NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

[Agenda item 5]

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Fourth report on nationality in relation to the succession of States, by Mr. Václav Mikulka, Special Rapporteur

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Introduction

1. The nationality of legal persons in relation to the succession of States is part of the topic that the Commission decided to include in its agenda at its forty-fifth session, in 1993, and which was initially entitled "State succession and its impact on the nationality of natural and legal persons".[1] In 1996 the Commission changed the title to "Nationality in relation to the succession of States", which continues to cover both the nationality of individuals and that of legal persons.[2]

2. In paragraph 8 of its resolution 51/160 of 16 December 1996, the General Assembly, having taken note of the completion of the preliminary study of the topic by the Commission, requested it to undertake the substantive study of the topic. It endorsed the Commission's intention to separate the consideration of the question of the nationality of natural persons from that of the nationality of legal persons and to give priority to the former.[3]

3. In paragraph 5 of its resolution 52/156 of 15 December 1997, the General Assembly "invite[d] Governments to submit comments and observations on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the International Law Commission in deciding on its future work on this portion of the topic".

4. Since 1993, the General Assembly, when considering the part of the Commission's report relating to this topic, repeatedly invited Governments to submit materials including national legislation, decisions of national tribunals and diplomatic and official correspondence relevant to the topic.[4] The documentation provided thus far, however, covers mainly the problem of the nationality of individuals.

[1] *Yearbook … 1993*, vol. II (Part Two), p. 96, para. 427.

[2] *Yearbook … 1996*, vol. II (Part Two), p. 76, para. 88.

[3] The division of the topic into two parts was suggested by the Special Rapporteur in his first report (*Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50), and again in his second report (*Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, pp. 151–152, paras. 169–172). It was also recommended by the Working Group (established at the forty-seventh session of the Commission) during the forty-eighth session of the Commission (see *Yearbook … 1996*, vol. II (Part Two), p. 75, para. 80). When considering the recommendations by the Working Group, the Commission undertook, *inter alia*, to take "[t]he decision on how to proceed with respect to the question of the nationality of legal persons … upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit on the practical problems raised in this field by a succession of States" (ibid., p. 76, para. 88 (*d*)).

[4] See General Assembly resolutions 48/31 of 9 December 1993, para. 7; 49/51 of 9 December 1994, para. 6; and 50/45 of 11 December 1995, para. 4.

CHAPTER I

History of the consideration of the nationality of legal persons in relation to the succession of States

A. Forty-seventh to forty-ninth sessions of the Commission

5. At its forty-seventh to forty-ninth sessions (1995–1997), the Commission focused on the nationality of natural persons, while the nationality of legal persons was at the margin of its attention.[5] There had, however, been some discussion concerning the nationality of legal persons during the preliminary study of the whole topic, when the Commission considered the first and the second reports of the Special Rapporteur.

6. The first report[6] addressed the question of the nationality of legal persons. Two main points were underlined by the Special Rapporteur: first that *there existed no rigid notion of nationality with respect to legal persons*, and secondly, that *there was a limit to the analogy that could be drawn between nationality of individuals and the nationality of legal persons*.

7. Concerning the first point, the report stressed that, even in the legal regimes in which the concept of nationality of legal persons is recognized, different tests of nationality are used for different purposes. In many cases the traditional criterion of the place of incorporation and the place where a corporation has a registered office establishes only a prima facie presumption of the bond of nationality between the corporation and the State. It is a usual practice of States to provide expressly, in a treaty or in their domestic laws, which legal persons may enjoy the benefits of treaty provisions reserved to "nationals" or to define as "nationals" corporations for the purposes of application of national laws in specific fields (fiscal law, labour law, etc.).[7]

8. As regards the second point, the Special Rapporteur recalled the warning by most authors that, while sometimes convenient, the analogy between the nationality of natural persons and that of legal persons might be misleading.[8]

