The Third Committee of the Conference adopted in first reading, by the unanimous vote of the States represented, an article 1 which provides that international responsibility shall be incurred by a State as a consequence of “any failure on the part of its organs to carry out the international obligations of the State. . .”.

(5) All the draft codes on international responsibility prepared by public institutions or learned societies formulate in similar terms the principle that the conduct of the organs of the State is attached to the State for the
The draft codes prepared by individual jurists contain clauses couched in similar terms.\(^{146}\)

(6) Finally, the attribution to the State of the acts of its organs for the purpose of determining its international responsibility is accepted by writers on international law, who are practically unanimous on this point,\(^{148}\) despite the differences of opinion which separate them on the issue whether all the actions or omissions of the "organs" of the State, and they alone, may or may not be attributed to it as "acts of the State".

(7) In this connexion, however, a fundamental distinction must always be borne in mind. The element of truth which exists in the identification of the organ with the State should not make us forget that the organs of the State are ultimately composed of human beings who are still capable of acting on their own account. It is therefore necessary to ascertain in each specific case whether, on that occasion, they have acted as organs of the State, under cover of that status, or as private individuals. The practical difficulties which may sometimes arise in this connexion in no way detract from the clarity of the distinction from the standpoint of principles.

(8) This conclusion, together with the corollary which in principle excludes attribution to the State, as acts which may give rise to responsibility, of actions or omissions committed in a purely private capacity by the human beings who compose its organs, is unanimously recognized in international practice and in international judicial decisions. It will therefore suffice to recall here just a few cases of that recognition. For instance, Governments took a very clear position on the point at the 1930 Codification Conference. Point V, No. 2 (d), of the request for information submitted by the Preparatory Committee of the Conference concerned the question whether the State becomes responsible for "acts or omissions of officials unconnected with their official duties". All the Governments which dealt with that point in their replies considered that the State was not responsible in such a case.\(^{144}\) This criterion was subsequently accepted by the State representatives at the Conference and was implicitly incorporated in the text of article 8 of the draft adopted in first reading by the Third Committee of the Conference.\(^{150}\)

(9) The same idea has been explicitly expressed on more than one occasion in arbitral awards and decisions of international and national claims commissions. One of the decisions most frequently quoted is that concerning the Bensleys case, handed down on 20 February 1850 by the Commission established under the Act of Congress of the United States of America on 3 March 1849. The following reason was given for the rejection of the claim for reparation submitted for the detention of a young United States boy in the house of a Mexican governor: "The detention of the boy appears to have been a wanton trespass committed by the governor, under no colour of official proceedings, and without any connexion with his official duties."\(^{151}\) The French-Mexican Claims Commission established under the Convention of 25 September 1924, in its decision of 7 June 1929 concerning the Caire case, stated that the only case in which the State was not responsible was that "in which the act had no connexion with the official function and was, in fact, merely the act of a private individual" [translation from French].\(^{152}\) In many other cases the criterion to which we are referring is not stated so explicitly, but nonetheless appears to have been implicitly accepted. This is so, for example, in the Putnam case,\(^{153}\) and the Morton case,\(^{154}\) decided by the United States of America/Mexico General Claims Commission established by the Convention of 8 September 1923. Generally speaking the various draft codes, whether public or private in origin, set forth the principle of attribution to the State, as a subject of international law, of the acts of its organs, but take care to exclude conduct adopted in a purely private capacity from that attribution.

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\(^{146}\) See for example, article 1 of the draft prepared by the Japanese branch of the International Law Association and the Kokusai Gakkwai; article 1 of the resolution adopted in 1927 by the Institute of International Law; article 3 (a) and (b) of the draft prepared in 1929 by the Harvard Law School; article 15 of the draft prepared in 1961 by the Harvard Law School; article 1 of the draft prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht; article V of the principles of International Law that Govern the Responsibility of the State in the Opinion of the Latin American Countries, prepared in 1962 by the Inter-American Juridical Committee; article II, III and IV of the Principles of International Law that Govern the Responsibility of the States in the Opinion of the United States of America, prepared in 1965 by the Inter-American Juridical Committee; and para. 169 of the Restatement of the Law of the American Law Institute. (See foot-note 14 above.)

\(^{148}\) For example, article 1 of the draft prepared by Strupp in 1927 and article 1 of the draft prepared by Roth in 1932. See also No. II of the Bases of Discussion prepared in 1965 by Mr. Garcia Amador, Special Rapporteur of the International Law Commission, as well as chapter II of his preliminary draft of 1957 and article 12 of his revised preliminary draft of 1961. (See foot-note 14 above.)


\(^{160}\) See J. B. Moore, History and Digest ... (op. cit.), vol. III, pp. 2018. See also the decision in the Case of the Castelains, handed down by the France-United States Mixed Commission established under the convention of 15 January 1880 (ibid., pp. 2999-3000).


\(^{163}\) Ibid., vol. IV (op. cit.), pp. 428 et seq.
(10) The questions raised by actions or omissions on the part of persons acting in a private capacity who at the same time have the status of “organs” of the State will be considered in their various aspects in the more general context of the discussion of the conduct of private individuals which appears in a later part of this chapter of the draft articles. At that point, it will be necessary to see whether or not purely private conduct can, in certain circumstances, be attributed to the State for the purpose of the draft articles on the international responsibility of States. At this initial stage, our only concern need be to ensure that the demarcation line which we have drawn is indicated with the necessary clarity. It must be pointed out forthwith, however, that the case of purely private conduct should not be confused with the quite different case of an organ functioning as such but acting ultra vires, or, more generally, in breach of the rules governing its operation. In this latter case, which will also be discussed in this chapter, the organ is nevertheless acting in the name of the State. This distinction has been clearly drawn in international arbitral decisions, for example, in the award in the Mallén case, rendered on 27 April 1927 by the United States of America/Mexico General Claims Commission. In that decision, two separate events were successively taken into consideration: firstly, the action of an official acting in a private capacity, and secondly, another action committed by the same official acting in his official capacity, although in an abusive way. In other cases, the distinction was less easy to apply and the tribunals concerned had to make a close examination of the facts before they could rule on the nature of the act. It should be noted, however, that the principle of the distinction has never been questioned.

(11) Having regard to the foregoing considerations, article 5 provides that:

For the purposes of the present articles, conduct for any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

By adopting this formula, the Commission has left the door open for the subsequent establishment of other rules, resulting from further observations, which will be the subject of other articles of chapter II of the draft and will serve to extend or, where appropriate, restrict the rule stated in article 5. The purpose of the opening proviso (“For the purposes of the present articles”) is to specify that article 5 concerns the attribution to the State of the conduct of its organs, not in general but solely in the context of the responsibility of States for internationally wrongful acts.

(12) The wording “conduct of any State organ having that status…” was preferred to other wording, such as “the conduct of a person or group of persons who . . . possess the status of organs of the State”, in order to avoid entering into theoretical problems concerning the definition of the notion of an organ itself. The Commission did not consider it necessary to add the words “an action or omission” after the word “conduct”, since the latter is already defined as an action or omission in article 3 (a) of the draft. In order to make it clear that the status of organ must have existed at the time of the conduct in question, the concluding verb (“was acting”) has been placed in the past tense.

(13) Finally, without prejudice to the different meanings which the term “organ” may have, particularly in the internal public law of different legal systems, it was agreed that the article should employ only the term “organ” and not the two terms “organ” and “agent”. The term “agent” would seem to denote, especially in English, a person acting on behalf of the State rather than a person having the actual status of an organ. Actions or omissions on the part of persons of this kind will be dealt with in another article of this chapter.

**Article 6. Irrelevance of the position of the organ in the organization of the State**

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

**Commentary**

(1) It was pointed out that the rule laid down in article 5 concerning the attribution to the State of the conduct of its organs was only an initial rule which would have to be supplemented by other rules. The purpose of the present article is to make it clear that the position of an
organ of the State in the organization of that State does not enter into consideration for the purpose of attributing the organ's conduct to the State—that is to say, of considering such conduct as an "act of the State" under international law. In other words, the purpose of article 6 is to indicate the scope of the expression "any State organ" as used in article 5.

(2) In the Commission's opinion there are three separate questions to be considered in relation to the problems raised by this article. The first is whether only the conduct of a State organ responsible for "external" relations can constitute a wrongful act of the State under international law or whether the conduct of an organ performing "internal" functions may also enter into consideration for this purpose. The second is whether it is only the conduct of a "governmental" or "executive" organ of the State which can give rise to an internationally wrongful act, or whether in fact no distinction should be made in this respect between an act or omission of such an organ and an act or omission of a constituent, legislative, judicial or other body, whatever it may be. The third is whether a distinction should or should not be made for these purposes between the conduct of a "superior" and that of a "subordinate" organ.

(3) With regard to the first question, it is an obsolete theory that only an act or omission of an organ responsible for conducting the external relations of the State can constitute an internationally wrongful act of the State. On that theory, the State would be called upon to answer only "indirectly" for the conduct of organs performing internal functions, such as administrative officials or judges, just as it is for the actions of private individuals; it would be responsible only if one of its organs responsible for external relations had endorsed the act or omission of the organ responsible for internal functions. This theory obviously resulted from confusion between the consideration of certain conduct as an internationally wrongful act and the attribution to the State of a manifestation of will capable of constituting a valid international legal act or establishing participation in such an act. International judicial decisions and practice show that there is no justification for the theory. Indeed, for a long time now writers have mentioned it only in order to reject it.159

(4) The second question may seem at first sight rather more complex. The study of possible cases of internationally wrongful acts on the part of particular organs has often been taken up separately in connexion with one or other of the main traditional branches of government: the legislature (or constituent power),160 the executive141 and the judiciary.162 This procedure has made it possible to go thoroughly into certain questions, but has also certainly given rise to difficulties which have not real bearing on the topic considered here, for most such questions go far beyond the limits of the problems which arise in the context of chapter II of this draft. They often amount merely to asking whether the conduct of a given organ does or does not objectively constitute a breach of an international obligation, rather than whether it should or should not be attributed to the State as a subject of international law. Sometimes they go beyond the bounds of international wrong and responsibility. Moreover the Commission found that the division of powers was by no means so clear-cut in practice as it might seem in theory and, in particular, that it was understood very differently in the various legal and political systems.

(5) For nearly a century there has not been a single international judicial or arbitral decision which has stated, or even implicitly accepted, the principle of non-responsibility of the State for the acts of its legislative or judicial organs. On the contrary, the opposite principle has been expressly confirmed in a number of decisions and implicitly recognized in many others. Thus, in the award of 8 May 1902 in the Salvador Commercial Company case, the United States of America/El Salvador arbitration tribunal, established under the Protocol of 19 December 1901 endorsed the opinion that:

... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive or judicial department of the Government, so far as the acts are done in their official capacity.163

The Permanent Court of International Justice, in its Judgement No. 7 of 25 May 1926 in the Case concerning...
certain German interests in Polish Upper Silesia (Merits), affirmed the principle that:

From the standpoint of international law and of the Court which is its organ, municipal laws... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.164

More recently, the Franco-Italian Conciliation Commission, set up under article 83 of the Treaty of Peace of 10 February 1947, expressed the following opinion in its decision of 7 December 1955 in the dispute concerning the interpretation of article 79 of the Treaty of Peace:

Although in some arbitral awards of the XIXth century the opinion is expressed that the independence of the courts, in accordance with the principle of the separation of powers generally recognized..., excludes the international responsibility of the State for acts of the judiciary contrary to law, this theory now seems to be universally and rightly rejected by writers and by international judicial decisions.

The possibility of attributing to the State acts committed by its legislative or judicial organs has been accepted in a great many international awards.

(6) With regard to State practice, the Commission found no evidence that the thesis, of the impossibility of invoking international responsibility for acts of legislative or judicial organs had ever been advanced, at least not for the last few decades. On the other hand it noted that the possibility of invoking international responsibility for such acts had been directly or indirectly recognized on many occasions.165 Countries which have

164 P.C.I.J., Series A, No. 7, p. 19. See also the award of 23 July 1927 made in the Chartist case by the United States/Mexico General Claims Commission set up under the Convention of 8 September 1923 (United Nations, Reports of International Arbitral Awards, vol. IV (op. cit.), p. 256).


166 See, for example, the judgements and advisory opinions rendered by the Permanent Court of International Justice in the cases concerning settlers of German origin in the territory ceded by Germany to Poland (P.C.I.J., Series B, No. 6, 1923, particularly pp. 35 et seq.); the Treatment of Polish nationals in the Danzig Territory (idem, Series A/B, No. 44, 1932, particularly pp. 24-25, and Phosphates in Morocco (idem, Series A/B, No. 74, 1938, particularly pp. 25-26); and those rendered by the International Court of Justice in the Case concerning the rights of nationals of the United States of America in Morocco (I.C.J. Reports 1952, pp. 176 et seq.), the Case of the monetary gold removed from Rome in 1943 (ibid., 1954, pp. 19 et seq., and particularly p. 32), and the Case concerning the application of the Convention of 1902 on the Guardianship of Infants (ibid., 1958, pp. 55 et seq.).

167 See for example the judgements and advisory opinions of the Permanent Court of International Justice in the Lotus case (P.C.I.J., Series A, No. 10, 1927, p. 24), the case concerning The jurisdiction of the Courts of Dantzig (idem, Series B, No. 15, 1928, p. 24) and the Phosphates in Morocco case (idem, Series A/B, No. 74, 1938, particularly p. 28); and the judgement of the International Court of Justice in the Ambatielos case (I.C.J. Reports 1953, pp. 10 et seq., and particularly pp. 21 et seq.). Mention may also be made of the decisions of the Arbitrator between Great Britain and Spain (1925) in the Case of British property in Spanish Morocco (United Nations, Reports of International Arbitral Awards, vol. II (op. cit.), pp. 615 et seq., and particularly p. 646).

168 For example, with regard to the acts of legislative organs, reference may be made to the opinions expressed respectively in a note dated 28 February 1913 from the British Ambassador at Washington addressed to the United States Secretary of State
(8) In the Commission’s view, therefore, there is no need to appeal to ideas of progressive development of international law in order to reach the conclusion that acts or omissions of any State organ—whether of the constituent or legislative power, the executive or the judiciary—can be attributed to the State as internationally wrongful acts. No one now supports the old theories that legislative organs were an exception because of the “sovereignty” of Parliament, or judicial organs because of the principles of the independence of the judiciary or the authority of res judicata. Cases in which States resorted to arguments based on principles of that kind, and found arbitral tribunals willing to accept them, belong to the distant past.\textsuperscript{174} Today the opinion that the respective positions of the different branches of government are important only in constitutional law and of no consequence whatsoever in international law, which regards the State as a single entity, is firmly rooted in international judicial decisions, the practice of States and the literature of international law.

(9) It remains to consider the last of the three questions mentioned at the beginning of the commentary to the present article, whether a further distinction, based on the superior or subordinate rank of the organ in the State hierarchy, should be made between State organs in order to determine those organs, an act or omission of which may be attributed to the State as an internationally wrongful act of the State. The view that the acts or omissions of “subordinate” ("subsidiary" or "minor") organs can be attributed to the State as a possible source of international responsibility, just as well as the acts or omissions of higher organs, is now generally accepted. But this has not always been so.

(10) One school of thought,\textsuperscript{175} which in its day found favour with certain legal writers in the United States and has continued to attract some support,\textsuperscript{176} holds that in international law only the conduct of “superior” organs is attributable to the State. It maintains that the State cannot be held responsible for an act by a “subordinate” organ except in cases where it appears that the conduct of that organ has been explicitly or implicitly endorsed by superior organs; in fact, that the State is responsible only for the acts of its superior organs.\textsuperscript{177}

(11) This thesis, however, encountered some reservations and even firm opposition in the legal literature of the time.\textsuperscript{178} In particular, it seems to have escaped the notice of its advocates that the point relied on in specific cases to prove that the conduct of a particular organ could not be attributed to the State was not the “subordinate” or “subsidiary” character of the organ but the fact that the organ had acted with a complete disregard for the law and the limits of its own even apparent authority.\textsuperscript{179} The thesis seems to have originated from a confusion with the requirement of exhaustion of local remedies and its effect on responsibility. The essence of the “local redress rule” is that a breach of an international obligation cannot, at least as a general rule, be deemed to have finally taken place so long as a single one of the organs capable of fulfilling the obligations has not yet taken any steps in the matter. Now it is obvious that such a situation will occur more frequently when the organ which acted first is of inferior rank. Nevertheless, the legal position does not change because of a mere increase in probability. Whether it is an act or an omission of a higher organ, if remedies are available against its injurious conduct, the responsibility of the State will not normally be involved until those remedies have been exhausted.\textsuperscript{180}

(12) The Commission recognized, however, that on this question diplomatic practice and arbitral awards between 1850 and 1914 were far from clear and unanimous. Some support for the view that the conduct of minor State organs cannot be attributed to the State derives from the fact that the legal system in the United States of America, unlike—for—the example systems of continental Europe, often provides in the case of injurious acts by government officials, especially minor officials, for the possibility of personal recourse against the individual/organ, but not against the government as such. Hence diplomatic notes from the United States Government,\textsuperscript{181} or arbitral awards in disputes to which it was

\textsuperscript{174} The theory of the independence of the judiciary was advanced by Portugal to avoid recognizing its international responsibility in the Croft (1856) and Yuelle, Shortridge and Co. (1861) cases (see A. de Lapradelle and N. Politis, Recueil des arbitrages internationaux (Paris, Pédome, 1923), vol. II, pp. 22 et seq., 101 et seq., and 103).

\textsuperscript{175} The principal spokesman for this school of thought was E. M. Borchard, Diplomatic Protection... (op. cit.), pp. 189 et seq.


\textsuperscript{177} This opinion is reflected in article 7 (b) of the draft convention prepared by the Harvard Law School under Borchard’s personal supervision in 1929 for the Hague Codification Conference (see Harvard Law School, Research in International Law (Cambridge, Mass., 1929), pp. 157 et seq. and 165 et seq.).

\textsuperscript{178} The principal spokesman for this school of thought was E. M. Borchard, Diplomatic Protection... (op. cit.), pp. 189 et seq.


\textsuperscript{177} This opinion is reflected in article 7 (b) of the draft convention prepared by the Harvard Law School under Borchard’s personal supervision in 1929 for the Hague Codification Conference (see Harvard Law School, Research in International Law (Cambridge, Mass., 1929), pp. 157 et seq. and 165 et seq.).

\textsuperscript{178} For the clearest and best-documented opposition, see C. Eagleton, Responsibility of States... (op. cit.), pp. 45 et seq. See also K. Strupp, Das völkerrechtliche Delikt (op. cit.), pp. 37-38 (note 5); C. C. Hyde, International Law chiefly as Interpreted and Applied in the United States, 2nd ed. rev. (Boston, Little, Brown, 1951), vol. 2, pp. 935-936; F. S. Dunn, The Protection of Nationals: a Study in the Application of International Law (London, Oxford University Press, 1932), pp. 125 et seq.

\textsuperscript{179} For example, in a letter dated 14 August 1900 from Mr. Adee, the United States Secretary of State, addressed to Baron de Fava, the Italian Ambassador at Washington (J. B. Moore, A Digest... (op. cit.), p. 743), it is stated that the misconduct of petty officials and agents had been committed outside the range not only of their real but even of their apparent authority.

\textsuperscript{180} It should also be noted that the idea of excluding the conduct of minor organs from “act of State” certainly stems from a basic misunderstanding due to the practice of stating the problem, not—as would be correct—in terms of attribution of such acts or omissions to the State, but directly in terms of responsibility. The conduct of any organ is attributable to the State as a subject of international law, even in the case where such conduct is not sufficient in itself to generate international responsibility but must be accompanied by the conduct of other organs before their combined conduct can be regarded as an internationally wrongful act and give rise to responsibility.

\textsuperscript{181} See, for example, the position taken by Cushing, Attorney-General of the United States, on a claim made against the United States Government for the loss of a vessel through the negligence of a pilot at San Francisco (J. B. Moore, A Digest... (op. cit.), pp. 740-741).
a party, have sometimes pointed out that such personal recourse was available to the plaintiff, and that he should not apply to the State. An attitude of this kind could be interpreted as indicating a failure to exhaust local remedies, but it could also be interpreted as expressing the opinion that the acts of inferior organs could not be regarded as acts capable of being attributed to the State. That helps to explain the differences of opinion sometimes noted in this connexion in the diplomatic correspondence exchanged before the First World War between the United States Government and Governments of European countries.