9. In the second report, the problems of the nationality of legal persons were considered in chapter II.[9] The main purpose of that chapter was to illustrate briefly the purposes for which the determination of the nationality of legal persons might be needed. Four areas had been identified in which the problem of the nationality of legal persons might arise: conflicts of laws, diplomatic protection, treatment of aliens and State responsibility.[10]

10. A number of rules under *private international law* are designed to connect a legal person to the laws of a State. The nationality of the legal person is one such criterion for connection.[11] But to be used as such, the nationality itself has first to be determined. The nationality is usually established by reference to one or more elements such as incorporation or formation, registered office, centre of operations or actual place of management, and, sometimes, control or dominant interest. Despite their common characteristics, the various legislations are far from uniform. The criteria are sometimes combined, particularly in many treaties on establishment and trade.[12] International conventions, however, frequently refer to the nationality of commercial corporations without regulating how that nationality is to be determined.

11. As in the case of an individual, nationality is a prerequisite for the exercise, by a State, of *diplomatic protection* of a legal person.[13] In the *Barcelona Traction* case, ICJ observed that:

> The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist.[14]

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[5] This work resulted in the adoption, on first reading, of the draft articles on nationality of natural persons in relation to the succession of States (see *Yearbook …1997*, vol. II (Part Two), pp. 13–14, para. 41).

[6] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, pp. 166–167, paras. 46–50.

[7] Ibid., p. 167, para. 49.

[8] According to *Oppenheim's International Law*, "those rules of international law which are based upon the nationality of individuals are not always to be applied without modification in relation to corporations. Various considerations militate against attributing to the nationality of corporations the same consequences as attach to the nationality of individuals: these include the manner in which corporations are created, operate and are brought to an end, their development as legal entities distinct from their shareholders, the inapplicability to companies of the essentially personal conception of allegiance which underlies the development of much of the present law regarding nationality, the general absence in relation to companies of any nationality legislation to provide a basis in municipal law for the operation of rules of international law, the great variety of forms of company organization and the possibilities for contriving an artificial and purely formal relationship with the state of 'nationality'" (Jennings and Watts, eds., pp. 860–861).

[9] *Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, pp. 147–151, paras. 140–167.

[10] Ibid., p. 148, para. 142.

[11] Under Anglo-American law, the norms relating to the legal status of commercial corporations do not include nationality as a criterion for connection with the domestic law, but go directly to incorporation or formation. See Caflisch, "La nationalité des sociétés commerciales en droit international privé", pp. 130–142.

[12] For examples of such treaties, see *Yearbook … 1996*, vol. II (Part One), document A/CN.4/474, para. 145, footnote 222.

[13] "As international law grants to each State the right to proffer diplomatic protection to its nationals, a corporation, in order to obtain diplomatic protection would have to prove that it possessed the nationality of the State concerned." (Seidl-Hohenveldern, *Corporations in and under International Law*, p. 7.)

[14] *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 43.

12. According to some authors, for determining the nationality of a legal person in the context of diplomatic protection, the criterion of substantial interest or control becomes much more relevant than in private international law. Other authors, however, warn against the "lifting of the corporate veil" to which acceptance of the "control test" would lead and consider it quite inappropriate even in the area of diplomatic protection.[15]

13. The concept of the nationality of legal persons also seems to be generally accepted in the sphere of the *law of aliens*.[16] The nationality of legal persons acquires particular importance in time of hostilities. Its determination, however, differs from that under private international law. To categorize foreign corporations as "nationals" of enemy States, criteria such as that of control by enemy nationals have often been used. This was, for example, the case of the United States Executive Order No. 8389 of 10 April 1940 which defined the term "national" of Norway or Denmark.[17] It has, however, been observed by some authors that the question was not so much of determining nationality as of establishing the "enemy nature" of the corporation.[18]

14. In the field of the *responsibility of States* under international law for certain acts or activities of their nationals, the nationality of legal persons is usually based on the control of the corporation or on the notion of "*intérêt substantiel*".[19] The problem of the nationality of legal persons may also occur in relation to the application of Security Council resolutions concerning sanctions against certain States.