(13) Despite these uncertainties and the reasons for them, there can be no doubt that pre-First World War arbitral awards and diplomatic practice provide many examples of recognition of the principle of the attribution to the State as a subject of international law of the acts and omissions of subordinate organs, and that applies also to decisions in disputes involving countries of the American continent. At all events, the uncertainty which may have existed earlier seems to have disappeared between the end of the First World War and 1930. The prevailing view among Governments was clearly expressed first during the preparatory work, and then during the actual proceedings, of the 1930 Codification Conference. In the light of the replies received from Governments, the Preparatory Committee, in the bases of discussion which it prepared for the Conference, did not allow for any difference of treatment between higher organs and subordinate organs. At the Conference itself, the question of organs of lower rank was considered only sporadically during the discussion, and no trace of it remained in the conclusions.

(14) International judicial practice over the last few decades does not seem to furnish any examples of dissenting opinions. The attribution to the State of the conduct of its subordinate organs was clearly affirmed after the First World War by a series of claims commissions, such as the Mexico/United States of America General Claims Commission established under the Convention of 8 September 1923, and the United States of America/Panama General Claims Commission established under the agreement of 28 July 1926. After the Second World War the Italian/United States of America, Franco-Italian and Anglo-Italian Conciliation Commissions established under article 83 of the Treaty of Peace of 10 February 1947 often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officials, and always agreed to treat the acts of such persons as acts attributable to the State. As regards the most recent legal literature it can be said that, with one or two exceptions, international lawyers trained in the most widely different systems of law all support the view that the conduct of even minor organs can be regarded as an act of the State. It should also be noted that none of the codification drafts, official or private—with the exception of the 1929 Harvard Draft already mentioned—makes any distinction between higher and subordinate organs. The same applies to the new 1961 Harvard Draft and to the Restatement of the Law by the American Law Institute.

(15) The Commission can therefore conclude, with regard to the third question, that there is no place today for the idea, which once found favour, of making a distinction between organs of the State according to their rank. There is no reason to consider only the conduct of higher officials as conduct of the State for purposes of international responsibility. Such a restriction, as we have seen, is almost unanimously rejected. Even if that were not so, such a view would have to be opposed from the standpoint of the progressive development of international law. To accept such a distinction would be to introduce a serious element of uncertainty into international relations.

(16) In conclusion, the Commission unanimously recognized that, for the purposes of the present draft, there was no justification for any distinction between different categories of State organs. The unity of the State requires that the acts or omissions of all its organs, individual or collective, should be regarded as acts or omissions of the State at the international level, i.e. as "acts of the State" capable of entailing its international responsibility.

182 See for example the position taken by the United States member of the United States/Mexico Mixed Commission established under the Convention of 4 July 1968 in the Leichardt case (J. B. Moore, History and Digest ... (op. cit.), vol. III, p. 3134).

183 The position of the Governments of European countries amounted to regarding the acts and omissions of the State's subordinate organs as emanating from the State for the purposes of generating its international responsibility. An expression of this view can be found, for example, in the instructions sent on 8 March 1882 by Mancini, then Italian Minister for Foreign Affairs, to the Italian Minister in Peru (Società Italiana per l'Organizzazione Interazionale—Consiglio Nazionale delle Ricerche, La prassi italiana di diritto internazionale (Dobbs Ferry, N.Y., Oceana, 1970), 1st series (1861-1887), vol. II, p. 862).

184 See for example the decision rendered by the Netherlands-Venezuela Mixed Commission established under the Protocol of 28 February 1903 in the Mael case (United Nations, Reports of International Arbitral Awards, vol. X (op. cit.), p. 132). See also the Moses case referred to in paragraph (3) of the commentary to article 5.

185 The Mexican delegate proposed an amendment to basis of discussion No. 12 (which later became article 8) to provide that in the case of acts or omissions by subordinate officials, the State would not incur any international responsibility if it disavowed the act and punished the guilty official. No State supported the Mexican delegate's amendment and he withdrew it (League of Nations, Acts of the Conference ... (op. cit.), pp. 82 et seq.).

186 See in particular the awards rendered by the Commission in the Roper case (United Nations, Reports of International Arbitral Awards, vol. IV (op. cit.), p. 145 et seq.), the Massey case (ibid., p. 155 et seq.) and the Way case (ibid., p. 400).

187 Baldwin case (ibid., vol. VI (United Nations publication, Sales No. 415.5.3), p. 328 et seq.).

188 See for example, Inter alia, the Currie case (1954), (ibid., vol. XIX (op. cit.), p. 24), the Différend concernant l'interprétation de l'article 79 du Traité de Paix avec l'Italie (1955) (ibid., vol. XIII (op. cit.), pp. 431-432) and the Différend Dome Mussé (1953) (ibid., pp. 492 et seq.).

responsibility. It would, moreover, be absurd to suppose that there was a category of organs specially designated for the commission of internationally wrongful acts. Any organ of the State, if it is materially able to engage in conduct that conflicts with an international obligation of the State, may be the source of an internationally wrongful act of the State. Of course there are organs which, by the nature of their duties, will in practice have more opportunities than others in this respect, but the diversity of international obligations does not permit any a priori distinction between organs which can commit internationally wrongful acts and those which cannot.

(17) It might have been thought that the rule laid down in article 5 already made it sufficiently clear that the position of an organ in the organization of the State is irrelevant for the purpose of attributing conduct of the organ to the State. The Commission, however, feels it necessary to include an express provision on that point in the draft. It must be sure that certain views held in the past and mentioned in this commentary will not be put forward again in the future, whether supported by the same old arguments or by new ones. Article 6 provides a safeguard against such an eventuality and at the same time reflects purely and simply the present state of international law in the matter. With regard to the formulation of the rule to be laid down, the Commission considered that the substance of the rule would be most clearly expressed by a single consolidated formula. The text it adopted for article 6 is therefore based on this criterion. The Commission wishes to emphasize that the enumeration of the "powers" in the text of the article is not exhaustive; indeed, this should be clear from the words "or other" after the words "constituent, legislative, executive, judicial".

Chapter III

SUCCESSION OF STATES IN RESPECT OF MATTERS OTHER THAN TREATIES

A. Introduction

59. The introduction to this chapter briefly reviews past work on the question of succession of States in respect of matters other than treaties, and examines some general questions relating to the draft articles which the Commission began to prepare at its twenty-fifth session.

1. Historical review of the Commission's work

(a) Division of the question of succession into three separate topics

60. As mentioned in the Commission's report on its twenty-fourth Session the Commission, at its nineteenth session, in 1967, made new arrangements for dealing with the topic "Succession of States and Governments", which was among the topics it had selected for codification in 1949, and decided to divide the topic among more than one special rapporteur, the basis for the division being the three main "headings" of the broad outline of the subject laid down in the report submitted in 1963 by its Sub-Committee on Succession of States and Governments. Those three headings were as follows:


(a) Succession in respect of treaties;
(b) Succession in respect of rights and duties resulting from sources other than treaties; and
(c) Succession in respect of membership of international organizations.

61. In 1967, the Commission also appointed Sir Humphrey Waldock Special Rapporteur for succession in respect of treaties and Mr. Mohammed Bedjaoui Special Rapporteur for succession in respect of rights and duties resulting from sources other than treaties. It decided to leave aside, for the time being, the third heading, namely succession in respect of membership of international organizations.

(b) Adoption by the Commission in 1972 of provisional draft articles on succession of States in respect of treaties

62. Between 1968 and 1972, Sir Humphrey Waldock submitted to the Commission five reports on succession of States in respect of treaties. In 1972, at its twenty-fourth session, the Commission adopted, in the light of those reports, a set of 31 provisional draft articles on the topic, which were transmitted in the same year to Governments of Member States for their comments, in accordance with articles 16 and 21 of the Commission's Statute.

196 Ibid., p. 230, chap. II, section C.
197 Ibid., p. 225, para. 23.
(c) Preliminary work on succession of States in respect of matters other than treaties

63. To facilitate the study of the question of succession, the Secretariat has, since 1962, prepared and distributed several documents and publications \(^{199}\) in accordance with the Commission’s requests. Most of these documents and publications deal exclusively with succession in respect of treaties, while others concern succession in respect of membership of international organizations. Some, however, are more general in nature and include information on the practice relating to succession of States in respect of matters other than treaties. The publications concerned are: (a) a study entitled “Digest of the decisions of international tribunals relating to State succession” \(^{200}\) and a supplement thereto; \(^{200}\) (b) a study entitled “Digest of decisions of national courts relating to succession of States and Governments” \(^{201}\) and (c) a volume in the United Nations Legislative Series entitled Materials on succession of States \(^{202}\) containing the information supplied by Governments of Member States in reply to the Secretary-General’s request. A supplement to that volume was circulated as a document \(^{203}\) at the twenty-fourth session of the Commission.

64. Following his appointment as Special Rapporteur, \(^{204}\) Mr. Bedjaoui submitted to the Commission in 1968 a first report on succession of States in respect of rights and duties resulting from sources other than treaties. \(^{205}\) In it, he considered inter alia the scope of the subject which had been entrusted to him and, accordingly, the appropriate title for the subject, as well as various aspects into which it could be divided. Following the discussion of that report, the Commission in the same year, at its twentieth session, took several decisions, one of which concerned the scope and title of the topic and another the priority to be given to one particular aspect of succession of States.

(i) Scope and title of the topic

65. Endorsing the recommendations contained in the first report by the Special Rapporteur, Mr. Bedjaoui, the Commission considered that the criterion for delimitation of the topic entrusted to him and the topic of succession in respect of treaties should be “the subject-matter of succession”. It decided, in accordance with the Special Rapporteur’s suggestion, to delete from the title of the topic all reference to sources in order to avoid any ambiguity regarding the delimitation of the topic entrusted to the Special Rapporteur. The Commission accordingly changed the title of the topic and replaced the original title “Succession in respect of rights and duties resulting from sources other than treaties” by the title “Succession in respect of matters other than treaties”. \(^{206}\)

66. This decision was confirmed by the General Assembly in paragraph 4 (b) of its resolution 2634 (XXV), which recommended that the Commission should continue its work with a view to making “progress in the consideration of succession of States in respect of matters other than treaties”. \(^{207}\) The absence of any reference to “succession of Governments” in that recommendation by the General Assembly reflects the decision taken by the Commission at its twentieth session to give priority to State succession and to consider succession of Governments, for the time being, “only to the extent necessary to supplement the study on State succession”. \(^{208}\)

(ii) Priority given to succession of States in economic and financial matters

67. As mentioned above, the first report by Mr. Bedjaoui reviewed the various particular aspects of the topic of succession of States in respect of matters other than treaties. The report of the Commission on the work of its twentieth session notes in this connexion that, during the debate, some members of the Commission referred to certain particular aspects of the topic (public property; public debts; territorial problems; legal régime of the predecessor State; status of the inhabitants; acquired rights) and made a few preliminary comments on them.

It adds that, in view of the breadth and complexity of the topic, the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later. \(^{209}\)

The report also notes that the predominant view of members of the Commission was that the economic aspects of succession should be considered first. It states:

At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources so as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic “Succession of States in economic and financial matters” and instructed the Special Rapporteur to prepare a report on it for the next [twenty-first] session. \(^{210}\)

68. The second report by Mr. Bedjaoui, \(^{211}\) submitted at the twenty-first session of the Commission, was entitled “Economic and financial acquired rights and...
State succession”. The report of the Commission on the work of that session notes that during the discussion on the subject most of the members were of the opinion that the topic of acquired rights was extremely controversial and that its study, at a premature stage, could only delay the Commission’s work on the topic as a whole. They considered that “an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts”. 213 The report notes that the Commission “requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters”. It further records that “the Commission took note of the Special Rapporteur’s intention to devote his next report to public property and public debts”. 218

(iii) Reports by the Special Rapporteur on succession of States to public property

69. Between 1970 and 1972, Mr. Bedjaoui submitted three reports to the Commission—his third report 214 in 1970, fourth 215 in 1971 and fifth 216 in 1972. Each of these reports dealt with succession of States to public property and contained draft articles on the subject. Being occupied with other tasks, the Commission was unable to consider any of these reports during its twenty-second (1970), twenty-third (1971) or twenty-fourth (1972) sessions. It did, however, include a summary of the third and fourth reports in its report on the work of its twenty-third session 217 and an outline of the fifth report in its report on the work of its twenty-fourth session. 218

70. At the twenty-fifth (1970), twenty-sixth (1971) and twenty-seventh sessions of the General Assembly, during the Sixth Committee’s consideration of the reports of the International Law Commission, several representatives expressed the wish that progress should be made with the study on succession of States in respect of matters other than treaties. 219 On 12 November 1970, the General Assembly adopted resolution 2634 (XXV), in paragraph 4 (b) of which it recommended that the Commission should continue its work on succession of States, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) 220 of 20 November 1962 and 1902 (XVIII) 221 of 18 November 1963, with a view to . . . making progress in the consideration of succession of States in respect of matters other than treaties.

On 3 December 1971, in paragraph 4 (a) of part I of its resolution 2780 (XXVI), the General Assembly again recommended that the Commission should make “progress in the consideration of succession of States in respect of matters other than treaties”. Lastly, on 28 November 1972, in paragraph 3 (c) of part I of its resolution 2926 (XXVII), the General Assembly recommended that the Commission should “continue its work on succession of States in respect of matters other than treaties, taking into account the views and considerations referred to in the relevant resolutions of the General Assembly”.

71. In 1973, for the present session of the Commission, Mr. Bedjaoui submitted a sixth report (A/CN.4/267) 222 dealing, like his three previous reports, with succession of States to public property. The sixth report revises and supplements the draft articles submitted earlier in the light, inter alia, of the provisional draft on succession of States in respect of treaties adopted by the Commission in 1972. 223 The results of this recasting are submitted by the Special Rapporteur in two series of draft articles, the articles in the second series being numbered in sequence after those in the first.

72. The first series of draft articles concerns questions bearing on the topic entrusted to the Special Rapporteur as a whole and is entitled “Preliminary provisions relating to succession of States in respect of matters other than treaties”. It contains articles 1, 2 and 3. These articles define the scope of the draft articles, the cases of succession covered by them and the meaning of certain terms, including “succession of States”.

73. The second series of draft articles is concerned exclusively with succession of States to public property and is entitled “Draft articles on succession to public property”. It contains articles 4 to 40, arranged in seven parts.

74. Parts one and two, containing articles 4 to 8, deal with general questions bearing on the whole topic

213 Ibid., p. 228, document A/7610/Rev.1, para. 61.
214 Ibid., pp. 228-229, para. 62.
221 See para. 62 above.
222 See p. 3 above.
of succession of States to public property, such as the sphere of application of the articles in the second series, the definition and determination of public property, the transfer of public property as it exists, the date of its transfer and the general treatment of public property according to ownership.

75. Part three, consisting of articles 9 to 11, sets forth the provisions common to all types of succession of States—the general principle of the transfer of State property, rights in respect of the authority to grant concessions, and succession to public debt-claims.

76. Part four, consisting of articles 12 to 31, sets forth the provisions peculiar to each type of succession of States. These provisions deal, for each type considered, with questions relating to currency and the privilege of issue, the treasury and public funds, archives and public libraries, and property situated outside the transferred territory. The Special Rapporteur has been guided, in part four, by the typology adopted by the Commission in its provisional draft articles on succession of States in respect of treaties. The specific characteristics of his subject led him, however, to formulate this typology in a slightly different manner.

77. Part five (articles 32 to 35), part six (articles 36 to 39) and part seven (article 40) comprise special provisions concerning public establishments, territorial authorities and property of foundations.

(d) Preparation of draft articles
by the Commission at its twenty-fifth session

78. At its twenty-fifth session, the Commission continued its consideration of succession of States in respect of matters other than treaties and began the preparation of draft articles on the topic in the light of Mr. Bedjaoui's sixth report. At its 1219th to 1229th meetings, it considered draft articles 1 to 7 contained in the sixth report, and also the commentaries to these articles. At its 1231st and 1232nd meetings, it considered the new article 9 (A/CN.4/L.197) submitted by the Special Rapporteur to replace articles 8 and 9 of his sixth report. All these texts were referred to the Drafting Committee, and at its 1230th, 1231st, 1239th and 1240th meetings the Commission, on the basis of the Committee's report, adopted on first reading the text of articles 1 to 8 which is reproduced below, for the information of the General Assembly.

79. The Commission wishes to draw attention to the fact that the articles reproduced in this chapter are only the first provisions of the draft which it proposes to prepare, a general outline of which is given below. It also wishes to emphasize the provisional nature of the text of these articles; this will be explained later.

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

80. At this initial stage in the preparation of the draft articles on succession of States in respect of matters other than treaties, the Commission will confine itself to a brief consideration of four general questions, the first three of which relate to the draft as a whole, while the last relates to the provisions adopted during the present session.

(a) Form of the draft

81. As in the case of the codification of other topics by the Commission, the form to be given to the codification of succession of States in respect of matters other than treaties cannot be determined until its study of this subject has been completed. The Commission, in accordance with its Statute, will then formulate the recommendations it considers appropriate. Without prejudging those recommendations, it has already decided to set out its study in the form of draft articles, since it believes that this is the best method of discerning or developing the rules of international law in the matter. The draft is being prepared in a form which would permit its use as a basis for a convention, if it were decided that a convention should be concluded.

(b) The expression "matters other than treaties"

82. The expression "matters other than treaties" did not appear in the titles of the three topics into which the question of succession was divided in 1967, namely, (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties, and (c) succession in respect of membership of international organizations. In 1968, in a report submitted at the twentieth session of the Commission, the Special Rapporteur for the second topic pointed out that, if the title of that topic (succession in respect of rights and duties resulting from sources other than treaties) were compared with the title of the first topic (succession in respect of treaties), it would be found that the word "treaty" was considered, in the two titles, from two different points of view. In the first case the treaty was regarded as a subject-matter of the law of succession and in the second as a source of succession. The Special Rapporteur pointed out that, apart from the lack of homogeneity, this division of the question had the drawback of excluding from the second topic all matters which were the subject of treaty provisions. He noted that in many cases State succession was accompanied by the conclusion of a treaty regulating inter alia certain aspects of the succession, which were thereby excluded from the second topic as entitled in 1967. Since these aspects did not come under the first topic either, the Commission would have been obliged, if this title had been retained, to leave a substantial part of the subject-matter aside in its study on State succession.

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224 Ibid.
226 See section B of the present chapter.
227 See paras. 85-89.
228 See para. 91 below.
229 For example, see para. 36 above.
230 See para. 60 above.
83. Consequently, the Special Rapporteur proposed taking the subject-matter of succession as the criterion for the second topic, and entitling it: “Succession in respect of matters other than treaties”.\footnote{233} This proposal was adopted by the Commission, which stated in its report on the work of the twentieth session that:

All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was “the subject matter of succession”, i.e., the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur’s suggestion, to delete from the title of the topic all reference to “sources”, since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession.\footnote{233}

84. Until the study has been completed, the Commission will not be able to indicate precisely what “matters other than treaties” are included in the topic.

\hspace{1cm}(c) Scheme of the draft and research to be undertaken

85. At its twentieth session, the Commission considered that, in view of the magnitude and complexity of the topic, it would be well to begin by studying one or two particular aspects, and it gave priority to economic and financial matters. At the same time it specified that “this did not in any way imply that all the other questions coming under the same heading would not be considered later”.\footnote{234} Accordingly, at its twenty-fifth session, the Commission expressed the intention, subject to any later decision, to include in the draft articles as many “matters other than treaties” as possible.

86. At the present stage of its work, the Commission intends to divide the draft into an introduction and a number of parts. The introduction will contain those provisions which apply to the draft as a whole, and each part will contain those which apply exclusively to one category of specific matters.

87. At the present session, the Commission provisionally adopted three articles for inclusion in the introduction and five articles for part I, entitled “Succession to State property”.\footnote{235} Mr. Bedjaoui’s sixth report, on the basis of which these provisions were prepared, contains a series of draft articles relating to public property in general.\footnote{236} It states that public property may be divided into the following three categories: property of the State; property of territorial authorities other than States or of public enterprises or public bodies; and property of the territory affected by the State succession. Wishing to consider these problems one by one, the Commission decided, after full discussion and on the proposal of the Special Rapporteur, to begin its study with State property, to which part I of the draft articles is devoted.

88. The Commission intends to include in section 1 of part I those provisions which are common to all State property, whatever its nature and whatever the type of succession envisaged. The other sections will be devoted to specific types of succession or to particular types of State property.

89. After completing its study of State property, the Commission proposes to consider the other two categories of public property listed by the Special Rapporteur. Subject to any decisions it may take later, the Commission intends after that to move on to the study of public debts. It will also decide in what order the other matters included in the topic are to be considered.