15. Thus, for example, in paragraph 3 of its resolution 883 (1993), the Security Council, acting under Chapter VII of the Charter of the United Nations, decided that all States should freeze funds and financial resources "owned or controlled, directly or indirectly, by:

(*a*) The Government or public authorities of Libya; or

(*b*) Any Libyan undertaking".[20]

16. The Committee established by the Security Council pursuant to resolution 748 (1992) concerning the Libyan Arab Jamahiriya[21] recognized that "States may face difficulties in deciding about the entities within their jurisdiction to be subject to measures imposed through Security Council resolution 883 (1993)". It therefore offered its advice to the States and indicated, at the same time, that:

– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in Security Council resolution 883 (1993), is a majority shareholder, should be considered to be Libyan entities subject to the assets freeze (paras. 3 and 4);

– Entities in which the Government or public authorities of Libya, or any Libyan undertaking as defined in the resolution, is a minority shareholder, but exercises effective control, may be considered a Libyan entity subject to the assets freeze (paras. 3 and 4) of the resolution.[22]

17. The question arises, however, as to whether the determination of Libyan entities may be considered as equal to the determination of their Libyan nationality. While both notions may to a certain extent overlap, they are not interchangeable.[23]

18. Owing to their character (embargo), the measures against Serbia and Montenegro adopted by the Security Council in its resolution 757 (1992) prohibited supplies or remitting of funds "to any commercial, industrial or public utility undertaking in the Federal Republic of Yugoslavia (Serbia and Montenegro)"or "to persons or bodies within the Federal Republic of Yugoslavia"[24] irrespective of their nationality. On the other hand, the resolution obliged

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[15] Seidl-Hohenveldern stresses that "[i]n the *Barcelona Traction* case the International Court of Justice, while admitting that the corporate veil may be lifted under certain circumstances, refused to do so in the case before it. The Court would have accepted the *jus standi* of the shareholders' home State had the corporation ceased to exist. On the demise of a corporation its shareholders become the owners of its assets on a *pro rata* basis" (*Corporations* ..., p. 9).

[16] Under English law and American law, the nationality of legal persons is dependent on the criterion of incorporation or formation. French law determines it by reference to relevant criteria in the area of conflicts of laws the actual place of management or sometimes incorporation or formation while under German law it is generally determined on the basis of the registered office (Caflisch, loc. cit., pp. 130, 133 and 137).

[17] According to the Order "[t]he term 'national' of Norway or Denmark shall include ... any partnership, association, or other organization, including any corporation organized under the laws of, or which on April 8, 1940, had its principal place of business in Norway or Denmark or which on or after such date has been controlled by, or a substantial part of the stock, shares, bonds, debentures, or other securities of which has been owned or controlled by, directly or indirectly, one or more persons, who have been, or who there is reasonable cause to believe have been, domiciled in, or the subjects, citizens or residents of Norway or Denmark at any time on or since April 8, 1940, and all persons acting or purporting to act directly or indirectly for the benefit or on behalf of the foregoing" (5 Fed. Reg. 1400, 1940).

[18] See Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre*, pp. 55 et seq., 66–68 et seq. and 98 et seq.

[19] See Caflisch, loc. cit., p. 125.

[20] The resolution further stipulates that, for its purposes, "Libyan undertaking ... means any commercial, industrial or public utility undertaking which is owned or controlled, directly or indirectly, by:

(i) The Government or public authorities of Libya,

(ii) Any entity, wherever located or organized, owned or controlled by the Government or public authorities of Libya, or

(iii) Any person identified by States as acting on behalf of the Government or public authorities of Libya or by any entity, wherever located or organized, owned or controlled by the Government or public authorities of Libya for the purposes of the present resolution".

[21] The mandate of the Committee is defined in paragraph 9 of Security Council resolution 748 (1992) and paragraphs 9 and 10 of Council resolution 883 (1993).

[22] The Committee further stated that "[s]uch cases must be examined on a case-by-case basis, taking into account, *inter alia*:

– The extent of Libyan ownership of the entity;

– The spread of ownership of the remaining shares, in particular, if Libyan persons or entities constitute the single largest block of shareholders, and other shareholding is diffuse;

– Representation of the Libyan Government and other Libyan undertakings on the board, or in the management of the entity and their capability to name directors or managers or otherwise influence business decisions".

(New consolidated guidelines of the Committee for the conduct of its work (S/AC.28/1994/CRP.2/Rev.3), para. 7.)

[23] The same resolution, on the other hand, uses the concept of nationality in order to define subjects of States other than the Libyan Arab Jamahiriya, affected by the obligation under the resolution (see paragraphs 3, 5 and 6).

[24] Security Council resolution 757 (1992), para. 5.

the States to prohibit such dealing by their "nationals"[25] or from their territories. This language was also used in Security Council resolution 1160 (1998) on Kosovo.[26]

19. The questions raised in the second report of the Special Rapporteur and summarized in the previous paragraphs do not represent the core issues of the present topic. They are, however, intrinsic to any analysis of the problem of the impact of the succession of States on the nationality of legal persons. Their discussion under the present topic, therefore, cannot be avoided.

20. In his first report, the Special Rapporteur wondered whether the study of problems of the nationality of legal persons had the same degree of urgency as the study of problems concerning the nationality of natural persons.[27]

21. Some members of the Commission were of the view that the question deserved prompt consideration. They stressed that rules concerning the nationality of legal persons might be more common in State practice and customary law, thus lending themselves more easily to systematization, in contrast to the striking absence of specific provisions on the nationality of natural persons in the context of State succession in the legislation of the majority of States.

22. The majority of the members of the Commission took the view that the question of the nationality of legal persons was highly specific. They therefore suggested that it should only be considered after the completion of the work on the nationality of natural persons.[28]

23. The Working Group established at the forty-seventh session of the Commission did not examine the question of the nationality of legal persons because of the laconic character of the relevant paragraphs of the first report devoted to the problem. However, it considered it necessary to underline that the lack of progress on this part of the topic should not be interpreted as reflecting unawareness of the importance of the question on its part.[29] In his second report, the Special Rapporteur suggested that, in order to provide some guidance for the future work of the Commission on this part of the topic, the Working Group should devote some time, during the forty-eighth session of the Commission, to the consideration of the problems mentioned in paragraphs 169–172 of his second report.[30] The Working Group, however, spent its time mainly on the problems of the nationality of natural persons and did not have time to consider legal persons.

24. Taking into account that, during its fifty-first session in 1999, the Commission might be able to complete the second reading and consequently its work on the nationality of natural persons, the Special Rapporteur considers that, during its fiftieth session, the Commission might wish to request the Working Group to devote some time to the study of the problem of the nationality of legal persons in relation to the succession of States. The Working Group could, in particular, discuss the general orientation to be given to the work on this part of the topic and identify the issues on which the Commission might encourage the Governments to concentrate when submitting their comments and observations in accordance with paragraph 5 of General Assembly resolution 52/156. The work of the Working Group would have a purely "preparatory" character and would in no way prejudice the recommendation that the Commission would address to the General Assembly concerning this part of the topic, when it has concluded its work on the nationality of natural persons.

B. Views expressed in the Sixth Committee during the fiftieth to fifty-second sessions of the General Assembly concerning the nationality of legal persons

25. During the fiftieth and fifty-first sessions of the General Assembly (1995–1996), several representatives in the Sixth Committee associated themselves with the view of the Commission that, despite the analogy between the nationality of natural persons and that of legal persons, the latter was particularly distinct from the former.

26. According to some representatives, this subject was important in practical terms and interesting from the legal standpoint. It was also observed that, contrary to the situation of natural persons who could, through a change of nationality, be affected in the exercise of fundamental civil and political rights and, to a certain extent, of economic and social rights, State succession had mainly economic or administrative consequences for legal persons.[31]

27. The point was also made that, because the practice of States with regard to the nationality of legal persons presented many common elements, the issue offered more fertile ground for codification in the traditional sense than that of the nationality of natural persons.[32]

28. During the fifty-second session of the General Assembly (1997), some delegations in the Sixth Committee once again stressed the importance of the Commission's future work on the nationality of legal persons in relation to the succession of States. It was observed, in particular, that the nationality of legal persons might also have consequences for individuals' property rights.[33]

C. Written comments by Governments

29. There have thus far been no written observations by Governments in response to the request contained in paragraph 5 of General Assembly resolution 52/156.