90. To facilitate the execution of the programme of work described above, the Commission requested the Secretariat, in consultation with the Special Rapporteur, to compile documentation on international practice in regard to succession of States in respect of matters other than treaties. This documentation would consist essentially of the relevant provisions of treaties and would also reflect the state of international and national jurisprudence and, as far as possible, the practice of Governments and international organizations. It would cover a representative selection of cases of State succession, primarily cases which have occurred since the Second World War but without entirely neglecting earlier cases, and would be compiled with a view to the publication by the Secretariat of a series of studies of which the first would be devoted to succession of States to public debts. The Commission invited the Secretariat to request Governments and international organizations to furnish all relevant information.

\hspace{1cm}(d) Provisional nature of the provisions adopted at the twenty-fifth session

91. The Commission deems it necessary, for the information of the General Assembly, to place at the beginning of its draft articles a series of general provisions defining in particular the meaning of the expressions “succession of States”\footnote{237} and “State property”.\footnote{238} However, the final content of provisions of this nature will depend to a considerable extent on the results reached by the Commission in its further work. The Commission therefore intends, during the first reading of the draft, to reconsider the text of the articles adopted provisionally at the present session, with a view to making any amendments which may be found necessary.

\hspace{1cm}B. Draft articles on succession of States in respect of matters other than treaties

92. The text of articles 1 to 8 and the commentaries thereto, adopted by the Commission at the twenty-fifth session on the proposal of the Special Rapporteur,

\footnote{233}{See sect. B, article 3 (a) below.}
\footnote{234}{See above, paras. 73-77.}
are reproduced below for the information of the General Assembly.

**INTRODUCTION**

*Commentary*

As the Commission has pointed out above, the introduction to the draft articles contains provisions which relate, not to one particular aspect of succession of States in respect of matters other than treaties, but to the topic as a whole. At present it comprises articles 1, 2 and 3.

**Article 1. Scope of the present articles**

The present articles apply to the effects of succession of States in respect of matters other than treaties.

*Commentary*

(1) This article corresponds to article 1 of the draft articles on succession of States in respect of treaties, adopted by the Commission at its twenty-fourth session. Its purpose is to limit the scope of the present draft articles in two important respects.

(2) First, article 1 reflects the decision by the General Assembly that the topic under consideration should be entitled: “Succession of States in respect of matters other than treaties”. In incorporating this wording in article 1, the Commission intended to exclude from the field of application of the present draft articles the succession of Governments and the succession of subjects of international law other than States, an exclusion which also results from article 3 (a). The Commission also intended to limit the field of application of the draft articles to “matters other than treaties”. It has already considered the meaning of this term in the introduction to the present chapter. It considered that it would be premature at the present stage of its work to give a complete enumeration of the matters which will be covered by the draft when it is completed.

(3) Secondly, article 1 limits the field of application of the draft articles to the effects of succession of States in respect of matters other than treaties. Article 3 (a), specifies that “Succession of States means the replacement of one State by another in the responsibility for the international relations of territory”. In using the term “effects” in article 1, the Commission wished to indicate that it intends to draft provisions concerning not the replacement itself but its legal effects, i.e., the rights and obligations deriving from it.

*Article 2. Cases of succession of States covered by the present articles*

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

*Commentary*

(1) This provision reproduces the terms of article 6 of the draft articles on succession of States in respect of treaties.

(2) As it stated in the report on its twenty-fourth session, the Commission, in preparing draft articles for the codification of general international law, normally assumes that these articles are to apply to facts occurring or situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Thus, when the Commission, at its twenty-fourth session, was preparing its draft articles on succession of States in respect of treaties, several members considered that it was unnecessary to specify in the draft that its provisions would apply only to the effects of a succession of States occurring in conformity with international law.

(3) Other members, however, pointed out that when matters not in conformity with international law called for specific treatment, the Commission had expressly so noted. They cited as examples the provisions of the draft on the law of treaties concerning treaties procured by coercion, treaties which conflict with norms of jus cogens, and various situations which might imply a breach of an international obligation. Accordingly, those members were of the opinion that, in regard particularly to transfers of territory, it should be expressly stipulated that only transfers occurring in conformity with international law would fall within the concept of “succession of States” for the purpose of the draft articles being prepared. The Commission adopted that view. However, the Commission’s report notes that

Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include amongst the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law.

(4) At the twenty-fifth session the Commission decided to include, in the introduction to the draft articles on succession of States in respect of matters other than treaties, a provision identical with that of article 6 of the draft articles on succession of States in respect of treaties. It took the view that there was now an

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See para. 86 above.

See para. 62 above.

See paras. 65 and 66 above.

See paras. 82-84 above.
important argument to be added to those which had been put forward at the twenty-fourth session in favour of article 6: the absence from the draft articles on succession of States in respect of matters other than treaties, of the provisions contained in article 6 of the draft articles on succession of States in respect of treaties might give rise to doubts as to the applicability to the present draft of the general presumption that the texts prepared by the Commission relate to facts occurring or situations established in conformity with international law.

Article 3. Use of terms

For the purposes of the present articles:

(a) “succession of States” means the replacement of one State by another in the responsibility for the international relations of territory;

(b) “predecessor State” means the State which has been replaced by another State on the occurrence of a succession of States;

(c) “successor State” means the State which has replaced another State on the occurrence of a succession of States;

(d) “date of the succession of States” means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Commentary

(1) This article reproduces the first words and subparagraphs (b), (c), (d) and (e) of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties. As the title and the words in question indicate, the purpose of article 3 is simply to specify the sense in which the terms referred to are used in the present draft articles. For the time being the Commission has included in article 3 only the terms appearing in the provisions adopted at the twenty-fifth session. It intends to add to it as further provisions are adopted. It will also consider the possibility of including in article 3 a second paragraph on the lines of article 2, paragraph 2, of the draft articles on succession of States in respect of treaties.

(2) Sub-paragraph (a) of article 3 reproduces the definition of the term “succession of States” contained in article 2, paragraph 1 (b), of the draft articles on succession of States in respect of treaties.

(3) The report of the Commission on the work of its twenty-fourth session specified in the commentary to article 2 that the definition of succession of States given in that article referred exclusively to the fact of the replacement of one State by another “in the responsibility for the international relations of territory”, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. It went on to say that the rights and obligations deriving from a succession of States were those specifically provided for in the draft articles on succession of States in respect of treaties. It further noted that the Commission had considered that the expression “in the responsibility for the international relations of territory” was preferable to other expressions such as “in the sovereignty in respect of territory” or “in the treaty-making competence in respect of territory”, because it was a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case, independently of the particular status of the territory in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The report specified that the word “responsibility” should be read in conjunction with the words “for the international relations of territory” and was not intended to convey any notion of “State responsibility”, a topic being studied separately by the Commission.\footnote{Ibid., p. 231, paras. 3 and 4 of the commentary to article 2.}

(4) At the twenty-fifth session, the Commission decided to include provisionally, in the draft articles in preparation, the definition of “succession of States” contained in the draft articles on succession of States in respect of treaties. It considered that as far as possible it was desirable that, where there were two separate sets of draft articles referring to one and the same phenomenon, they should give identical definitions of it. Furthermore, article 1 supplements the definition of “succession of States” by specifying that the draft articles apply, not to the replacement of one State by another in the responsibility for the international relations of territory, but to the effects of that replacement. At the same time the Commission wishes to emphasize that its decision is provisional\footnote{See para. 91 above.} and that it intends to reconsider the definition of “succession of States” when it has completed its first reading of the present draft.

(5) Several members expressed reservations regarding the Commission’s decision to retain provisionally in the present draft the definition of “succession of States” adopted at the twenty-fourth session for the draft on succession of States in respect of treaties. They considered that it was already clear that this definition was too narrow to cover all aspects of succession of States in respect of matters other than treaties. It was also maintained that the expression “in the responsibility for the international relations of the territory” was not appropriate in the present draft and might give rise to misunderstandings.

(6) Sub-paragraphs (b), (c) and (d) of article 3 reproduce the terms of sub-paragraphs (e), (d) and (e) of article 2, paragraph 1, of the draft articles on succession of States in respect of treaties. The meaning which they attribute to the terms “predecessor State”, “successor State” and “date of the succession of States” derives, in each case, from the meaning given to the term “succession of States” in sub-paragraph (a), and would not seem to call for any comment.
PART I

SUCCESSION TO STATE PROPERTY

Commentary

As stated above, the Commission decided to consider separately the three categories of public property envisaged by the Special Rapporteur and to begin its study with property in the first category, namely, State property. Part I of these draft articles is therefore concerned with State property.

SECTION 1. GENERAL PROVISIONS

Article 4. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State property.

Commentary

The purpose of this provision is simply to make it clear that the articles in Part I deal with only one category of public property, namely, State property. It should be read in the light of article 1, which states that “The present articles apply to the effects of succession of States in respect of matters other than treaties”. State property constitutes, for the purposes of article 4 and Part I in general, a special category of the “matters other than treaties” referred to in article 1.

Article 5. State property

For the purposes of the articles in the present Part, “State property” means property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Commentary

(1) The purpose of article 5 is not to settle what is to become of the State property of the predecessor State, but merely to establish a criterion for determining such property.

(2) There are in practice quite a number of examples of treaty provisions which determine, in connexion with a succession of States, the State property of the predecessor State, sometimes in detail. They include article 10 of the Treaty of Utrecht of 11 April 1713; article II of the Treaty of 30 April 1803 between France and the United States, for the sale of Louisiana; article 2 of the Treaty of 9 January 1895, by which King Leopold ceded the Congo to the Belgian State; article II of the Treaty of Peace of Shimonoseki of 17 April 1895 between China and Japan, and article I of the Convention of Retrocession of 8 November 1895 between the same States; article VIII of the Treaty of Peace of 10 December 1898 between Spain and the United States of America; and the annexes to the Treaty of 16 August 1960 concerning the establishment of the Republic of Cyprus.

(3) An exact specification of the property to be transferred by the predecessor State to the successor State in two particular cases of succession of States is also to be found in two resolutions adopted by the General Assembly in pursuance of the provisions of the Treaty of Peace with Italy of 10 February 1947. The first of these, resolution 388 (V), was adopted on 15 December 1950, with the title “Economic and financial provisions relating to Libya”. The second, resolution 530 (VI), was adopted on 29 January 1952, with the title “Economic and financial provisions relating to Eritrea”.

(4) No generally applicable criteria, however, can be deduced from the treaty provisions mentioned above, the content of which varied according to the circumstances of the case, or from the two General Assembly resolutions, which were adopted in pursuance of a treaty and related exclusively to special situations. Moreover, as the Franco-Italian Conciliation Commission stated in an award of 26 September 1964, “customary international law has not established any autonomous criterion for determining what constitutes State property”.

(5) Up to the moment when the succession of States takes place, it is the internal law of the predecessor State which governs that State’s property and determines its status as State property. The successor State receives it as it is into its own juridical order. As a sovereign State, it is free, within the limits of general international law, to change its status, but any decision it takes in that connexion is necessarily subsequent to the succession of States and derives from its competence as a State and not from its capacity as the successor State. Such a decision is outside the scope of State succession.

(6) The Commission notes, however, that there are several cases in diplomatic practice where the successor State has not taken the internal law of the predecessor

247 See para. 87 above.
252 Ibid., p. 1195.
255 Ibid., vol. 49, p. 3.
State into consideration in characterizing State property. Some decisions by international courts have done the same in relation to the property in dispute.

(7) For example, in its judgement of 15 December 1933 in the Peter Pázmány University case, the Permanent Court of International Justice took the view that it had "no need to rely upon" the interpretation of the law of the predecessor State in order to decide whether the property in dispute was public property. It is true that the matter was governed by various provisions of the Treaty of Trianon, which limited the Court's freedom of judgement. In another case, in which Italy was the predecessor State, the United Nations Tribunal in Libya ruled on 27 June 1955 that in deciding whether an institution was public or private, the Tribunal was not bound by Italian law and judicial decisions. Here again, the matter was governed by special provisions—in this case, those of resolution 388 (V) already mentioned which limited the Court's freedom of judgement.

(8) In view of the judicial decisions cited in the previous paragraph and the practice already referred to, the Commission intends to reconsider the rule stated in article 5 in the light of the provisions it adopts during the first reading of the draft, in order to determine whether any exceptions should be made to it.

(9) The opening words of article 5 emphasize that the rule it states applies only to the provisions of Part I of the present draft and that, as usual in such cases, the Commission did not in any way intend to put forward a general definition.

(10) The Commission wishes to stress that the expression "property, rights and interests" in article 5 refers only to rights and interests of a legal nature. This expression is to be found in many treaty provisions, such as article 297 of the Treaty of Versailles, article 249 of the Treaty of Saint-Germain-en-Laye article 177 of the Treaty of Neuilly-sur-Seine, article 232 of the Treaty of Trianon and article 79 of the Treaty of Peace with Italy. Although the expression is frequently used, it has no equivalent in some legal systems. The Commission therefore proposes to try, during the first reading of these draft articles, to find another expression for the whole of a State's tangible and intangible property which would be more generally understood.

(11) In article 5, the expression "internal law of the predecessor State" refers to rules of the legal order of the predecessor State which are applicable to State property. For States whose legislation is not unified, these rules include, in particular, those which determine the specific law of the predecessor State—national, federal, metropolitan or territorial—that applies to each piece of its State property.

(12) While accepting the text of article 5 provisionally, some members pointed out that the expression "State property" was used at the beginning of the text without qualification. That, and also the title of the article, seem to indicate an intention on the part of the Commission to formulate a general criterion for determining State property, applicable to the property of all States without distinction. The concluding phrase of the article, however, showed that the article concerned only the property of a particular State, namely, the predecessor State. Those members considered that it would have been better to amend that phrase so as to preserve the general character of the criterion, even if it meant specifying in every provision of the draft relating to State property which particular State it was whose property was referred to.

**Article 6. Rights of the successor State to State property passing to it**

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the present articles.

**Commentary**

(1) Article 6 makes it clear that a succession of States has a dual juridical effect on the respective rights of the predecessor State and the successor State as regards State property passing from the former to the latter. It entails, on the one hand, the extinction of the rights of the predecessor State to the property in question and, on the other hand and simultaneously, the arising of the rights of the successor State to that property. As indicated by the clause "such of the State property as passes to the successor State in accordance with the provisions of the present articles", the purpose of article 6 is not to determine what State property passes to the successor State. The Commission considered that it was unable at the present stage of its work to establish a general criterion in this respect and it intends to formulate, at a future session, a series of special criteria for each type of succession. It is to the provisions in which those special criteria will be set out that article 6 refers in the above-mentioned clause.

(2) Article 6 gives expression in a single provision to a consistent practice, and reflects the endeavour to translate, by a variety of formulae, the rule that a suc-
cession of States entails the extinction of the rights of the predecessor State and the arising of those of the successor State to State property passing to the successor State. The terminology used for this purpose has varied according to time and place. One of the first notions found in peace treaties is that of the renunciation by the predecessor State of all rights over the ceded territories, including those relating to State property. This notion already appears in the Treaty of the Pyrénées of 1659, and found expression again in 1923 in the Treaty of Lausanne and in 1951 in the Treaty of Peace with Japan. The Treaty of Versailles expresses a similar idea concerning State property in a clause which stipulates that "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States". A similar clause is found in the Treaties of Saint-Germain-en-Laye, Neuilly-sur-Seine and Trianon. The notion of cession is also frequently used in several treaties. Despite the variety of formulae, the large majority of treaties relating to transfers of territory contain a consistent rule, namely, that of the extinction and simultaneous arising of rights to State property.

(3) For article 6, the Commission adopted the notion of the "passing" of State property, rather than of the "transfer" of such property, because it considered that the notion of transfer was inconsistent with the juridical nature of the effects of a succession of States on the rights of the two States in question to State property. On the one hand, a transfer often presupposes an act of will on the part of the transferor. As indicated by the word "entails" in the text of article 6, however, the extinction of the rights of the predecessor State and the arising of the rights of the successor State take place as of right. On the other hand, a transfer implies a certain continuity, whereas a simultaneous extinction and arising imply a break in continuity. The Commission nevertheless wishes to make two comments on this latter point.

(4) In the first place, the successor State may create a certain element of continuity by maintaining provisionally in force the rules of the law of the predecessor State relating to the régime of State property. Such rules are certainly no longer applied on behalf of the predecessor State, but rather on behalf of the successor State, which has received them into its own law by a decision taken in its capacity as a sovereign State. Although, however, at the moment of succession, it is another juridical order that is in question, the material content of the rules remains the same. Consequently, in the case envisaged, the effect of the succession of States is essentially to change the entitlement to the rights to the State property.

(5) In the second place, the legal passing of the State property of the predecessor State to the successor State is often, in practice, followed by a material transfer of such property between the said States, accompanied by the drawing-up of inventories, certificates of delivery and other documents.

(6) As regards the actual text of article 6, some members criticized the word "passer" in the expression "such of the State property as passes to the successor State". They maintained that since this article gave expression to the principle of the extinction of the rights of the predecessor State to State property, it could not be a question of the passing of such property, but rather of its acquisition by the successor State. Other members claimed that an essential element was lacking in article 6 because it did not specify at what moment the extinction of the rights of the predecessor State to State property and the arising of the rights of the successor State took place. As in the case of the other provisions adopted at the present session, the Commission intends to take into consideration all the comments of members on the text of article 6 when it reconsiders it during the first reading of the draft.

### Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

#### Commentary

(1) Article 7 contains a residuary provision specifying that the date of the passing of State property is that of the succession of States. It should be read together with article 3 (d), which states that "'date of the succession of States' means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates".

(2) The residuary character of the provision in article 7 is brought out by the subsidiary clause with which the article begins: "Unless otherwise agreed or decided". It follows from that clause that the date of the passing of State property may be fixed either by agreement or by a decision.

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271 Article 208 (ibid., pp. 412-414).
272 Article 142 (ibid., vol. 112, pp. 821-822).
275 See para. 91 above.
(3) In fact, it sometimes occurs in practice that the States concerned agree to choose a date for the passing of State property other than that of the succession of States. It is that situation which is referred to by the term "agreed" in the above-mentioned opening clause. Some members of the Commission suggested that the words "between the predecessor State and the successor State" should be added. Others, however, opposed that suggestion on the grounds that for State property situated in the territory of a third State the date of passing might be laid down by a tripartite agreement concluded between the predecessor State, the successor State and the third State. At the present stage of its work, and until it has considered the question in greater detail, the Commission preferred not to limit the scope of the initial provision of article 7.

(4) There have also been cases where an international court has ruled on the question what was the date of the passing of certain State property from the predecessor State to the successor State.\(^{274}\) The Commission therefore added the words "or decided" after the word "agreed" at the beginning of article 7. However, the Commission did not intend to specify from whom a decision might come.

(5) Several members expressed the view that not only article 7 but most of the other articles of the draft were residuary, and that the draft should include a general provision to that effect. In their opinion, such a provision would make the opening clause of article 7 unnecessary.

(6) As for the main provision of article 7, which is contained in the second clause of the article, it was stated during the discussion in the Commission that the date of the passing of State property varied from one type of succession to another and could not be made the subject of a general provision. Moreover, it was argued, article 7 as it stood merely gave a definition of the date of the passing of State property and imposed no obligation on the States concerned. The right place for such a text, if the Commission decided that it should be retained, was in article 3, on use of terms.

Article 8. Passing of State property without compensation

Without prejudice to the rights of third parties, the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation unless otherwise agreed or decided.

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\(^{274}\) See, for example, the Judgement No. 7 handed down on 25 May 1926 by the Permanent Court of International Justice in the Case concerning certain German interests in Polish Upper Silisia (P.C.I.J., Series A, No. 7), and its Advisory Opinion of 10 September 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland (ibid., Series B, No. 6, pp. 6-43).

Commentary

(1) Article 8 comprises a main provision and two subsidiary clauses. The main provision lays down the rule that the passing of State property from the predecessor State to the successor State in accordance with the provisions of the present articles shall take place without compensation. It constitutes a necessary complement to article 6, but, like that article—and for the same reasons—\(^{277}\) it is not intended to determine what State property passes to the successor State.

(2) With some exceptions,\(^{278}\) practice confirms the rule set forth in the main provision of article 8. In many treaties concerning the transfer of territories, acceptance of this rule is implied by the fact that no obligation is imposed on the successor State to pay compensation for the cession by the predecessor State of public property, including State property. Other treaties state the rule expressly, stipulating that such cession shall be without compensation. These treaties contain phrases such as "without compensation",\(^{279}\) "in full Right",\(^{280}\) "without payment" ("sans paiement")\(^{281}\) or "gratuitement".\(^{282}\)

(3) However, several members were not sure whether the Commission might not subsequently have to allow certain exceptions to the rule that State property passes without compensation in order to take into account the particular circumstances of each case of State succession and especially the nature of the State property.
in question or the type of succession envisaged. Other members even expressed doubts as to the possibility of framing a general rule on the subject.

(4) The first subsidiary clause of article 8 reserves the rights of third parties, a question which the Commission proposes to study at a later stage.

(5) The second subsidiary clause of article 8 reads:

"unless otherwise agreed or decided". Its purpose is to provide expressly for the possibility of derogating from the rule in this article. It is identical with the clause in article 7 on which the Commission has already commented.283

283 See above, paras. 2-5 of the commentary to article 7.

Chapter IV

THE MOST-FAVOURED-NATION CLAUSE

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

93. At its sixteenth session, in 1964, the Commission considered a proposal by one of its members, Mr. Jiménez de Arechaga, that it should include in its draft on the law of treaties a provision on the so-called "most-favoured-nation clause". The suggested provision was intended formally to reserve the clause from the operation of the articles dealing with the problem of the effect of treaties on third states.284 In support of the proposal it was urged that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.285 The Commission maintained this position at its eighteenth session.286

94. At its nineteenth session, in 1967, the Commission noted that several representative in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to UNCITRAL the Commission decided to place on its programme the topic of "most-favoured-nation clauses in the law of treaties" and appointed Mr. Endre Ustor as Special Rapporteur on that topic.287

95. At the Commission's twentieth session, in 1968, the Special Rapporteur submitted a working paper giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage.288 The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations without, however, entering into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.

96. The Commission decided at the same session to shorten the title of the topic to, simply, "The most-favoured-nation clause".289

97. By resolution 2400 (XXIII), of 11 December 1968, the General Assembly recommended that the Commission, inter alia, continue its study of the most-favoured-nation

284 Yearbook ... 1964, vol. I, p. 184, 752nd meeting, para 2.

98. At the twenty-first session of the Commission in 1969, the Special Rapporteur submitted his first report containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report and, accepting the suggestion of the Special Rapporteur, instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.

99. Following the instructions of the Commission, the Special Rapporteur submitted his second report at the twenty-second session of the Commission in 1970. In part I of this report, he attempted an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice pertaining to the clause: the Anglo-Iranian Oil Company Case (Jurisdiction) [1952], the Case concerning the rights of nationals of the United States of America in Morocco (Judgment) [1952] and the Ambatielos Case (merits: obligation to arbitrate) [1953]. He also dealt with the Award handed down on 6 March 1956 by the Commission of Arbitration established by the Agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the Ambatielos claim.

100. In part II of his second report, he set out in a systematic manner the replies of international organizations and interested agencies to the circular letter of the Secretary-General dated 23 January 1969. In this letter the organizations concerned were requested to submit, for transmittal to the Special Rapporteur, all the information derived from their experience which might assist him and the Commission in the work of codification and progressive development of the rules of international law concerning the most-favoured-nation clause. They were particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact and to give their views as to the existing rules which could be discerned in respect of the clause. A number of international organizations gave a detailed answer to the circular letter and those answers served as a basis for part II of the Special Rapporteur's second report.

101. Owing to lack of time, the Commission was unable to consider the topic at its twenty-second (1970) and twenty-third (1971) sessions.

102. At its twenty-third session, however, the Commission, on the suggestion of the Special Rapporteur, requested the Secretariat to prepare, on the basis of the collections of law reports available to it and of the information to be requested from Governments, a "Digest of decisions of national courts relating to most-favoured-nation clauses".

103. At the twenty-fourth session of the Commission, in 1972, the Special Rapporteur submitted his third report containing a set of five draft articles on the most-favoured-nation clause, with commentaries. The articles defined the terms used in the draft, in particular the terms "most-favoured-nation clause" and "most-favoured-nation treatment". The commentary pointed out that the undertaking to accord most-favoured-nation treatment was the constitutive element of any most-favoured-nation clause. The report recalled that States have no general right to most-favoured-nation treatment, which can be claimed only on the basis of a legal obligation. It pointed out that the right of the beneficiary State to claim the advantages accorded by the granting State to a third State arises from a most-favoured-nation clause. In other words, the legal bond between the granting State and the beneficiary State originates in the treaty containing such a clause and not in the collateral treaty concluded between the granting State and the third State.

104. Being fully occupied with the completion of draft articles on succession of States in respect of treaties and draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable to examine the topic at its twenty-fourth session (1972).

105. At that session, however, at the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations Treaty Series, which would survey the fields of application of the clauses in question, examine their relation to national treatment clauses, the exceptions provided for in treaties, and the practice concerning succession of States in respect of most-favoured-nation clauses.

106. At the present session, the Special Rapporteur submitted his fourth report (A/CN.4/266) containing three more draft articles, with commentaries, dealing with the presumption of unconditional character of the clause, the ejusdem generis rule and the acquired rights of the beneficiary State.
107. The Commission considered the Special Rapporteur’s third report at its 1214th to 1218th meetings and referred draft articles 2, 3, 4 and 5 contained therein to the Drafting Committee. At its 1238th meeting, the Commission considered the reports of the Drafting Committee and adopted on first reading articles 1 to 7.

108. The text of the draft articles and the commentaries thereon as adopted by the Commission are reproduced in the present report for the information of the General Assembly. In doing so, the Commission wishes to draw the attention of the General Assembly to the fact that the adoption of the seven draft articles constitutes only the initial stage of its work in the preparation of draft articles on the topic. Thus the Commission, as has been its usual practice, adopted an article on the use of terms only on a provisional basis. The final decision on such an article could not, in the Commission’s view, be taken until the substantive articles contained in a full set of draft articles had been considered by the Commission.

109. In its future consideration of the topic, it is the Commission’s intention to consider, inter alia, the three draft articles contained in the Special Rapporteur’s fourth report submitted at the present session. The report states that, unless most-favoured-nation treatment is accorded under the conditions of material reciprocity, it is presumed that the granting State is obliged to accord, and the beneficiary State is entitled to receive, most-favoured-nation treatment irrespective of whether the favours accorded by the granting State to any third State are accorded gratuitously or against compensation. It states the rule that the beneficiary State cannot claim under a most-favoured-nation clause any rights other than those relating to the subject-matter of the clause and falling within its scope. Finally, the report states that the rights of the beneficiary State under a most-favoured-nation clause are not affected by an agreement between the granting State and one or more third States confining certain benefits to their mutual relations, without the written consent of the beneficiary State.

110. The Rapporteur of the Commission suggested at the present session that the Special Rapporteur indicate to the Commission those problems with which he proposed to deal in future draft articles. The Special Rapporteur accordingly indicated that it was his intention to deal, in future draft articles, with such problems as the contingent character of the most-favoured-nation clause and the question of the beginning and termination of the operation of the clause. The interaction between the operation of most-favoured-nation clauses and national treatment clauses would be considered, particularly the attraction by most-favoured-nation clauses of benefits obtained under national treatment clauses. In addition, future draft articles would deal with the question of exceptions to the operation of the clause. Besides the exceptions provided by customs unions, free trade areas, frontier traffic, etc., he drew particular attention to the question of excepting from the operation of the clause preferences granted to developing States by developed States. He intended to examine the question whether and to what extent the beneficiary State has a right to be informed of the advantages or benefits accorded by the granting State to a third State, which relate to the most-favoured-nation clause in force between the granting State and the beneficiary State. Finally, he indicated that the question of the succession of States in respect of most-favoured-nation clauses might be dealt with in the future.

111. At the present session, the Secretariat distributed a document entitled “Digest of decisions of national courts relating to the most-favoured-nation clause” (A/CN.4/269), prepared in accordance with the Commission’s request. The Secretariat has also been requested to prepare a study on the most-favoured-nation clauses included in the treaties published in the United Nations Treaty Series.

2. SCOPE OF THE DRAFT ARTICLES

112. As already noted, the idea that the Commission should undertake a study of the most-favoured-nation clause arose in the course of its work on the law of treaties. The Commission felt that although the clause, conceived as a treaty provision, fell entirely under the general law of treaties, it would be desirable to make a special study of it. While it recognized that there was a particular interest in taking up this study because of the attention devoted to the clause as a device frequently used in economic fields, it understood its task as being to deal with the clause as an aspect of the law of treaties. When it first discussed the question on the basis of the preparatory work of the Special Rapporteur in 1968, the Commission decided to concentrate on the legal character of the clause and the legal conditions of its application in order that the scope and effect of the clause as a legal institution might be clarified.

113. The Commission maintains the position which it took in 1968 and points out that the fact that the original title of the topic was changed from “most-favoured-nation clauses in the law of treaties” to “the most-favoured-nation clause” does not indicate any change in its intention to deal with the clause as a legal institution and to explore the rules of law pertaining to the clause. The Commission’s approach remains the same: while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, it does not wish to confine its study to the operation of the clause in this field but to extend the Study to the operation of the clause in as many fields as possible.

114. On the other hand, while it is not the Commission’s intention to deal with matters not included in its functions, it wishes to take into consideration all modern developments which may have a bearing upon the
codification or progressive development of rules pertaining to the operation of the clause. In this connexion, the Commission wishes to devote special attention to the question of the manner in which the need of developing countries for preferences in the form of exceptions to the most-favoured-nation clause in the field of international trade, can be given expression in legal rules.\textsuperscript{310}

115. The Commission also limited the scope of the present draft articles by the introduction of articles 1 and 3; the reasons for this are given in the commentaries to those articles.

3. THE MOST-FAVOURED-NATION CLAUSE AND THE PRINCIPLE OF NON-DISCRIMINATION

116. The Commission considered the relationship and interaction between the most-favoured-nation clause and the principle of non-discrimination. It discussed particularly the question whether the principle of non-discrimination did not imply the generalization of most-favoured-nation treatment.

117. The Commission recognized several years ago that the rule of non-discrimination “is a general rule which follows from the equality of States”\textsuperscript{311} and that non-discrimination is “a general rule inherent in the sovereign equality of States”.\textsuperscript{312} The General Assembly, by resolution 2625 (XXV) of 24 October 1970, approved the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which States, \textit{inter alia}:

States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality.\ldots

118. The most-favoured-nation clause, in the Commission’s view, may be considered as a technique or means for promoting the equality of States or non-discrimination. The International Court of Justice has stated that the intention of the clause is “to establish and maintain at all times fundamental equality without discrimination among all of the countries concerned”.\textsuperscript{313}

119. The Commission observed, however, that the close relationship between the most-favoured-nation clause and the general principle of non-discrimination should not blur the differences between the two notions. Those differences are illustrated by the relevant articles in the Vienna Conventions on Diplomatic Relations\textsuperscript{314} and on Consular Relations.\textsuperscript{315} Both Conventions contain an article reading, in part, as follows:

\textbf{1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.}

\textbf{2. However, discrimination shall not be regarded as taking place: \ldots}

\textit{(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.}\textsuperscript{316}

These provisions reflect the obvious rule that, while States are bound by the duty arising from the principle of non-discrimination, they are nevertheless free to grant special favours to other States on the ground of some special relationship of a geographic, economic, political or other nature. In other words, the principle of non-discrimination may be considered as a general rule which can always be invoked by any State. But a State cannot normally invoke the principle against another State which has extended particularly favourable treatment to a third State, provided that the State concerned had itself received the general non-discriminatory treatment on a par with other States. The claim to be assimilated to a State put in a favoured position can only be raised on the basis of an explicit commitment of the State granting the favours in the form of a conventional stipulation, namely, a most-favoured-nation clause.

4. THE MOST-FAVOURED-NATION CLAUSE AND THE DIFFERENT LEVELS OF ECONOMIC DEVELOPMENT

120. The Commission, though at an early stage of its work, took cognizance of the problem which the application of the most-favoured-nation clause creates in the field of international trade when a striking inequality exists between the development of the States concerned. It recalled the report on “International trade and the most-favoured-nation clause” prepared by the secretariat of UNCTAD (the UNCTAD memorandum) which states, \textit{inter alia}:

To apply the most-favoured-nation clause to all countries regardless of their level of development would satisfy the conditions of formal equality, but would in fact involve implicit discrimination against the weaker members of the international community. This is not to reject on a permanent basis the most-favoured-nation clause.\ldots The recognition of the trade and development needs of developing countries requires that for a certain period of time, the most-favoured-nation clause will not apply to certain types of international trade relations.\textsuperscript{317}

121. It also recalled General Principle Eight of annex A.I.1. of the recommendations adopted by UNCTAD at its first session, which states, \textit{inter alia}:

\textsuperscript{310} See paras. 120 et seq. below.


\textsuperscript{312} \textit{Yearbook of the International Law Commission, 1961}, vol. II, p. 128, document A/4843, chap. II, sect. IV, para. 1 of the commentary to article 70 of the draft articles on consular relations.

\textsuperscript{313} \textit{Case concerning Rights of Nationals of the United States of America in Morocco (Judgment)} (I.C.J. Reports 1952, p. 192).


\textsuperscript{315} \textit{Ibid.}, vol. 596, p. 261.

\textsuperscript{316} Article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.


“There will be the same equality between the shares as between the persons, since the ratio between the shares will be equal to the ratio between the persons; for if the persons are not equal, they will not have equal shares; it is when equals possess or are allotted unequal shares, or persons not equal shares, that quarrels and complaints arise.”\textsuperscript{3}
International trade should be conducted to mutual advantage on the basis of the most-favoured-nation treatment and should be free from measures detrimental to the trading interests of other countries. However, developed countries should grant concessions to all developing countries and extend to developing countries new preferential concessions, both tariff and non-tariff, should be made to developing countries as a whole and such preferences should not be extended to developed countries. Developing countries need not extend to developed countries preferential treatment in operation amongst them.\textsuperscript{318}

122. In recalling the question of the operation of the most-favoured-nation clause in trade relations between States at different levels of economic development, the Commission was aware that it could not enter into fields outside its functions and was not in a position to deal with economic matters and suggest rules for the organization of international trade. Nevertheless, it recognized that the operation of the clause in the sphere of international trade with particular reference to the developing countries posed serious problems, some of which related to the Commission's work on the topic. As indicated by the Special Rapporteur,\textsuperscript{319} the Commission intends to examine, in future draft articles, the question of exceptions to the operation of the clause; it recognizes the importance of the question and intends to revert to it in the course of its future work.

B. Draft articles on the most-favoured-nation clause

123. The text of articles 1 to 7 and the commentaries thereto, adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below for the information of the General Assembly.

\section*{Article 1. Scope of the present articles}

The present articles apply to most-favoured-nation clauses contained in treaties between States.

\textbf{Commentary}

(1) This article corresponds to article 1 of the Vienna Convention on the Law of Treaties; its purpose is to define the scope of the present articles.

(2) It gives effect to the Commission's decision that the scope of the present articles should be restricted to most-favoured-nation clauses contained in treaties concluded between States. It therefore emphasizes that the provisions which follow are designed for application only to most-favoured-nation clauses contained in treaties between States. This restriction also finds expression in article 2 \textit{(a)}, which gives the term "treaty" the same meaning as in the Vienna Convention on the Law of Treaties, a meaning which specifically limits the term to "an international agreement concluded between States".\textsuperscript{318}


\textsuperscript{319} See para. 110 above.

(3) It follows from the use of the term "treaty" and from the meaning given to it in article 2 \textit{(a)}, that article 1 restricts the scope of the articles to most-favoured-nation clauses contained in international agreements between States in written form.

(4) Consequently, the present articles have not been drafted so as to apply to clauses contained in oral agreements between States and in international agreements concluded between States and other subjects of international law. At the same time, the Commission recognized that the principles which the articles contain may also be applicable in some measure to international agreements falling outside the scope of the present articles. Accordingly, in article 3 it has made a general reservation on this point analogous to that in article 3 of the Vienna Convention on the Law of Treaties.

(5) The Commission adopted article 1 provisionally with a view to reverting to it if, in the course of the elaboration of the articles, some enlargement of the scope of the draft should seem desirable.

\section*{Article 2. Use of terms}

For the purposes of the present articles:

\textit{(a)} "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

\textit{(b)} "granting State" means a State which grants most-favoured-nation treatment;

\textit{(c)} "beneficiary State" means a State which has been granted most-favoured-nation treatment;

\textit{(d)} "third State" means any State other than the granting State or the beneficiary State.

\textbf{Commentary}

(1) Following the example of many of its previous drafts, the Commission has specified in article 2 the meaning of the expressions most frequently used in the draft.

(2) As the introductory words of the article indicate, the definitions contained therein are limited to the draft articles. They only state the meanings in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) Paragraph \textit{(a)} reproduces the definition of the term "treaty" given in article 2, paragraph 1 \textit{(a)}, of the Vienna Convention on the Law of Treaties. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and its relationship with the Vienna Convention.\textsuperscript{320} Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general
term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(4) Paragraphs (b) and (c) define the terms “granting State” and “beneficiary State”. These expressions denote the States parties to a treaty which contains a “most-favoured-nation” clause, parties which are promisors and promisees, respectively, of the most-favoured-nation treatment. The verb “grant” has been used to convey the meaning not only of an actual according or enjoyment of the treatment but also the creation of the legal obligation and corresponding right to that treatment. A State party to a treaty including a most-favoured-nation clause may be a granting State and a beneficiary State at the same time if, by the same clause, it grants to another State most-favoured-nation treatment and is granted by that State the same treatment.

(5) Paragraph (d), in defining the term “third State”, departs from the meaning assigned to that term by article 2, paragraph 1 (b), of the Vienna Convention on the Law of Treaties. According to that sub-paragraph, “third State” means a State not a party to the treaty. In cases where a most-favoured-nation clause is contained in a bilateral treaty, that definition could have been applicable. However, most-favoured-nation clauses can be, and indeed are, included in multilateral treaties. In such clauses, the parties undertake to accord each other the treatment granted by them to any third State. In such cases, the third State is not necessarily outside the bounds of the treaty: it may also be one of the parties to the multilateral treaty in question. It is for this reason that article 2 defines the term “third State” as meaning “any State other than the granting State or the beneficiary State”.

(6) Article 2 has been adopted by the Commission provisionally. The Commission may possibly include definitions of other terms in the article if, in the course of the adoption of further articles on the most-favoured-nation clause, it deems that to be necessary. The final text of the article will be established after the formulation of all the articles that will constitute the draft.

**Article 3. Clauses not within the scope of the present articles**

The fact that the present articles do not apply (1) to a clause on most-favoured-nation treatment contained in an international agreement between States not in written form, or (2) to a clause contained in an international agreement by which a State undertakes to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, or (3) to a clause contained in an international agreement by which a subject of international law other than a State undertakes to accord most-favoured-nation treatment to a State, shall not affect:

(a) The legal effect of any such clause;

(b) The application to such a clause of any of the rules set forth in the present articles to which it would be subject under international law independently of the articles;

(c) The application of the provisions of the present articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States, when such clauses are contained in international agreements in written form to which other subjects of international law are also parties.

**Commentary**

(1) This article is drafted on the pattern of article 3 of the Vienna Convention on the Law of Treaties. Its first purpose is to prevent any misconception which might result from the express limitation of the scope of the draft articles to clauses contained in treaties concluded between States and in written form.

(2) Article 3 recognizes that the present articles do not apply to the clauses enumerated therein, under (1), (2) and (3). However, it preserves the legal effect of such clauses and the possibility of the application to such clauses of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles.

(3) Article 3 follows in this respect the system of the Vienna Convention which, in its article 3, preserved the legal force of certain agreements and the possibility of the application to them of certain rules of the Vienna Convention. Article 3 does not refer to exactly the same types of international agreements as does the Vienna Convention. Article 3 refers (1) to clauses on most-favoured-nation treatment contained in international agreements between States not in written form, (2) to clauses contained in international agreements by which States undertake to accord to a subject of international law other than a State treatment not less favourable than that accorded to any subject of international law, and (3) to clauses contained in international agreements by which subjects of international law other than States undertake to accord most-favoured-nation treatment to States. It does not, however, refer to clauses in international agreements by which subjects of international law other than States undertake to accord to each other treatment not less favourable than that accorded by them to other such subjects of international law. The reason for the omission of a reference to such clauses is that the Commission is not aware of such clauses having arisen in practice, though hypothetically it is not impossible.

(4) The reservation in paragraph (c) is based on the provision contained in article 3, paragraph (c), of the Vienna Convention. It safeguards the application of the rules set forth in the draft articles to the relations of States as between themselves under clauses by which States undertake to accord most-favoured-nation treatment to other States when such clauses are contained in international agreements in written form to which other subjects of international law are also parties. The reservation in paragraph (c)—in contradistinction to the parallel paragraph (c) of article 3 of the Vienna Con-
treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State in an agreed sphere of relations.