[25] Ibid., paras. 4 (*b*) and (*c*), 5 and 7 (*b*).

[26] Paragraph 8 of the resolution.

[27] *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 167, para. 50.

[28] *Yearbook … 1995*, vol. II (Part Two), pp. 39–40, para. 205.

[29] Ibid., p. 39, para. 200, comments of the Special Rapporteur.

[30] *Yearbook … 1996*, vol. II (Part One), p. 121, document A/CN.4/474.

[31] "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session" (A/CN.4/472/Add.1), para. 12.

[32] Ibid.

[33] "Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-second session" (A/CN.4/483), para. 60.

CHAPTER II

Orientation to be given to the work on this part of the topic

30. Before the Commission takes a decision on how to proceed with the question of the nationality of legal persons, it should re-establish a working group. The task of the working group should be to consider any possible approach to this part of the topic. Such a preliminary examination would facilitate a decision by the Commission. The present chapter offers several issues for consideration by the working group.

A. Should the nationality of legal persons be considered only in the context of the succession of States?

31. From the title of the topic, it appears that the Commission has not set itself the task of considering the problem of the nationality of legal persons as such. It has limited the problem to the effect on the nationality of legal persons in case of succession of States. Such succession affects certain elements that are used as criteria for determining the nationality of a legal person and, accordingly, may lead to a change of nationality.

32. It has to be recalled that, contrary to the question of the nationality of natural persons, which the Commission first addressed to some extent when it considered the problem of statelessness[34] and then in relation to the succession of States, the problem of the nationality of legal persons as such has never been studied by the Commission. The Commission should therefore consider the possibility of expanding the study of the second part of the topic, i.e. the question of the nationality of legal persons, beyond succession of States. The risk of such an enlargement of the present topic would be the possible overlapping with the topic of diplomatic protection.

B. Should the study be limited to the problems of the impact of the succession of States on the nationality of legal persons in international law?

33. Should the Commission prefer to keep the study of the question of the nationality of legal persons limited to the situation of the succession of States, one of the first questions to be answered would be whether legal persons are affected as to their existence by the succession of States.

34. There are many reasons to believe that, regardless of the succession of States, the legal personality of legal persons continues to exist. Despite the fact that they are creations of the law of the State which itself may cease to exist, they would not disappear together with such State or its legal order.[35] What may be affected, however, is their legal status, including nationality.

35. But unless the predecessor State ceases to exist, it is not obvious which legal persons are those whose status is so affected. On the basis of what criteria are they defined and distinguished from those legal persons whose nationality remains unaffected? Does it depend on the location of their seat in one of the States concerned? Or is it due to the fact that they have been "registered" with the authorities which are now located in one of the States concerned? Or, still, is it due to the fact that the majority of shareholders have become nationals of one of the States concerned? In the event of the succession of States, one or more States concerned, i.e. two or more successor States, or a predecessor and a successor State, may consider a legal person that was, on the date of the succession of States, a national of the predecessor State as their national. But it may also occur that a legal person is not considered by either of these States as its national. As in the case of individuals, the succession of States can give rise to conflicts that are negative (statelessness) or positive (dual nationality or multiple nationality), and these problems are not merely academic.[36]

36. The effects of the succession of States on the nationality of legal persons may be seen in the legislation of the States concerned, that is, the predecessor or successor States. The activities of the legal person, after the date of the succession of States, may be governed by the laws and provisions applicable to "foreign" legal persons, although prior to the succession of States, under the laws and regulations of the predecessor State, such legal persons had not been treated as "foreign" legal persons. This kind of distinction between legal persons may occur even if the concept of "nationality" of legal persons is not expressly defined by the legislation of the State concerned.