Commentary

(1) Articles 4 and 5 contain definitions which could have found their place in article 2 on the use of terms. Because of the importance of the terms “most-favoured-nation clause” and “most-favoured-nation treatment”, which are the cornerstones of these articles, the Commission decided to keep these articles separate from the article on the use of terms.

(2) As to the expressions “most-favoured-nation clause” and “most-favoured-nation treatment”, it was pointed out in the course of the discussion in the Commission that they are not legally precise. They refer to a “nation” instead of a State and to “most-favoured” nation although the “most-favoured” third State in question may indeed be less favoured than the beneficiary State. Nevertheless, the Commission has retained these expressions. There are other expressions in international law, like the very term international law itself, which could be criticized on grounds of precision, but which having been sanctioned by practice remain in constant use.

(3) The use of the word “clause” was also discussed. In the course of the discussion it was pointed out that there are cases where a whole treaty consists of nothing else but a more or less detailed stipulation of most-favoured-nation pledges. It is the understanding of the Commission that the word “clause” covers both single provisions of treaties or other agreements and such stipulations, sometimes lengthy, which make up a whole treaty. From the point of view of the present articles, it is irrelevant whether a most-favoured-nation clause is short and concise or long and detailed, or whether it amounts to the whole content of a treaty or not.

(4) The articles apply to clauses of treaties in the sense of the word “treaty” as defined in article 2 of the Vienna Convention on the Law of Treaties and in article 2 of the present draft. This definition does not affect the provision contained in article 3, paragraph (c), according to which the present articles are also applicable to the clauses described in that paragraph.

(5) Article 4 explains the contents of the clause as a treaty provision whereby a State undertakes to accord most-favoured-nation treatment to another State. In the simplest form of the clause, one State, the granting State, makes this undertaking and the other State, the beneficiary State, accepts it. This constitutes a unilateral clause which is today a rather exceptional phenomenon. Most-favoured-nation pledges are usually undertaken by the States parties to a treaty in a synallagmatic way, i.e., reciprocally.

(6) Unilateral most-favoured-nation clauses were found in capitulatory régimes and have largely disappeared with them. They were also provided, for a shorter period, in favour of the victorious powers in the Peace Treaties which concluded the World Wars. (These clauses were justified by the fact that the war terminated the commercial treaties between the contesting parties and the victorious powers wanted to be treated by the vanquished—even before the conclusion of a new commercial treaty—at least on an equal footing with the allies of the latter.) The usual practice today is for States parties to a treaty to extend to each other most-favoured-nation treatment. There are, however, exceptional situations in which the nature of things only one of the contracting parties is in the position to offer most-favoured-nation treatment in a certain sphere of relations, possibly against a different type of compensation. Such unilateral clauses occur, for example, in treaties by which most-favoured-nation treatment is accorded to the ships of a land-locked State in the ports and harbours of the granting maritime State. The land-locked State not being in a position to reciprocate in kind, the clause remains unilateral. The same treaty may of course provide for another type of compensation against the granting of most-favoured-nation treatment. There are other exceptional situations: the States associated with the European Economic Community have extended to the Community—against special preferences—unilateral most-favoured-nation treatment of imports and exports in certain agreements on association and commerce.

(7) In the usual case, both States parties to a treaty, or in the case of a multilateral treaty all States parties, extend to each other most-favoured-nation treatment, becoming thereby granting and beneficiary States at the same time. The expressions “granting” and “beneficiary” then become somewhat artificial. These expressions were found useful, however, in the examination of the situations which may arise from reciprocal pledges.

(8) Although most-favoured-nation treatment is usually granted by States parties to a treaty reciprocally, this reciprocity is in the simplest and unconditional form of the most-favoured-nation clause only a formal reciprocity. There is no guarantee that States granting each other most-favoured-nation treatment will receive materially equal advantages. (The questions connected with the conditional clauses will be considered by the Commission

221 See para. 4 of the commentary to article 5.
later, on the basis of the relevant article presented by the Special Rapporteur in his fourth report (A/CN.4/266).\textsuperscript{328} The grant of most-favoured-nation treatment is not necessarily a great advantage to the beneficiary State. It may be no advantage at all if the granting State does not extend any favours to third States in the domain covered by the clause. All that the most-favoured-nation clause promises is that the contracting party concerned will treat the other party as well as it treats any third country, which may be very badly. It has been rightly said in this connexion that, in the absence of any undertakings to third States, the clause remains but an empty shell.

(9) The drafting of a clause is usually done in a positive form, i.e. the parties promise each other most-favourable treatment. An example of this is the most-favoured-nation clause of article I, paragraph 1, of the General Agreement on Tariffs and Trade.\textsuperscript{324} The clause may be formulated in a negative way when the pledge is for the least unfavourable treatment. An example of the latter formula is article 4 of the Treaty of Trade and Navigation between the Czechoslovak Republic and the German Democratic Republic of 25 November 1959:

... natural and manufactured products imported from the territory of one Contracting Party ... shall not be liable to any duties, taxes or similar charges other or higher, or to regulations other or formalities more burdensome than those imposed on similar natural and manufactured products of any third State.\textsuperscript{325}

(10) Article 4 is intended to cover most-favoured-nation clauses in bilateral as well as multilateral treaties. Traditionally, most-favoured-nation clauses appear in bilateral treaties. With the increase of multilateralism in international relations, such clauses have found their way into multilateral treaties. The most notable examples of the latter are the clauses of the General Agreement on Tariffs and Trade of 30 October 1947, and that of the Treaty Establishing a Free Trade Area and Instituting the Latin American Free-Trade Association, signed at Montevideo on 18 February 1960. The most important most-favoured-nation clause in the General Agreement (article I, paragraph 1) reads as follows:

With respect to customs duties and charges of any kind imposed on or in connexion with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connexion with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III [i.e., matters of internal taxation and quantitative and other regulations], any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.\textsuperscript{326}

The most-favoured-nation clause of the Montevideo Treaty reads as follows:

Article 18

Any advantage, benefit, franchise, immunity or privilege applied by a Contracting Party in respect of a product originating in or intended for consignment to any other country shall be immediately and unconditionally extended to the similar product originating in or intended for consignment to the territory of the other Contracting Parties.\textsuperscript{327}

Unless multilateral treaties containing a most-favoured-nation clause stipulate otherwise, the relations created by such clauses are essentially bilateral, i.e., every party to the treaty may demand from any other party to accord it equal treatment to that accorded to any third State, irrespective of whether that third State is a party to the treaty or not. Under the GATT system (under article II of the Agreement), each contracting party is obliged to apply its duty reductions to all other parties. The General Agreement goes beyond the most-favoured-nation principle in this respect. Each member granting a concession is directly bound to grant the same concession to all other members in their own right; this is not the same thing as obliging all other members to rely on continued agreement between the party granting the concession and the party that negotiated it.\textsuperscript{328} Thus, the operation of the GATT clause differs in this respect from that of the usual bilateral most-favoured-nation clause.

(11) Article 4 expresses the idea that a most-favoured-nation pledge is an international, i.e., inter-State, undertaking. The beneficiary of this undertaking is the beneficiary State and only through the latter State do the persons in a particular relationship with that State, usually its nationals, enjoy the treatment stipulated by the granting State.\textsuperscript{329}

(12) It follows from the definition of the most-favoured-nation clause, as given in article 4, that the undertaking to accord most-favoured-nation treatment is the constitutive element of a most-favoured-nation clause. Consequently, clauses which do not contain this element will fall outside the scope of the present articles even if they aim at an effect similar to that of a most-favoured-nation clause. A case in point is article XVII, paragraph 2, of GATT where "fair and equitable treatment" is demanded from the contracting parties with respect to imports of products for immediate governmental use.\textsuperscript{330} Other examples are article XIII, paragraph 1, of the General Agreement, which requires that the administration of quantitative restrictions shall be non-dis-


\textsuperscript{329} See p. 97 above.

\textsuperscript{330}See para. 10. below.


criterion, and article 23 of the Montevideo Treaty. While a most-favoured-nation clause insures the beneficiary against discrimination, a clause promising non-discrimination will not necessarily yield the same advantages as a most-favoured-nation clause. Cases in point are article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. These clauses, while assuring the States parties to the Conventions of non-discrimination by other parties to the treaty, do not give any right to most-favoured-nation treatment.

(13) Whether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways and that is why an eminent authority on the matter stated: “although it is customary to speak of the most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalize upon the meaning and effect of such clauses must be made, and accepted, with caution”. Expressed in other words: “Speaking strictly, there is no such thing as the most-favoured-nation clause: every treaty requires independent examination” and further: “there are innumerable most-favoured-nation clauses, but there is only one most-favoured-nation standard”. These considerations were taken into account when the form of the definition of the clause was chosen. In that form stress is laid upon most-favoured-nation treatment, the essence of the definition being that any treaty stipulation according most-favoured-nation treatment is a most-favoured-nation clause.

(14) Article 4 states that the grant of most-favoured-nation treatment to another State by a most-favoured-nation clause shall be in “an agreed sphere of relations”. Most-favoured-nation clauses have been customarily categorized as “general” or “special” clauses. A “general” clause means a clause which promises most-favoured-nation treatment in all relations between the parties concerned, whereas a “special” one refers to relations in certain limited fields. Although States are free to agree to grant each other most-favoured-nation treatment in all fields which are susceptible to such agreements, this is rather an exception today. A recent case in point is a stipulation in the treaty concerning the establishment of the Republic of Cyprus signed at Nicosia on 16 August 1960, which is rather a pactum de contrahendo concerning future agreements on most-favoured-nation grants: “The Republic of Cyprus shall, by the agreement on appropriate terms, accord most-favoured-nation treat-

ment to the United Kingdom, Greece and Turkey in connexion with all agreements whatever their nature”.

(15) The usual type of a “general clause”, however, does not embrace all relations between the respective countries, it refers to all relations in certain fields. Thus, for example, “in all matters relating to trade, navigation and all other economic relations . . . ”. Most-favoured-nation clauses may be less broad but still general, the “general clause” of article I, paragraph 1 of GATT being a well-known example.

(16) The fields in which most-favoured-nation clauses are used are extremely varied. A tentative classification of the fields in question, which does not claim to be exhaustive, can be given as follows:

(a) International regulation of trade and payments (exports, imports, customs tariffs);

(b) Transport in general and treatment of foreign means of transport (in particular, ships, airplanes, trains, motor vehicles, etc.)

(c) Establishment of foreign physical and juridical persons, their personal rights and obligations;

(d) Establishment of diplomatic, consular and other missions, their privileges and immunities and treatment in general;

(e) Intellectual property (rights in industrial property, literary and artistic rights);

(f) Administration of justice, access to courts and to administrative tribunals in all degrees of jurisdiction, recognition and execution of foreign judgements, cautio judicatum solvi, etc.

The study to be undertaken by the Secretariat will survey the most-favoured-nation clauses included in the treaties published in the United Nations Treaty Series and will examine the fields to which these clauses are applicable. A most-favoured-nation clause can apply to one or more of the fields enumerated above. The important point is that the clause always applies to a determined sphere of relations agreed upon by the parties to the treaty concerned.

(17) The ejusdem generis rule, according to which no other rights can be claimed under a most-favoured-nation clause than those relating to the subject-matter of the clause and falling within the scope of the clause, will be dealt with later in connexion with article 7, which is contained in the Special Rapporteur’s fourth report.


333 See para. 119 above.


336 Ibid., p. 159.


339 Quoted above in para. 10 of this commentary.

340 See above, para. 105 of the present report.
Article 5. Most-favoured-nation treatment

Most-favoured-nation treatment means treatment by the granting State of the beneficiary State or of persons or things in a determined relationship with that State, not less favourable than treatment by the granting State of a third State or of persons or things in the same relationship with a third State.

Commentary

(1) While article 4 defines "most-favoured-nation clause" by "most-favoured-nation treatment", article 5 explains the meaning of the latter term. In the course of the discussion in the Commission, attention was drawn to the fact that in some languages most-favoured-nation treatment is expressed as most favourable treatment, as in the Russian term: "rezhim naibolshego blagopriatsvovanija". The Commission wishes to retain in English, French, Russian and Spanish, the customary forms of expression: "most-favoured-nation treatment"; "traitement de la nation la plus favorisée"; "rezhim naibolee blagopriatsvenoi natzi"; and "trato de la nación más favorecida".

(2) While the commitment to grant most-favoured-nation treatment is undertaken by one State vis-à-vis another, the treatment promised thereby is one given in most cases to persons and things and only in a minority of cases to States themselves (e.g. in cases promising most-favoured-nation treatment to embassies or consulates). By what methods and under what circumstances the person concerned (or the things for that matter) will come to enjoy the treatment depends on the intention of the parties to the treaty in question and on the internal law of the beneficiary State. The High Commissioner of Danzig, in his decision of 8 April 1927 regarding the jurisdiction of Danzig courts in actions brought by railway officials against the Railway Administration, explained the relationship between a treaty and the application of its provisions to individuals as follows:

It is a rule of law generally recognized in doctrine and in practice that international treaties do not confer direct rights on individuals, but merely on the governments concerned. Very often a government is obliged, under a treaty, to accord certain benefits or rights to individuals, but in this case the individuals do not themselves automatically acquire these rights. The government has to introduce certain provisions into its internal legislation in order to carry out the obligations into which it has entered with another government. Should it be necessary to insist on the carrying out or application of this obligation, the only Party to the case who can legally take action is the other government. That government moreover would not institute proceedings in civil courts but would take diplomatic action or apply to the competent organs of international justice.

The case in question is not comparable to that of an undertaking on behalf of a third Party ... which figures in certain civil codes, precisely because international treaties are not civil contracts under which governments assume obligations at private law on behalf of the persons concerned. To give an example: "the most-favoured-nation clause in a treaty of commerce does not entitle an individual to refuse to pay customs duties on the ground that in his opinion they are too high to be compatible with the clause; he can only base his action on the internal customs legislation which should be drafted in conformity with the clauses of the treaty of commerce." Although the Court reversed the decision of the High Commissioner in the case in question, referring to the intention of the parties and the special characteristics of the case, the situation in countries where treaties are not self-executing is primarily the one described by the High Commissioner of Danzig. This is the case with regard to treaties in general, and most-favoured-nation clauses in particular, in the United Kingdom and Australia (see the statements quoted in the "Digest of decisions of national courts relating to the most-favoured-nation clause" prepared by the Secretariat (A/CN.4/269)) . The situation is similar in the Federal Republic of Germany where the courts have explicitly refused in several instances to recognize a direct application of article III of GATT (on national treatment on internal taxation and regulation) on the ground that this commitment binds the States parties to the Agreement alone and individuals may therefore derive no rights from this provision. In the United States, however, self-execution is the rule for treaties embodying most-favoured-nation clauses for the following reasons: ... Unconditional most-favoured-nation clauses ... [provide] for United States private interests the benefit in a particular country of the best economic opportunity given by that country to any alien goods or alien capital, whether arising before or after the treaty with the United States has come into effect. But trade and establishment treaties, including the most-favored-nation clauses in them, must run both ways, for states will not enter into such arrangements on any other basis. This means that the United States must be able at any given moment to show that the goods and capital of the other party may claim unconditional most-favored-nation treatment in this country. It would be difficult for the United States to be able to give the required reciprocity, considering the fact that unconditional most-favored-nation clauses are open-ended (i.e. they promise the best treatment given in any other treaty, regardless of whether the other treaty is later or earlier in time) if in each instance implementing legislation by the Congress had to be obtained to extend the benefit of a treaty with a third country to the country claiming most-favoured-nation rights. Self-execution is the only feasible answer to the problem. ...

(3) Article 5 states that the persons or things whose treatment is in question have to be in a "determined relationship" with the beneficiary State and that their treatment is contingent upon the treatment extended by the granting State to persons or things which are in the "same relationship" with a third State. A "determined relationship" in this context means that the relationship between the States concerned and the persons and things concerned is determined by the

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341 See article 3, para. 1 of the United Kingdom-Norway Consular Convention of 1951 according to which "Either High Contracting Party may establish and maintain consulates in the territories of the other at any place where any third State possesses a consulate ..." (United Nations, Treaty Series, vol. 326, p. 214).
clause, i.e., by the treaty. The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favoured-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons and things concerned. The most frequent such relationship is nationality or citizenship of persons, place of registry of vessels, State of origin of products, etc. Under article 5, the beneficiary State can claim most-favoured-nation treatment in respect of its nationals, ships, products, etc., only to the extent that the granting State confers the same benefits upon the nationals, ships, products, etc., of a third State. The beneficiary State is normally not entitled to claim for its residents the benefits which the granting State extends to the nationals of the third State. Although residence creates also a certain relationship between a person and a State, this is not the same relationship as that of the link of nationality. These two relationships are not interchangeable. This example explains the meaning of the expression “same relationship” as used in article 5. The expression “same relationship”, however, has to be used with caution because, to continue the example, the relationship between State A and its nationals is not necessarily the “same” as the relationship between State B and its nationals. Nationality laws of States are so diverse that the sum total of the rights and obligations arising from one State’s nationality laws might be quite different from that arising from another State’s nationality laws. The meaning of the word “same” in this context could perhaps be better expressed by the expressions “the same type of” or “the same kind of”. The Commission came, however, to the conclusion that the wording of article 5 was clear enough and that an over-burdening of the text would not be desirable.

(4) Article 5 describes the treatment to which the beneficiary State is entitled as “not less favourable” than the treatment accorded by the granting State to a third State. The Commission considered whether it should not use the adjective “equal” to denote the relationship between the terms of the treatment enjoyed by a third State and those promised by the granting State to the beneficiary State. Arguments adduced in favour of the use of the word “equal” were based on the fact that the notion of “equality of treatment” is particularly closely attached to the operation of the most-favoured-nation clause. It has been argued that the clause represents and is the instrument of the principle of equality of treatment and that the clause is a means to an end: the application of the rule of equality of treatment in international relations. The arguments put forward against the use of the adjective “equal” admitted that “equal” was not as rigid as “identical” and not as vague as “similar” and was therefore more appropriate than those expressions. However, although a most-favoured-nation pledge does not oblige the granting State to accord to the beneficiary State treatment more favourable than that extended to the third State, it does not exclude the possibility that the granting State might accord to the beneficiary State additional advantages beyond those conceded to the most-favoured third State. In other words, while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State. Consequently, the treatment accorded to the beneficiary State and that accorded to the third State are not necessarily “equal”. This argument was countered with the obvious truth that if the granting State accords preferential treatment to the beneficiary State, i.e., treatment beyond that granted to the third State, which it need not do on the strength of the clause, such treatment will be accorded independently of the operation of the clause. Ultimately, the Commission accepted the term “not less favourable” because it believed this to be the expression commonly used in most-favoured-nation clauses.

(5) Most-favoured-nation clauses may define exactly the conditions for the operation of the clause, namely, the kind of treatment accorded by the granting State to a third State which will give rise to the actual claim of the beneficiary State to similar, the same, equal or identical treatment. If, as is the usual case, the clause itself does not provide otherwise, the clause comes into operation, i.e., a claim can be raised under the clause, if the third State (or persons or things in the same relationship with the third State as the persons or things mentioned in the clause are with the beneficiary State) has actually been granted the favours which constitute the treatment. It is not necessary for the beginning of the operation of the clause that the treatment actually granted to the third State, with respect to itself or the persons and things concerned, be based on a former treaty or agreement. The mere fact of favourable treatment is enough to set in motion the operation of the clause. However, the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are patently due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause. The beginning and the termination of the operation of the clause will be dealt with in a separate article to be formulated later by the Special Rapporteur.

(6) According to article 5, “treatment” is that which is accorded by a State to other States (e.g., with respect to their embassies or consulates) or to persons or things. The Commission considered whether it should not also include in the enumeration “activities”. Indeed, activities such as the exercise of certain trades and professions, entry into port of ships, etc., can also be subjects of most-favoured-nation treatment. After a

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219

An understanding was reached between Bolivia and Germany in 1936 to the effect that the operation of the most-favoured-nation clause included in article V of the Treaty of Friendship between the two countries should also cover marriages celebrated by consuls (see Reichsgesetzblatt, 1936, II, p. 216, quoted in L. Raape, Internationales Privatrecht (Berlin, Vahlen, 1961, p. 20).
brief discussion, however, it decided not to refer to activities in the article because activities are ultimately related to persons and things, so that an express reference was deemed not to be indispensable.

(7) Article 5 brings in the notion of third State. The term "third State" appears also in the Vienna Convention on the Law of Treaties and the reasons for not using the expression "third State" in the present articles in the same manner as in the Vienna Convention have been set out in connexion with article 2, paragraph (d). In earlier history there was a practice whereby the States parties to the clause explicitly named the third State enjoying the treatment which might be claimed by the beneficiary State. Thus, the Treaty of 17 August 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders, specified that the masters of the ships of the contracting parties should enjoy in their respective ports the same favours as the "Français, Hollandois, ZeUandois, et Escohois".

(8) Similarly, in the Anglo-Spanish Treaty of Commerce of 1886, Spain accorded to England most-favoured-nation treatment in all matters of commerce, navigation, consular rights and privileges under the same terms and with the same advantages as were accorded to France and Germany by virtue of the Treaties of 6 February 1882 and 12 July 1883. This way of drafting does not necessarily produce a "most-favoured" nation clause, because the States mentioned in the clause as tertium comparationis are not necessarily those most favoured by the granting State. In the instances quoted and in most similar cases, they were the "most favoured" and it was precisely because of their favoured position that they were selected and explicitly indicated in the clauses in question. In modern practice, most-favoured-nation clauses are usually drafted in such a way that they refer as tertium comparationis to "any State".

(9) What often happens is rather an indication or enumeration of determined third States which, under the operation of the most-favoured-nation clause, will remain in an exceptional position, i.e., the treatment granted to them will not be attracted by the operation of the clause. Members of the Commission pointed out in this connexion that special solidarities existing between members of various groups of States within the international community may induce States to except explicitly from their most-favoured-nation obligations the treatment granted to a certain group of States with which they feel more closely connected. The establishment of customs unions, free trade areas and other groupings may also result in conventional exceptions to most-favoured-nation pledges. Several members drew attention to the preferences to be granted in the field of international trade to developing countries in order that the treatment given to them by developed countries should comply with the requirement of justice and should assist them in the acceleration of their development. It was pointed out that to apply the most-favoured-nation clause in the field of international trade to all countries regardless of their level of development would satisfy the conditions of formal equality but would in fact involve explicit discrimination against the weaker members of the international community. The Commission instructed the Special Rapporteur, when he came to the question of exceptions to the most-favoured-nation clause, to deal with it in a sufficiently detailed manner and take into account not only resolutions of UNCTAD (such as resolutions 21 (II) of 26 March 1968 and 62 (III) of 19 May 1972), and resolutions of the General Assembly (such as resolution 2626 (XXV) of 24 October 1970 on an International Development Strategy for the Second United Nations Development Decade, and 3036 (XXVII) of 19 December 1972 on special measures in favour of the least developed among the developing countries), but also the arrangements concerning the establishment of generalized, non-discriminatory, non-reciprocal preferential treatment to exports of developing countries drawn up in UNCTAD as well as in the framework of GATT, and any other material found relevant.

Article 6. Legal basis of most-favoured-nation treatment

Nothing in the present articles shall imply that a State is entitled to be accorded most-favoured-nation treatment by another State otherwise than on the ground of a legal obligation.

Commentary

(1) Article 6 states in negative form the obvious rule that no State is entitled to most-favoured-nation treatment by another State unless that State has a legal obligation to accord such treatment. This rule follows from the principle of the sovereignty of States and their liberty of action. This liberty includes the right of States to grant special favours to some States and not to be bound by customary law to extend the same favours to others. This right is not impaired by the general duty of non-discrimination. The general duty not to discriminate between States is not breached by treating another State, its nationals, ships, products, etc., in a particularly advantageous way. Other States do not have the right to challenge such behaviour and to demand for themselves, for their nationals, ships, products, etc., the same treatment as that granted by the State concerned to a particularly favoured State. Such a claim can rightfully be made only if its proved that the State in question has a legal obligation to extend to the claiming State the same treatment as that conferred upon the

347 See commentary to article 2, para. (5).
particularly favoured State or on its nationals, ships, products, etc.

(2) In practice, such a legal obligation cannot normally be proved other than by means of a most-favoured-nation clause, i.e., a contractual undertaking by the granting State to this effect. Indeed, legal literature is practically unanimous that, while there is no most-favoured-nation clause without a promise of most-favoured-nation treatment (such a promise being the constitutive element of the former). States have no right to claim most-favoured-nation treatment without being entitled to it by a most-favoured-nation clause.351

(3) The question whether States can claim most-favoured-nation treatment from each other as a right was discussed in the Economic Committee of the League of Nations but only with respect to customs tariffs. The Economic Committee did not reach any agreement in the matter beyond declaring that "...the grant of most-favoured-nation treatment ought to be the normal..." 352 Although the grant of most-favoured-nation treatment is frequent in commercial treaties, there is no evidence that it has developed into a rule of customary international law. Hence it is widely held that only treaties are the foundation of most-favoured-nation treatment.353

(4) The Commission briefly discussed the question whether or not it should adopt a simple rule stating that most-favoured-nation treatment cannot be claimed except on the basis of a most-favoured-nation clause, i.e., under a provision of a treaty (as defined in article 2, paragraph (a)), promising most-favoured-nation treatment. It found that, although a rigid statement to this effect would to a large extent satisfy all practical purposes, it nevertheless would not be in complete conformity with the legal situation as it exists and would not cover possible future development. While most-favoured-nation clauses, i.e., treaty provisions, constitute in most cases the basis for a claim to most-favoured-nation treatment, it is not impossible even at present that such claims might be based on oral agreements. Among other possible sources of such claims, members of the Commission mentioned binding resolutions of international organizations and legally binding unilateral acts, and as a potential source, a possible evolution of regional customary law to this effect. The Commission therefore decided to adopt the rule in more general terms, that a State is not entitled to most-favoured-nation treatment by another State unless there exists a legal obligation of the latter to extend such treatment.

(5) The Commission further concluded that a rule stating directly that most-favoured-nation treatment cannot be claimed unless there exists a legal obligation to accord it would fall outside the scope of the articles on the most-favoured-nation clause. The purpose of such articles can only be to state the rules of the operation and application of such a clause if it exists. It is not for these articles to state the conditions under which States can claim most-favoured-nation treatment from each other. It is for these reasons that the Commission, while not wishing to omit the rule from the articles because of its theoretical and practical importance, decided to state it in negative form as a general saving clause.

(6) The proper place for this saving clause will be decided by the Commission after the adoption of all the articles constituting the final draft, and at that time an endeavour will be made to find a more appropriate title which will express the fact that the article is a saving clause.

(7) The question whether or not a State would violate its international obligations if it granted most-favoured-nation treatment to most of its partners in a certain field but refused to make similar agreements with others was briefly discussed. The Commission took the view that, while such behaviour could be considered by the States not granted most-favoured-nation treatment as an unfriendly act, the present articles could not establish a legal title to such claims which might perhaps be based on a general rule of non-discrimination. The answer to this question is thus clearly beyond the scope of the present articles.

Article 7. The source and scope of most-favoured-nation treatment

The right of the beneficiary State to obtain from the granting State treatment extended by the latter to a third State or to persons or things in a determined relationship with a third State arises from the most-favoured-nation clause in force between the granting State and the beneficiary State.

The treatment to which the beneficiary State is entitled under that clause is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.

Commentary

(1) This article sets out the basic structure of the operation of the most-favoured-nation clause. It states that the right of the beneficiary State to receive from the granting State most-favoured-nation treatment is
anchored in the most-favoured-nation clause, in other words, that the clause is the exclusive source of the beneficiary State's rights. It also states that the treatment, i.e., the extent of benefits to which the beneficiary State may lay claim for itself or for persons or things in a determined relationship with it, depends upon the treatment extended by the granting State to a third State or to persons or things in the same relationship with a third State. The rule is important and its validity is not dependent on whether the treatment accorded by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, other agreement, unilateral, legislative, or other act, or mere practice.

(2) When two treaties exist, one between the granting and the beneficiary State containing the most-favoured-nation clause and the other between the granting State and a third State entitling the latter to certain favours, the question arises as to which one is the basic treaty. That question was thoroughly discussed in the Anglo-Iranian Oil Company case before the International Court of Justice. It was contended before the Court that:

... A most-favoured-nation clause is in essence by itself a clause without content; it is a contingent clause. If the country granting most-favoured-nation treatment has no treaty relations at all with any third State, the most-favoured-nation clause remains without content. It acquires its content only when the grantor State enters into relations with a third State, and its content increases whenever fresh favours are granted to third States... 354

Against this argument it was maintained that the most-favoured-nation clause:

... involves a commitment whose object is real. True, it is not determined and is liable to vary in extent according to the treaties concluded later, but that is enough to make it determinable. Thus the role of later treaties is not to give rise to new obligations towards the State beneficiary of the clause but to alter the scope of the former obligation. The latter nevertheless remains the root of the law, the source of the law, the origin of the law, on which the United Kingdom Government is relying in this case. [Translation from French.] 355

The majority of the Court held that:

The treaty containing the most-favoured-nation clause is the basic treaty.... It is this treaty which establishes the juridical link between the United Kingdom [the beneficiary State] and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom [the beneficiary State] and Iran [the granting State]; it is res inter alios acta. 356

The decision of the Court contributed to a great extent, to the clarification of legal theory. Before the Court's decision there was no lack of legal writers who presented the operation of the most-favoured-nation clause (or more precisely that of the third-party treaty) as an exception to the rule pacta tertiis nec nocent nec prosum; i.e., that treaties only produce effects as between the contracting parties. 357 Legal theory seems now unanimous in endorsing the findings of the majority of the Court. 358

(3) The solution adopted by the Court is in accordance with the rules of the law of treaties relating to the effect of treaties on States not parties to a particular treaty. The view that the third-party treaty (the treaty by which the granting State accords favours to a third State) is the origin of the rights of the beneficiary State (a State not party to the third-party treaty) runs counter to the rule embodied in article 36, paragraph 1, of the Vienna Convention on the Law of Treaties. As explained in the commentary of the Convention, the 1966 draft (which, with insignificant drafting changes, has become article 36 of the Convention):

Paragraph 1 lays down that a right may arise for a State from a provision of a treaty to which it is not a party under two conditions. First, the parties must intend the provision to accord the right either to the particular State in question, or to a group of States to which it belongs, or to States in general. The 'intention to accord the right is of cardinal importance, since it is only when the parties have such an intention that a legal right, as distinct from a mere benefit, may arise from the provision.... 359

It seems evident that the parties to a third party treaty do not have such an intention. They may be aware that their agreement can have an indirect effect through the operation of the most-favoured-nation clause (to the advantage of the State beneficiary of the clause), but any such indirect effect is unintentional. It follows that the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State and that the provision of article 36 of the Vienna Convention is not applicable to that treaty.

(4) The United Nations Conference on the Law of Treaties upheld this view. At the fourteenth plenary meeting, held on 7 May 1969, the President of the Conference stated that article 32, paragraph 1 (of the 1966 draft of the International Law Commission), "did not affect the interests of States under the most-favoured-nation system". 360

(5) By the adoption of article 7, the Commission maintained its previous position. Article 7 reflects the view that the basic act (acte règle) is the agreement at

355 Ibid., p. 616.
between the granting State and the beneficiary State. Under this agreement, i.e., under the most-favoured-nation clause, the beneficiary State will benefit from the favours granted by the granting State to the third State but only because this is the common wish of the granting State and the beneficiary State. The agreement between the granting State and a third State creating obligations in their mutual relations does not create obligations in the relations between the granting State and the beneficiary State. This is nothing more than an act creating a condition (acte condition).

(6) The relationship between the treaty containing the most-favoured-nation clause and the subsequent, third party treaty was characterized by Fitzmaurice as follows:

If the later treaty can be compared to the hands of a clock that point to the particular hour, it is the earlier treaty which constitutes the mechanism that moves the hands round.361

(7) If there is no treaty or other agreement between the granting State and the third State, the rule stated in the article is even more evident. The root of the right of the beneficiary State is obviously the treaty containing the most-favoured-nation clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

(8) The parties stipulating the most-favoured-nation clause, the granting State and the beneficiary State, can, however, restrict in the treaty itself the extent of the favours which can be claimed by the beneficiary State. For example, this restriction can consist of the imposition of a condition, a matter which will be dealt with by the Commission when it comes to consider the so-called conditional most-favoured-nation clauses in connection with the relevant article contained in the Special Rapporteur's fourth report. If the clause contains a restriction, the beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours accorded by the granting State to the third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause. This is the reason for the wording of the second sentence of article 7 which expressly states that the treatment to which the beneficiary State or the persons or things being in a determined relationship with it are entitled under the most-favoured-nation clause, is determined by the treatment extended by the granting State to the third State or to persons or things in the determined relationship with the latter State.


Chapter V

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

124. At its twenty-third session, in 1971, the Commission confirmed the request it had addressed to the Secretary-General at its twenty-second session that he prepare a number of documents on the subject for the use of members of the Commission,362 it being understood that he would, in consultation with the Special Rapporteur, Mr. Paul Reuter, phase and select the studies required for the preparation of those documents, which would include, in addition to as full as bibliography as possible, an account of the relevant practice of the United Nations and the principal international organizations.363

125. In pursuance of the decision referred to in the previous paragraph, the Special Rapporteur, through the Secretary-General, addressed a questionnaire to the principal international organizations for the purpose of obtaining information on their practice in the matter. Pending the receipt of the replies of the organizations, he submitted to the Commission at its twenty-fourth session a first report 364 which was also communicated to the organizations concerned. That report contains a survey of the development of the subject, based on the discussions in the Commission during its consideration of the question of the law of treaties from 1950 to 1966 and in the United Nations Conference on the Law of Treaties, held at Vienna in 1968 and 1969. In the light of that survey, the report makes a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations, and the precise meaning of the reservation concerning “any relevant rules of the organization” which appears in article 5 of the Vienna Convention on the Law of Treaties.365

126. At the present session, the Special Rapporteur submitted a second report (A/CN.4/271) 366 designed to supplement the preceding one by taking account of new

365 Ibid., p. 324, document A/8710/Rev.1, para. 76.
366 See p. 75 above.
particularly in regard to the collection of information the method followed hitherto by the Special Rapporteur, at its 1238th and 1241st to 1243rd meetings.

party in relation to certain treaties between States? in a treaty on behalf of a territory it represents; Part III organization, and the effects of agreements with respect concluded with a view to applying other agreements, conclusion of a treaty; agreements concluded by subsidiary organs, to the representation of certain territories by international organizations, and to most aspects of the representation of international organizations in the conclusion of treaties. On certain questions, widely differing views were expressed. For example, on the question of the capacity of international organizations to conclude international agreements, some members of the Commission consider that this capacity is inherent in an international organization, others that it does not come within the subject of the report, while others, though anxious that the draft should include one or more provisions on the matter, consider that the question is governed essentially by the law peculiar to each organization. The Special Rapporteur indicated that he would try to prepare one or more draft articles on the subject of capacity.

127. The Commission considered the first and second reports submitted by Mr. Paul Reuter, Special Rapporteur, at its 1238th and 1241st to 1243rd meetings.

128. The Commission approved the general lines of the method followed hitherto by the Special Rapporteur, particularly in regard to the collection of information from international organizations, and agreed that the enquiry from that source should be continued until the Commission's next session. Some members of the Commission expressed the wish that the information obtained should be circulated as soon as possible and that the organizations should in due course be associated more directly with the Commission's work on this topic.

129. The Commission confirmed the instructions previously given to the Special Rapporteur regarding the character and general outline of a set of draft articles on the subject.

130. Although, generally speaking, the essential aim must be to adapt and transpose the provisions of the Vienna Convention, various shades are discernible in the opinions expressed on this subject. Some members feel that the Special Rapporteur should enjoy a certain liberty in regard to the provisions of the Vienna Convention, others feel that the framework of the Convention should be fairly strictly adhered to.

131. With regard to the subject of the report, it was agreed unanimously that the draft should start from a definition of "international organization" identical with the one given in the Vienna Convention. It was generally accepted that the subject of the report should be the agreements of international organizations and that there should be no encroachment on questions governed by the law peculiar to each organization. In many cases, no solution sufficiently precise or general to provide a basis for rules common to all organizations has been found for certain problems; this would seem to be the case, for example, with problems relating to agreements concluded by subsidiary organs, to the representation of certain territories by international organizations, and to most aspects of the representation of international organizations in the conclusion of treaties. On certain questions, widely differing views were expressed. For example, on the question of the capacity of international organizations to conclude international agreements, some members of the Commission consider that this capacity is inherent in an international organization, others that it does not come within the subject of the report, while others, though anxious that the draft should include one or more provisions on the matter, consider that the question is governed essentially by the law peculiar to each organization. The Special Rapporteur indicated that he would try to prepare one or more draft articles on the subject of capacity.

132. A fairly substantial exchange of views was also held on the fundamental and difficult problem of the effects of certain treaties between States with respect to an organization which is not a party to them, and its converse, the effects of an agreement to which an organization is a party with respect to the States members of the organization concerned. This problem involves the question of the effects of treaties and agreements with respect to third parties. To what extent are the principles laid down in the Vienna Convention adequate for solving this problem? To what extent is it enough merely to introduce an element of flexibility into some of the rules laid down in this Convention, particularly those regarding formalities in articles 35 and 37? Several different suggestions were made, but the Commission as a whole requested the Special Rapporteur to undertake a detailed study of this problem.

133. In conclusion, the Commission approved the general lines of the reports which had been submitted to it and decided to continue, for the time being by the same methods as last year, the collection of information from international organizations, with special emphasis on certain particular points. It requested the Special Rapporteur to continue his work and to begin the preparation of a set of draft articles on the basis of the reports and the comments made during the discussion.
Chapter VI

REVIEW OF THE COMMISSION'S PROGRAMME OF WORK

134. As already mentioned, the Commission adopted as item 5 of its agenda for the twenty-fifth session the following item:

5. (a) Review of the Commission’s long-term programme of work: “Survey of International Law” prepared by the Secretary-General (A/CN.4/245);

(b) Priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)).

135. The present chapter contains a summary of the Commission’s proceedings at earlier sessions with respect to each of the two aspects of the item, together with a summary of the Commission’s discussion on the item at the present session, preceded by a commentary on the Commission’s work during its first twenty-five sessions.

A. Summary of the Commission’s proceedings prior to the present session

1. REVIEW OF THE COMMISSION’S LONG-TERM PROGRAMME OF WORK

136. At its nineteenth session, held in 1967, the International Law Commission, having in mind that the following year it was due to hold its twentieth session, considered that that would be an appropriate time for general review of the topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and of its procedures and methods of work under its Statute. It therefore unanimously decided to place on the provisional agenda for its twentieth session an item on review of the Commission’s programme and methods of work.

137. At its twentieth session, held in 1968, the Commission had before it two working papers prepared by the Secretariat on the Commission’s programme and methods of work, which it decided to include as an annex to its report to the General Assembly on the work of the session. The Commission discussed the item both at public and private meetings and reached a number of conclusions and decisions thereon. Inter alia, it agreed that it should give attention to its long-term programme of work and for that purpose decided to ask the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled Survey of international law in relation to the work of codification of the International Law Commission submitted at the Commission’s first session in 1949. On the basis of such a new survey, the Commission could then draw up a list of topics that were ripe for codification, taking into account General Assembly recommendations and the international community’s current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment.

138. At its twenty-first session, held in 1969, the Commission confirmed its intention of bringing up to date its long-term programme of work by again surveying the topics suitable for codification in the whole field of international law, in accordance with article 18 of its Statute. With a view to facilitating this task, the Commission asked the Secretary-General to submit a preparatory working paper.

139. Pursuant to this request, the Secretariat submitted, at the twenty-second session of the Commission, held in 1970, a preparatory working paper concerning the review of the Commission’s programme of work. Confirming again its intention of bringing up to date its long-term programme of work, the Commission asked the Secretary-General to submit at its twenty-third session a new working paper as a basis for the Commission’s selection of a list of topics which might be included in its long-term programme of work.

140. At its twenty-third session in 1971, the Commission had before it a working paper entitled “Survey of Inter-
226


The chapters are entitled: I. The position of States in international law; II. The law relating to international peace and security; III. The law relating to economic development; IV. State responsibility; V. Succession of States and Governments; VI. Diplomatic and consular law; VII. The law of treaties; VIII. Unilateral acts; IX. The law relating to international watercourses; X. The law of the sea; XI. The law of the air; XII. The law of outer space; XIII. The law relating to the environment; XIV. The law relating to international organizations; XV. International law relating to individuals; XVI. The law relating to armed conflicts; XVII. International criminal law. (See *Yearbook... 1971*, vol. II (Part Two) document A/CN.4/245.)