37. During the debate in the Commission, the view was expressed that, although certain legal systems did not regulate the nationality of corporations, international law attributed a nationality to those legal persons for its own purposes, and that such nationality could be affected by State succession.[37]

38. It is generally accepted that, as in the case of natural persons, international law imposes certain limits on the

[34] For the history of the Commission's work on nationality, see *Yearbook … 1995*, vol. II (Part One), document A/CN.4/467, p. 160, paras. 8–12; see also *The Work of the International Law Commission* (United Nations publication, Sales No. E.95.V.6), pp. 41–44.

[35] The Special Rapporteur shares the view according to which the legal offer of the new State has "original" character, even if its content is mostly identical with the legal order of the predecessor State.

[36] Caflisch, loc. cit., pp. 150–151. This author notes, on the one hand, that, while cases of statelessness may arise, they are actually rare. On the other hand, he concludes that the theory of international private law generally allows that a company can have two or more nationalities. In order to resolve positive conflicts of nationality, State courts will give preference, as in the case of individuals, to the nationality which is the most effective.

[37] See *Yearbook … 1995*, vol. I, 2388th meeting, statement by Mr. Crawford, p. 60, para. 41.

right of a State to bestow its nationality on legal persons. As one author stresses: "[The State] may do so only if the corporation is either established under its law, or has its seat, centre of management or exploitation there, or is controlled by shareholders who are nationals of the State concerned."[38] It may be assumed that similar limitations apply as well in the event of a succession of States. There are also undoubtedly some presumptions on which the determination of the nationality of legal persons may be based. These questions should, in the Special Rapporteur's view, be in the centre of the Commission's interest.

C. Which categories of "legal persons" should the Commission consider?

39. Contrary to natural persons, legal persons can assume various forms. The attempt to cover all such forms or categories of legal persons could make the whole exercise abortive. The Commission should define the type of legal persons on which it will focus.

40. Some authors underline the difference between two types of commercial corporations: those which have been incorporated *intuitu personae* and which are deemed to be primarily associations of individuals (*sociétés de personnes*), and those which have been established *intuitu pecuniae* and for which capital is a significant consideration (*sociétés de capitaux*). The latter have a more distinct legal personality than the former.[39]

41. From another perspective, a distinction is often drawn between private corporations and State-owned corporations.

42. But there may be still other types of legal persons. During its previous work on other topics, the Commission, when considering the notion of the "State", concluded that:

> the Government is often composed of State organs and departments or ministries that act on its behalf. Such organs of State and departments of government can be, and are often, constituted as *separate legal entities*[*] within the internal legal system of the State. Lacking as they do international legal personality as a sovereign entity, they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof.[40]

43. Similarly, the United States Foreign Sovereign Immunities Act of 1976[41] defines "agency or instrumentality of a foreign state" as an entity

> (1) which is a separate legal person, …
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (*c*) and (*d*) of this title, nor created under the laws of any third country.

44. Transnational corporations constitute yet another category of legal persons.[42]

45. The Commission should consider on which type of legal persons its study should focus. To cover all types of legal persons might be a difficult and even useless task.

D. To which legal relations should the study be limited?

46. It has been stressed during previous debates in the Commission that, unlike natural persons, legal persons do not necessarily have the same nationality in all their legal relations.[43] The Commission should therefore decide to which legal relations the study should be limited.

E. Should the study concentrate on the "nationality" or rather on the "status" of legal persons in relation to the succession of States or, eventually, also cover other questions related to activities of such legal persons?

47. Peace treaties concluded after the First World War contained special provisions concerning the nationality of legal persons.[44] Some treaties covered a broader spectrum of problems concerning legal persons.[45] Some treaties

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[38] Seidl-Hohenveldern, *Corporations* …, p. 8; see also the same author in *Völkerrecht*, p. 280.

[39] Caflisch, loc. cit., p. 119, footnote 1. According to this author, the term commercial corporations means groups of persons incorporated in accordance with the law who have a profit-making goal and aim to carry out commercial or industrial activity under private law.