141. The Commission held a preliminary discussion on the review of its long-term programme of work, during which several members made general observations on the "Survey" as well as detailed comments on particular points or subjects referred to in it. Being conscious of the need for further reflection on a question which might influence the codification and progressive development of international law in the years to come, and in view of the fact that members were at the end of their term of office, the Commission concluded that the definitive task of reviewing its long-term programme of work should be left to the Commission in its new composition. With these considerations in mind, the Commission decided, *inter alia*, (a) to place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General (A/CN.4/245)", and (b) to invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission.\(^{377}\)

142. At its twenty-fourth session, held in 1972, the Commission had before it the observations submitted by some members on the Commission's long-term programme of work. In view of the great difficulties of completing, in the course of a ten-week session, the two sets of draft articles on other topics which it actually prepared, the Commission did not, however, consider the item at that session.


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\(^{377}\) The "Survey" contains a preface, an introduction and seventeen chapters, subdivided in some cases into sections. The chapters are entitled: I. The position of States in international law; II. The law relating to international peace and security; III. The law relating to economic development; IV. State responsibility; V. Succession of States and Governments; VI. Diplomatic and consular law; VII. The law of treaties; VIII. Unilateral acts; IX. The law relating to international watercourses; X. The law of the sea; XI. The law of the air; XII. The law of outer space; XIII. The law relating to the environment; XIV. The law relating to international organizations; XV. International law relating to individuals; XVI. The law relating to armed conflicts; XVII. International criminal law. (See *Yearbook... 1971*, vol. II (Part One) document A/8410/Rev.1, paras. 127 and 128.

2. **Priority to be given to the topic of the law of the non-navigational uses of international watercourses**

144. In paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the International Law Commission should as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deemed it appropriate.

145. In the light of the General Assembly's recommendation quoted in the preceding paragraph, the Commission, at its twenty-third session, held in 1971, decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work without prejudging the priority to be given to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other action should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme.\(^{378}\)

146. The Commission agreed that for undertaking the substantive study of the rules of international law relating to non-navigational uses of international watercourses with a view to their progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers"\(^{378}\) prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the *United Nations Legislative Series*.\(^{380}\) On the other hand, paragraph 2 of General Assembly resolution 2669 (XXV) requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, "taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter".\(^{381}\)

147. In paragraph 5, section I, of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that "the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses".

148. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the fore-
going recommendation of the General Assembly when it came to discuss its long-term programme of work. At that session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity and accordingly requested the Secretariat to continue compiling the material relating to the topic with special reference to the problems of the pollution of international watercourses.382

149. In paragraph 5, section I, of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission's intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. Also by the same resolution (paragraph 6 of section I) the General Assembly requested the Secretary-General to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the Assembly in resolution 2669 (XXV), and to present an advance report on the study to the International Law Commission at its twenty-fifth session.

150. Pursuant to the foregoing decision of the General Assembly, the Secretary-General submitted to the Commission, at its present session, an advance report (A/CN.4/270)383 on the progress of work in the preparation of the supplementary report requested by the Assembly.

B. The work of the Commission during its first twenty-five sessions

151. On the occasion of its tenth session, in 1958, the International Law Commission included in its report to the General Assembly on the work of that session a brief review of the work accomplished during the first ten years of its existence.384 That review had a bearing on the planning and possible speeding up of the work of the Commission, a matter that was then under discussion. The question of the methods of work of the Commission is one that merits continuous attention; nevertheless, in view of the fact that now, at the close of a century, a far greater volume of codification of international law is available than existed at the end of the first decade, it is appropriate to look back, and ahead, from a somewhat wider angle. This can be done both concisely and comprehensively, since the General Assembly has in recent years had access to three documents which give a fairly complete picture of the Commission's work and achievements. Two of those documents have already been referred to; they are the working papers prepared by the Secretariat on the review of the Commission's programme and methods of work,385 and the "Survey of International Law" prepared by the Secretary-General.386 The third document is a revised edition of the booklet entitled The Work of the International Law Commission, issued by the Office of Public Information of the United Nations.387

152. When the International Law Commission held its first session, in 1949, it had before it the first Survey of International Law submitted by the Secretary-General as a guide to the Commission in its initial task under article 18 of its Statute.388 As provided for in that article, the Secretariat's memorandum surveyed "the whole field of international law with a view to selecting topics for codification". The document covered the whole of international law, as it then existed, in such a systematic manner that no topic for future work could possibly be overlooked. It was inspired by a confident optimism that reflected the codification ideals of an earlier period, rather than the practical difficulties experienced under the League of Nations. Thus it stated, if it is realized... that the eventual codification of the entirety of international law must properly be regarded as the ultimate object of the International Law Commission—then the question of selection of topics no longer presents an insoluble or perplexing problem. If we bear that in mind, then the question of selection of topics is no longer one of haphazard and, possibly, arbitrary choice, but one of fitting the work of the Commission at any particular time into the orbit of a comprehensive plan.389

153. It may be pointed out in this connexion that, in a way, the Commission inherited at its birth certain ideas and experience with respect to the codification of international law which in part went far back into the nineteenth century and even beyond. From the French Revolution up to the period before the First World War, philosophers and jurists in different parts of the world had attempted to embrace the entirety of the law of nations in codes of increasing complexity, from the very concise draft, still worth reading, which the Abbé Grégoire submitted to the French Convention, to elaborate projects comprising thousands of articles.

154. The Commission, on the other hand, in accordance with its Statute, had to take a more pragmatic approach and to select particular topics, a process for which the survey of the whole field of international law was the logical means. With respect to the question of establishing a general plan of codification, the report of the Commission covering the work of its first session stated:

The Commission discussed the question whether a general plan of codification, embracing the entirety of international law, should be drawn up. Those who favoured this course had in view the preparation at the outset of a plan of a complete code of public international law, into the framework of which topics would be inserted as they were codified. The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to

383 See p. 95 above.
385 See para. 137 above.
386 See para. 140 above.
388 Survey of International Law in relation to the Work of Codification of the International Law Commission (United Nations publication, Sales No. 48.V.1(1)).
389 Ibid., para. 19.
discuss a general systematic plan which might be left to later elaboration.\textsuperscript{390}

This initial statement marked the transfer from ultimate objectives to what were later to be called “the current needs of the international community”.

155. In this spirit the Commission, at its first session, reviewed 25 topics which represented most of the concrete matters on which the development of international law had focused until that moment. It dropped certain topics of a generic nature, such as “subjects of international law” and “sources of international law”. It also dropped the “laws of war”, a subject which only came back to the Commission, at any rate in certain of its aspects, when the formulation of the Nürnberg Principles and some related questions were referred to the Commission by the General Assembly in resolution 177 (II) of 21 November 1947. Ever since, the Commission has kept within the limits of the international law of peace and made its drafts strictly applicable to peaceful conditions only.

156. Looking back, in the perspective of time, from the twenty-fifth to the first session, what may seem striking is not so much the fact that the Commission renounced the codification of the whole of international law, but the degree to which an approximation to that ultimate aim has taken place under the original long-term programme. Most of the fourteen topics selected at the time have materialized, or will do in due course, into final drafts, including all the great chapters that were inherited from traditional international law. The law of treaties, the law of the sea, State succession, nationality, State responsibility, diplomatic and consular intercourse have been dealt with or are being studied. Perhaps the one single subject found on the 1949 list which was always considered to be a major one and on which the Commission did only initial work is the “treatment of aliens”. That subject was studied on the basis of the first reports submitted on State responsibility but it was decided later not to proceed, in such a context, with the development of any substantive rules the breach of which would entail State responsibility.

157. Nevertheless, the fact that a considerable part of the original programme could be realized, or is well under way, is somewhat overshadowed by important events which occurred after the Commission started its work, and which led to an increasing law-making activity.

158. A most far-reaching development, whose full impact on the work of the Commission could only be felt in the course of time, was the advent of the decolonization process. In the space of a few years, that process made its own contribution to the codification and progressive development of international law. As far as the Commission was concerned, the process made itself felt particularly in the field of State succession, where adaptations were made to meet the specific needs of new States.

159. Decolonization also had vast consequences for law-making activities outside the Commission. The new chapter of international law relating to economic development and economic and technical assistance draws its essential significance from those economic and social inequalities which only became fully manifest in the process of decolonization. The new law of economic development appeals to a very old and inherent concept of all law, namely, the concept of justice calling for equality of treatment of equals and, if need be, inequality of treatment of unequals in such a manner that justice may emerge in the final result. As the Secretary-General of the United Nations expressed it in a recent note, when defining “equity” as the main objective of collective economic security, “equal treatment is equitable only among equals”.\textsuperscript{391} In the sphere of the Commission’s activities, the study of the most-favoured-nation clause, recently undertaken by the Commission, is perhaps the one most immediately related to these ideas, even though from a technical point of view that subject is a specialized part of the law of treaties.

160. A law-making activity which had remained from the beginning outside the domain of the Commission emerged in the field of human rights. This was not entirely unexpected since the seed of this new international law was already planted in the Charter of the United Nations, and the Commission on Human Rights was established well before the International Law Commission. On the very day of its establishment the Commission was directed by the General Assembly, as has already been mentioned,\textsuperscript{392} to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. Within the purview of the same subject-matter, the Commission was also directed by the General Assembly to study the question of international criminal jurisdiction and to prepare a draft code of offences against the peace and security of mankind. As most of the other early studies and drafts that were assigned to the Commission by the General Assembly, such as the draft declaration on rights and duties of States and the draft code of offences, completed in 1951 and modified at later sessions,\textsuperscript{393} has more or less receded into the background of the Commission’s achievements, but read again in the light of the subsequent evolution of international relations, it might well provide a framework for rethinking the whole subject-matter of individual offences of international concern.

161. Another phenomenon which manifested itself on a scale unknown to pre-war international law and which constituted an important contribution to the elaboration of international texts of a legal nature, was the institutionalization of the international community through an increasing number of international organizations, each with its own legal system and methods. This

\textsuperscript{390} Yearbook ... 1949, p. 290, document A/925, para. 14.
\textsuperscript{391} E/5263, section 3, second paragraph.
\textsuperscript{392} See para. 155 above.
\textsuperscript{393} Yearbook ... 1951, vol. II, p. 134, document A/1858, para. 59. See also General Assembly resolution 1186 (XII) of 11 December 1957.
development was brought before the Commission as an aspect of the law of treaties, pursuant to a resolution of the United Nations Conference on the Law of Treaties recommending the study of agreements concluded by international organizations. The working being undertaken in this area will provide an opportunity to examine, apart from the much discussed relationship between international law and national law systems, the interaction of international law systems as represented by general international law on the one hand and organizational systems on the other. Previously the rapid progression of the institutionalization of the international community has led the Commission to review the legal relations between States and international organizations as laid down, at the time the Commission was established, in conventions on privileges and immunities and headquarters agreements within the framework of the United Nations system.

162. The technological revolution was the last external event whose international legal consequences were not foreseen in the long-term programme of work of the Commission. Certain law-making activities following from technological innovations, particularly with regard to the law of the sea, outer space and the human environment, have taken place outside the Commission. There is one significant exception, however; the fact that exploitation of the continental shelf suddenly came within the range of practical possibility induced the Commission to add a draft on that subject to the others it had prepared on the law of the sea. There are indications that old legal concepts now being further developed in the fields just mentioned will eventually have to be examined in a new light, either in the context of the Commission's current work, or as separate topics.

163. Compared to the wide possibilities that seemed to be within reach in the late 1940s, a different situation presents itself at the opening of a new era in the Commission's existence. The new trends in the development of international law which manifested themselves at an early date have in the meantime generated a mass of authoritative statements of a legal nature. There is no reason to assume that this process will slow down in the years to come, nor that the present specialization in law-making functions will diminish. The formulation of aims and principles of economic development is a field of continuous study; the interdependence of the component parts of the international community is reflected in the continuous growth of international institutions, each with its own practice contributing to international law. The position of the individual in the international legal system remains an inexhaustible source of legal study. The aspect of human duties and responsibilities under international law is due to become more prominent the more it becomes a fact of international concern that private persons, individual as well as corporate, in certain parts of the world are able to control an increasing amount of physical and economic power. The rapid development of science and technology in such fields as nuclear energy, the conquest of outer space and the exploitation of the sea-bed, makes any prediction very difficult. But it may be predicted with some confidence that in the aftermath of such events as the United Nations Conference on the Human Environment held at Stockholm in 1972 and the future conferences on the law of the sea there will be a series of new rules, and a development of old rules, on such matters as responsibility, co-operation and protection.

164. The Charter of the United Nations has been a stabilizing and consolidating factor. Its formulations were wide enough to be adapted by practice and judicial decision to needs that could not be foreseen in every detail at the time of their drafting. Actually, special organs were established to provide an authoritative interpretation of parts of the Charter, such as the Special Committee on the Definition of Aggression, which relieved the International Law Commission of one of the tasks assigned to it earlier. Of particular importance was the work of the Special Committee which drafted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the General Assembly by resolution 2625 (XXV) of 24 October 1970, which is essentially an extensive interpretation of principles laid down in Chapter I of the Charter. The Commission in its discussions has often referred to that important Declaration which was adopted solemnly and unanimously. The more nearly the goal of universal membership in the world Organization is attained, the more the Charter, enriched by the practice of its application, will provide the framework into which, having regard to Article 103, the creation of all international law has to fit.

165. Among the different bodies that work or have worked within the United Nations system on the definition of the principles of international law, the International Law Commission has very distinctive features. As a permanent organ the Commission has in its life-time garnered a rich experience. Thanks to the Codification Division of the Office of Legal Affairs of the United Nations Secretariat, it has at its disposal for any new undertaking a full scientific documentation. In the successive phases of the preparation of a draft, it profits from an exchange of views through government comments and annual debates in the Sixth Committee of the General Assembly. It maintains consultative and co-operative relations with organizations belonging to the United Nations family and with regional bodies engaged in legal work similar to its own.

166. One advantage of machinery such as the Commission is the continuous interaction, throughout the development of a codification draft, between professional expertise and governmental responsibility, between independent vision and the realities of international life. This element, so often absent from earlier attempts at codification, has proved to be the condition which offers the best prospects for the success of the codification conference to which a draft is finally submitted, and of the entry into force of any convention that eventually results. One obvious disadvantage is that such a safe
and solid method is also time-consuming; in effect the preparation by special rapporteurs of their reports, the time allowed for government comments, the consideration of those comments in the course of a second reading of a draft, and the fact that the General Assembly, like the Commission itself, is not a continuously functioning body, entails a process that often takes years. Whatever improvements it may be possible to make in the methods of work of the Commission, it is clear that there is an inbuilt periodicity at work that places certain limits on the Commission's ability to respond promptly to urgent requests.

167. Taking into account these inherent limitations, there are no statutory restraints on the future tasks of the Commission, subject to the decision of the General Assembly. As was already stated in the first Survey of International Law: "the task of the Commission in deciding upon its plan of work is simplified by the deliberate elasticity of its Statute" 296. The distinction in the Statute between progressive development of international law and its codification has proved in practice not to require different methodological approaches. Where a distinction has appeared is rather between modes of progressive development. There are the entirely new areas, undiscovered by pre-war international law, of which several examples have been given in the preceding paragraphs. Besides subjects in regard to which, as defined in the Statute "the law has not yet been sufficiently developed in the practice of States" 296 there are areas where such practice does exist but is insufficiently explored, as has become clear in connexion with the study of the law of succession. Finally, it may be recalled that the Commission has from time to time proposed certain specific innovations, independently of the more or less progressive nature of the context in which the innovations appeared.

168. With regard to the nature of the future tasks of the Commission, it is planned to proceed to the full completion of the structural projects that are already on its programme, that is to say, State responsibility and succession of States. The more comprehensive their scope appears to be, the more a certain overlap and inter-relation will make themselves felt, as has been already shown on the borderline between the law of treaties and the law of succession, and between the latter and the law of responsibility. Sometimes it appears necessary, when a subject becomes too extensive, to split off an autonomous part so that in that way a topic of codification generates new topics, but the original connexion will remain as a link in the structural coherence of international law. It is not sufficient to consider the systematic unity of international law as mainly a theoretical question; actually this was not the purpose of the first Survey. The unity and the interconnexion of all international law may well be seen as a practical contribution to its stability and credibility. The Commission is well equipped to watch over that particular aspect of codification.

169. With regard to the instruments of codification, it is to be expected that in the years ahead the codification convention will continue to be considered as the most effective means of carrying on the work of codification. Its preciseness, its binding character, the fact that it has gone through the negotiating stage of collective diplomacy at an international conference, the publication and wide dissemination of the conventions, all these are assets that will not lightly be abandoned. In the interests of the effectiveness of the codification process, the Commission would consider it desirable for the conventions adopted at codification conferences to receive as soon as possible the formal consent (ratification or accession) of States.

C. Consideration of the item by the Commission at its present session

170. At its present session, the Commission considered the item on the review of the Commission's long-term programme of work at its 1233rd to 1237th meetings.

171. It was noted that, in accordance with previous decisions of the Commission, endorsed by the General Assembly, the Commission will, for some years, have ample work to do to complete consideration of the five topics upon which it is at present actively engaged, 297 namely:

1. Succession of States in respect of treaties;
2. State responsibility;
3. Succession of States in respect of matters other than treaties;
4. The most-favoured-nation clause;
5. The question of treaties concluded between States and international organizations or between two or more international organizations.

172. It was also noted that, in addition to the topics listed in the preceding paragraph, other topics remain in the Commission's long-term programme of work as constituted by the list originally adopted in 1949 298 and the topics later added to it pursuant to recommendations of the General Assembly.

173. In the course of consideration of the long-term programme of work, apart from the topic of the law of the non-navigational uses of international water-courses, 299 among the topics repeatedly mentioned were the jurisdicional immunities of foreign States and of their organs, agencies and property; unilateral acts; treatment of aliens; and liability for possible injurious consequences arising out of the performance of certain lawful activities. Frequent reference was also made to the law relating to the environment and the law relating to economic development. Other topics on which one or more members thought that the Commission might envisage undertaking work included extradition, the law

296 Survey of International Law . . . (op. cit.), para. 20.
296 Article 15.
297 An account of the consideration by the Commission, at its twenty-fifth session, of the last four of those topics appears in chapters II to V above.
298 See foot-note 372 above.
299 See para. 175 below.
relating to international organizations, succession of Governments, peaceful settlement of disputes, recognition of States and Governments, and the right of asylum.

174. The Commission decided that it would give further consideration to the foregoing proposals or suggestions in the course of future sessions.

175. The Commission, pursuant to General Assembly resolution 2780 (XXVI) of 3 December 1971, gave special attention to the question of the priority to be given to the topic of the law of the non-navigational uses of international watercourses. In the discussions regarding this topic, most members supported the view that it was desirable to proceed promptly with the consideration of that topic. A number emphasized the urgency of taking up the legal aspects of the problem of pollution of international watercourses and proposed that this should be the first problem to be studied. The Commission also took into account the fact that the supplementary report on international watercourses would be submitted to members by the Secretariat in the near future. It accordingly considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report.

176. In connexion with the discussion regarding the Commission's future programme of work, reference was made by several members to the need to improve the current methods of work with a view to meeting the requirements of such a programme. The Commission also reiterated the recommendation it had made at its twentieth session, held in 1968, regarding the pressing need to increase the staff of the Codification Division of the Office of Legal Affairs so as to enable it to give to the Commission and to its special rapporteurs all the assistance required by the increasing demands of its work, especially in the area of research projects and studies.

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400 See paras. 149-150 above.

Chapter VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Succession of States in respect of treaties

177. As the former Special Rapporteur for this topic, Sir Humphrey Waldock, resigned from membership of the Commission upon being elected to the International Court of Justice during the twenty-seventh session of the General Assembly, the Commission decided to appoint Sir Francis Vallat as the new Special Rapporteur for the topic of succession of States in respect of treaties.

B. Organization of future work

178. At its twenty-sixth session the Commission intends to concentrate on two of the topics in its current programme of work, namely, succession of States in respect of treaties and State responsibility. This is without prejudice to the possibility, time permitting, of giving some time to the consideration of the remaining topics in its current programme of work, namely: succession of States in respect of matters other than treaties, the most-favoured-nation clause, and the question of treaties concluded between States and international organizations or between two or more international organizations. The Commission's intention is, in accordance with the practice as regards its provisional drafts, to complete at the next session the second reading of the whole of the draft articles on the topic of succession of States in respect of treaties. The Commission intends also to make substantial progress in the study of State responsibility, with a view to the preparation of a first set of draft articles on that topic as repeatedly requested by the General Assembly. In order to accomplish satisfactorily its intended programme, bearing in mind the complexity of the topics, the large number of draft articles involved and the need to achieve rapid progress in the study of State responsibility, members of the Commission deemed it indispensable to request a fourteen-week session for 1974.

C. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

179. Mr. Abdul Hakim Tabibi submitted a report (A/CN.4/272) on the fourteenth session of the Asian-African Legal Consultative Committee held at New Delhi, India, from 10 to 18 January 1973, which he had attended as an observer for the Commission.

180. The Asian-African Legal Consultative Committee was represented at the twenty-fifth session of the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 1235th meeting.

181. Mr. Sen noted the close ties and co-operation which existed between the Commission and the Committee which he represented. He conveyed to the Com-


402 See p. 155 above.
mission the admiration which the Asian-African community felt for the Commission's work, together with the hope that its recommendations would be even more widely followed in the future.

182. He also remarked that at its fourteenth session the Committee had had the satisfaction of welcoming 40 delegations of observers from States in the Americas and Europe. He emphasized that the Committee had extended its assistance during the past three years to non-member States in Asia and Africa, many of which participated in its sessions and other meetings through observers and regularly received the Committee's documentation. Although the Committee worked mainly in English, its more important documents were now being translated into French, and simultaneous English-French interpretation was provided at all meetings. The secretariat of the Committee had arranged for the issue of a publication on the constitutions of African States, which gave a brief account of constitutional developments in those countries. The Committee hoped thereby to arouse greater interest in African affairs and to focus attention on the process of constitutional development on that continent.

183. Turning to the topic of the law of the sea, to which the Committee had focused much of its attention at its fourteenth session, Mr. Sen said that extensive documentation had been prepared, abundant material had been collected, and an analysis had been made of the proposals before the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction in order to help the Governments of Asian and African States to prepare for the 1974 conference on the law of the sea. Of particular interest was the work of the Committee's Special Study Group on Landlocked States which had put forward tentative draft proposals on some matters affecting such States.

184. In addition to the topic of the law of the sea, Mr. Sen informed the Commission that the Committee had held a useful exchange of views on the organization of legal advisory services in Foreign Offices—a subject of great interest to developing countries in the region. The Committee had decided to organize, at the appropriate stage, a meeting of Foreign Office legal advisers to exchange views and information.

185. Mr. Sen noted the contributions made by the Committee's sub-committees. One sub-committee had dealt with the question of the use of waters of international rivers for agricultural purposes while another sub-committee had considered the question of prescription in international sales.

186. Other topics on the agenda of the Committee's fourteenth session and which related to the work of the Commission included State succession, State responsibility and the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law. In addition, the Committee's agenda included the question of pollution of international rivers.

187. Finally, Mr. Sen expressed great interest in the Commission's discussion of its long-term programme of work and said he could assure the Commission that, whatever its final decisions on that subject, its work would always command the same degree of respect as had the draft articles produced by the Commission on various topics.

188. The Commission was informed that the fifteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Tokyo, Japan, in January 1974. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

189. Mr. Richard D. Kearney attended the seventeenth session of the European Committee on Legal Co-operation held at Strasbourg, France, in November 1972, as an observer for the Commission and made a statement before the Committee.

190. The European Committee on Legal Co-operation was represented at the twenty-fifth session of the Commission by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1236th meeting.

191. Mr. Golsong said that the Commission's relations with the European Committee on Legal Co-operation, the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee, as well as the relations between the last-named three bodies, were very important to the synchronized development of international law.

192. Turning to aspects of the Committee's activities which had a bearing on the Commission's long-term programme of work as it might be deduced from the "Survey of International Law" prepared by the Secretary-General of the United Nations, Mr. Golsong first mentioned the fulfilment in good faith of the obligations of international law assumed by States. With regard to the relations between those obligations and obligations created by municipal law, he brought to the attention of the Commission a recently adopted decision of the European Court of Human Rights concerning the application of article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms. That article provided that, if an international court found that an international obligation towards a private person had been violated, it might subsequently grant just satisfaction if internal law alone could not eliminate the consequences of the breach of an international obligation. The judgement of the European Court had a number of interesting aspects, particularly with regard to the implicit power of an international

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court to construe its own judgments and to the concept of good faith.

193. As regards the jurisdictional immunities of States, Mr. Golsong stated that the European Convention recently concluded on the subject would probably enter into force in 1974. Although its application was limited geographically, the Convention had the merit of bridging the gap between the different conceptions held in common-law countries and the countries of the European continent with regard to the jurisdictional immunities of States.

194. With regard to extra-territorial questions involved in the exercise of jurisdiction by States, Mr. Golsong indicated that the Committee he represented was endeavouring to bring national systems of criminal law into line, by expanding the competence of courts in certain States members of the Council of Europe to deal with acts committed abroad.

195. On the question of State responsibility, Mr. Golsong noted that the European Committee on Legal Co-operation was particularly interested in that question because it had been obliged on several occasions to take up that problem without being able to define its position.

196. Mr. Golsong informed the Commission in detail of the activities of the Council of Europe concerning the protection of international watercourses against pollution. He stated that a draft European convention had been drawn up on the subject, which concerned both the law of international watercourses and the law relating to the environment. He explained that that text had been intended to settle a number of problems, the first of which was that of the balance to be struck between uniform rules for all the future contracting parties—the seventeen States members of the Council of Europe—and the particular obligations to be laid down for the riparian States of a particular watercourse. The second was the settlement of disputes regarding the interpretation or application of the future convention, of co-operation agreements and of any instruments drawn up pursuant to such agreements. The third was that of balancing the charges to be borne by the contracting parties. The last problem was that of the relationship between the pollution of fresh water and the telluric pollution of coastal waters.

197. On the question of treaties concluded between States and international organizations or between two or more international organizations, he said that the Committee was looking for ways to speed up procedures for the ratification of multilateral conventions and to reduce the number of reservations. In addition, an exchange of views on the techniques of international codification was to be held shortly, with a view to general application of the rules laid down.

198. The Commission was informed that the eighteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

3. INTER-AMERICAN JURIDICAL COMMITTEE

199. Mr. Richard D. Kearney attended the last session of the Inter-American Juridical Committee, held at Rio de Janeiro, Brazil, in January and February 1973, as observer for the Commission and made a statement before the Committee.

200. The Inter-American Juridical Committee was represented at the twenty-fifth session of the Commission by Mr. E. Vargas Carreño, who addressed the Commission at its 1227th and 1228th meetings.

201. He said he first wished to congratulate the Commission on the important contribution which it had been making to the codification and progressive development of international law. The Committee which he represented attached great importance to its collaboration with the Commission. It was impossible to formulate regional principles and rules of law without taking into account the rules and principles which were of universal application. The interdependence of States brought about by the multiplication of international relations had facilitated the universalization of international law. He expressed the view that, although there should not be any conflict between general international law and regional legal systems on the same subject-matter, the latter might nevertheless have their own legal institutions, such as the right of diplomatic asylum, in Latin America, or other questions which were not settled by general international law. On the other hand, in its work of codifying and progressively developing international law, the Commission should take account of the practices and doctrinal formulations of the various regions and legal systems of the world, especially when those practices and formulations came from inter-State judicial bodies.

202. Mr. Vargas Carreño went on to say that, following the revision of the Charter of OAS, the Committee had become one of the central organs of that organization. It was now carrying out its work mainly by means of resolutions and draft conventions, which it either prepared on its own initiative or at the request of the main organs of OAS, namely, the General Assembly and the Meeting of Consultation of Ministers for Foreign Affairs.

203. Turning to the work of the Committee at its last session, he said that the Committee had adopted a resolution concerning the law of the sea which attempted to reconcile contradictory positions in an effort to produce a document representing the points of agreement of the Latin American countries. He explained that the debates had centred on the legal character to be ascribed to that area of the sea extending 200 miles from the coast line. Some had favoured full sovereignty of the coastal State over a distance of 200 nautical miles, while others favoured a territorial sea of a breadth of not more than twelve miles, with a second zone, termed "patrimonial sea" or "economic zone", extending up to 200 miles. With regard to the second zone, questions arose regarding the necessity to respect the freedoms of navigation and overflight, and freedom to lay submarine cables and pipelines. The
Committee's resolution reflected the various opinions brought out in the debates. In addition, the resolution indicated that there existed three areas of the sea-bed and ocean floor, a fact which implied a modification of the international law of the sea. In the first area, up to a distance of 200 miles, the coastal State exercised sovereignty and jurisdiction over the sea-bed and subsoil of the sea. The second area, beyond the 200-mile limit and up to the edge of the continental slope, was legally termed the “continental shelf”; in it, the coastal State exercised sovereignty for purposes of exploration and exploitation of natural resources. Lastly, beyond those two areas, which were subject to State jurisdiction, the sea-bed and ocean floor and the resources thereof constituted the “common heritage of mankind”, as acknowledged by General Assembly resolution 2749 (XXV) of 17 December 1970.

204. Regarding another subject on which the Committee had focused much of its attention at its last session, Mr. Vargas Carreño stated that the Committee had approved a draft inter-American convention on extradition. He explained that the draft convention, inter alia, specified the obligation of each contracting State to extradite, to another contracting State which made the request, any persons charged, prosecuted or sentenced by the judicial authorities of the requesting State. It was necessary that the alleged offence should have been committed in the territory of the requesting State; if it had been committed elsewhere, the requesting State must have had, at the time, jurisdiction under its own laws to try a person for such an offence committed abroad. For the purposes of determining what offences were extraditable, the draft offered contracting States to the future convention the choice between two criteria. The first was the penalty legally applicable for the alleged offence, irrespective of the denomination of the offence and of the existence or non-existence of extenuating or aggravating circumstances. Only offences punishable at the time of their commission by imprisonment for a minimum of one year under the law of both the requesting and the requested State, would constitute extraditable offences. The second criterion consisted of lists of offences which each contracting State might attach as an annex to the future convention at the time of signature or ratification. Under the draft, there would be no extradition in the following cases: first, where the person concerned had already served a sentence equivalent to the prescribed penalty or had been pardoned, amnestied, acquitted, or discharged in respect of the alleged offence; secondly, where the statutory time-limit for prosecution or for the execution of the penalty under the laws of either the requesting State or the requested State had expired before extradition; thirdly, where the person concerned was due to be tried by a special court in the requesting State; fourthly, where, under the laws of the requested State, the alleged offence was classed as a political offence or was connected with such an offence. Mr. Vargas Carreño pointed out that the last exception mentioned was particularly important because it embodied a well-established Latin American practice according to which a State called upon to decide whether to extradite or grant asylum was competent to rule unilaterally on whether the alleged offence constituted a political or an ordinary offence. The draft specified, however, that none of its provisions should preclude extradition for the crime of genocide or any other offence which was extraditable under a treaty in force between the requesting and the requested States. The final clauses of the draft specified that the future convention should be open for signature not only by States members of OAS but also by any other State which so requested. It was possible that the forthcoming Assembly of OAS would convene a specialized conference of plenipotentiaries to examine the draft convention.

205. Finally, he wished to draw attention to the fact that the Inter-American Juridical Committee's agenda for its forthcoming sessions contained a number of items that were closely connected with topics under consideration by the Commission or listed in its programme of work. That was an additional reason for the keen interest with which he and the other members of the Committee followed the Commission's work. In the near future the Committee would be examining the questions of the immunity of the State from jurisdiction and of the nationalization of foreign property and international law.

206. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Jorge Castañeda, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

D. Date and place of the twenty-sixth session


E. Representation at the twenty-eighth session of the General Assembly

208. The Commission decided that it should be represented at the twenty-eighth session of the General Assembly by its Chairman, Mr. Jorge Castañeda. It decided that Mr. Castañeda should also represent the Commission at the observance of the twenty-fifth anniversary of the International Law Commission by the General Assembly to be held during its twenty-eighth session in accordance with resolution 2927 (XXVII) of 28 November 1972.

F. Commemoration of the twenty-fifth anniversary of the opening of the Commission's first session

209. The Commission decided to commemorate at its next session, in 1974, the twenty-fifth anniversary of the opening of its first session.
G. Gilberto Amado Memorial Lecture

210. In accordance with a decision taken by the Commission at its twenty-third session and thanks to another generous grant by the Brazilian Government, the second Gilberto Amado Memorial Lecture was given at the Palais des Nations on 11 July 1973. The lecture was delivered by Professor Constantin Eustathien, a former member of the Commission, who spoke on "Unratified Codification Conventions". It was attended by members of the Commission, the Legal Counsel of the United Nations, the Secretary and members of the secretariat of the Commission, the Director of the International Law Seminar and distinguished jurists. The lecture was followed by a dinner. The Commission expressed the opinion that it was desirable to print the above-mentioned lecture, at least in English and French, with a view to bringing it to the attention of the largest possible number of specialists in the field of international law.

211. The Commission expressed its gratitude to the Brazilian Government for its renewed gesture, which had made the second Gilberto Amado Memorial Lecture possible, and hoped that that Government would find it possible to renew its financial assistance so as to make possible the continuation of the series of lectures as a tribute to the memory of this illustrious Brazilian jurist who had been for so many years a member of the International Law Commission. The Commission asked Mr. Sette Câmara to convey its views to the Brazilian Government.

H. International Law Seminar

212. Pursuant to General Assembly resolution 2926 (XXVII) of 28 November 1972, the United Nations Office at Geneva organized during the Commission's twenty-fifth session a ninth session of the International Law Seminar intended for advanced students of that discipline and young officials of government departments, mainly Ministries of Foreign Affairs, whose functions habitually include consideration of questions of international law.

213. Between 21 May and 8 June 1973 the Seminar held twelve meetings devoted to lectures followed by discussion; the last meeting was set aside for the evaluation of the Seminar by the participants.

214. Twenty-two students from 21 different countries participated in the Seminar; they also attended meetings of the Commission during that period, had access to the facilities of the Palais des Nations Library and had the opportunity to attend a film show given by the United Nations Information Service.

215. Seven members of the Commission generously gave their services as lecturers. The lectures dealt with various subjects, some connected with the past, present and future work of the Commission, namely, special missions (Mr. Bartos), the most-favoured-nation clause (Mr. Ustor) and the future work of the Commission (Mr. Kearney). Two lectures were given on the International Court of Justice: one dealing with the Court and judicial review (Mr. Elias) the other with the problem of intervention in the proceedings of the Court (Mr. Hambro). One lecture dealt with the question of new trends in the law of the sea (Mr. Castañeda), another with the General Assembly agenda item on the need to consider suggestions regarding the review of the United Nations Charter (Mr. Yasseen), while one lecture was devoted to the pacific settlement of disputes in Africa (Mr. Bedjaoui).

216. In addition, the Legal Adviser of the International Labour Office (Mr. Wolf), spoke on the subject of the ILO and the International Labour Conventions, while the Director of the Department of Principles and Law of the International Committee of the Red Cross (Mr. Pilloud) spoke on the international humanitarian law applicable in armed conflicts. The last-named lecture was held in connexion with General Assembly resolution 3032 (XXVII) of 18 December 1972 calling for the study and teaching of principles of respect for international humanitarian rules applicable in armed conflicts. Ambassador J. Humbert, the High Commissioner of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts, to be held in Geneva early in 1974, was present. Mr. Raton, Director of the Seminar, gave an introductory talk on the International Law Commission.

217. The Seminar was held without cost to the United Nations, which did not contribute to the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Twelve candidates were awarded such fellowships. Two holders of UNITAR scholarships were also admitted to the Seminar, and in addition one candidate received a combined fellowship from the seminar and UNITAR. The award of fellowships is making it possible to achieve a much better geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending the session solely by lack of funds. It is therefore to be hoped that the above-mentioned Governments will continue to be generous and even that, if possible, one or two additional fellowships will be granted to offset the reduced real value of fellowships following changes made in the parities of certain currencies since 1971. It is especially gratifying to note that several of the above-mentioned Governments have taken this situation into account and accordingly increased or promised to increase the amount of the fellowships. It should be noted that the names of those to be awarded fellowships are made known to the donor Governments and that the recipients are likewise informed of the source of their fellowships,
CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

NOTE. This list includes all United Nations documents identified in the text by their symbols for which no detailed reference is given in a foot-note.

<table>
<thead>
<tr>
<th>Document</th>
<th>Title</th>
<th>Observations and references</th>
</tr>
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<td>Panama: Draft Declaration on the rights and duties of States</td>
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<td>Legal problems relating to the utilization and use of international rivers: report of the Secretary-General [summary of legislative texts and treaty provisions]</td>
<td>Idem. For the full text of the legislative texts and treaty provisions, see United Nations publication, Sales No. 63.V.4.</td>
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<td>A/8058</td>
<td>Permanent sovereignty over natural resources—The exercise of permanent sovereignty over natural resources and the use of foreign capital and technology for their exploitation: report of the Secretary-General</td>
<td>Mimeographed.</td>
</tr>
</tbody>
</table>

237
<table>
<thead>
<tr>
<th>Document</th>
<th>Title</th>
<th>Observations and references</th>
</tr>
</thead>
<tbody>
<tr>
<td>A/CN.4/SC.1/WP.7</td>
<td>Idem.—The social nature of personal responsibilities—working paper prepared by Mr. Angel Modesto Paredes</td>
<td>Ibid., p. 256.</td>
</tr>
<tr>
<td>E/5263</td>
<td>Collective economic security: preliminary consideration of the concept, its scope and potential practical consequences—note by the Secretary-General</td>
<td>Mimeographed.</td>
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<tr>
<td>ILC (XIV)/SC.1/WP.1</td>
<td>State responsibility: The duty to compensate for the nationalization of foreign property—working paper submitted by Mr. E. Jiménez de Aréchaga</td>
<td>Yearbook ... 1963, vol. II, p. 237, document A/5509, annex I, appendix II.</td>
</tr>
<tr>
<td>ILC (XIV)/SC.1/WP.2</td>
<td>Idem.—An approach to State responsibility—working paper submitted by Mr. Angel Modesto Paredes and Add.1</td>
<td>Ibid., p. 244.</td>
</tr>
</tbody>
</table>
### Check List of Documents of the Twenty-Fifth Session

#### Not Reproduced in This Volume

<table>
<thead>
<tr>
<th>Document</th>
<th>Title</th>
<th>Observations and References</th>
</tr>
</thead>
<tbody>
<tr>
<td>A/CN.4/265</td>
<td>Provisional agenda</td>
<td>Mimeoographed. For the agenda as adopted, see p. 164 above (A/9010/Rev.1, para. 9).</td>
</tr>
<tr>
<td>A/CN.4/268/Add.1</td>
<td>Filling of casual vacancies: addendum to the note by the Secretariat—list of candidates</td>
<td>Mimeoographed.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Idem.</td>
</tr>
<tr>
<td>A/CN.4/L.193</td>
<td>Request from the Economic and Social Council for the International Law Commission's comments on the report of the <em>Ad hoc</em> Working Group of Experts of the Commission on Human Rights concerning the question of Apartheid from the point of view of international penal law</td>
<td>Idem.</td>
</tr>
<tr>
<td>A/CN.4/L.194</td>
<td>Draft articles on State responsibility: titles of the draft and of chapters I and II, titles and texts of articles 1-6 adopted by the Drafting Committee</td>
<td>Texts reproduced in the summary records of the 1225th and 1226th meetings (vol. I).</td>
</tr>
<tr>
<td>Add.1-3</td>
<td></td>
<td>Idem.</td>
</tr>
<tr>
<td>A/CN.4/L.196 and</td>
<td>Draft articles on succession of States in respect of matters other than treaties: titles of the draft articles, the introduction, part I and section I, and articles 1-8 adopted by the Drafting Committee</td>
<td>Texts reproduced in the summary records of the 1230th, 1231st, 1239th and 1240th meetings (vol. I).</td>
</tr>
<tr>
<td>Add.1</td>
<td></td>
<td>Idem.</td>
</tr>
<tr>
<td>Add.1-7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A/CN.4/L.199 and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Add.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A/CN.4/L.200 and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Add.1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A/CN.4/L.201,</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A/CN.4/L.202</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A/CN.4/L.203</td>
<td>The most-favoured-nation clause: title of the draft articles, titles and texts of articles 1 to 7 adopted by the Drafting Committee</td>
<td>Texts reproduced in the summary record of the 1238th meeting (vol. I).</td>
</tr>
<tr>
<td>A/CN.4/ SR.1200-</td>
<td>Provisional summary records of the 1200th to 1249th meetings of the International Law Commission</td>
<td>Mimeoographed. For the final text, see vol. I.</td>
</tr>
<tr>
<td>1249</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

239
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