[40] *Yearbook … 1991*, vol. II (Part Two), draft articles on jurisdictional immunities of States and their property, p. 15, para. (10) of the commentary to article 2.

[41] Text reproduced in *Materials on Jurisdictional Immunities of States and their Property* (United Nations publication, Sales No. E/F.81.V.10), pp. 55 et seq.

[42] During earlier discussions, for example, one view was expressed that inasmuch as multinational corporations had the means to take care of their own interests this question did not need to be dealt with by the Commission (*Yearbook …1995*, vol. II (Part Two), pp. 39–40, para. 205).

[43] See *Yearbook … 1995*, vol. I, 2387th meeting, statement by Mr. Tomuschat, p. 53, para. 12; in the same vein see also Kegel, *Internationales Privatrecht*, p. 413.

[44] Thus, for example, according to article 54, para. 3, of the Treaty of Versailles: "Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognised as possessing this quality, whether by the French administrative authorities or by a judicial decision." Similarly, according to article 75 of the Peace Treaty of Saint-Germain-en-Laye: "Juridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision."

[45] For example, article 75, para. 1, of the Treaty of Versailles provided that:

> "Notwithstanding the stipulations of Section V of part X (Economic Clauses) of the present Treaty, all contracts made before the date of the promulgation in Alsace-Lorraine of the French decree of November 30, 1918, between Alsace-Lorrainers (whether individuals or juridical persons) or others resident in Alsace-Lorraine on the one part, and the German Empire or German States and their nationals resident in Germany on the other part, the execution of which has been suspended by the armistice or by subsequent French legislation, shall be maintained."

The Convention relating to Manufacture and Transport Undertakings, forming Annex C to the Commercial Convention between Austria and Poland of 25 September 1922 (League of Nations, *Treaty Series*, vol. LIX, p. 307) granted Austrian companies which had undertakings in the territories ceded to Poland the right to transfer their seat of business and register their statutes in Poland; similarly, the Agreement

(*Continued on next page.*)

seem to be concerned rather with the recognition of the legal status and rights attached to it than with the nationality of legal persons. Thus, for example, the Agreement between India and France for the settlement of the question of the future of the French Establishments in India of 21 October 1954 provided that: "The Government of India agrees to recognise as legal corporate bodies, with all due rights attached to such a qualification, ..."[46]

48. If the Commission decides to retain the existing limitation of the topic to the succession of States, it should consider going beyond the study of nationality to include the status of legal persons and conditions of their operations following succession of States. By the "status" of legal persons the Special Rapporteur understands including, in addition to the nationality, rights and obligations inherent to the legal capacity of the legal person, those determining the type of a legal person.

F. What could be the possible outcome of the work of the Commission on this part of the topic?

49. As in the case of the nationality of individuals, the Commission should also consider the question of the possible outcome of its work on this part of the topic and the form it could take. The consideration of this problem, however, would currently be premature.

Conclusion

50. As has been mentioned above (para. 3), the General Assembly during its regular fifty-second session (1997), once again invited Governments to submit comments on the practical problems raised by the succession of States affecting the nationality of legal persons in order to assist the Commission in deciding on its future work on this portion of the topic.[47] No such comments have been received by the Special Rapporteur thus far. The views of the Governments are, however, of particular importance at the current stage of work on this part of the topic.

51. In order to encourage comments by Governments, the Commission might wish to indicate in its report more precisely "those specific issues ... on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work".[48]

52. In addition to the questions that the working group could suggest to the Commission for inclusion in its report, in order to ascertain the views of Governments on issues discussed in chapter II, it would also be useful to encourage States to describe briefly their practice in this field, by requesting States having the experience with the succession of States to indicate how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States, became "foreign" legal persons, etc.

(*Footnote 45 continued.*)
regarding Companies, namely Legal Persons, incorporated Commercial and other Associations, other than Banks and Insurance Companies, signed on 16 July 1923 between Austria and Italy (ibid., vol. XXVII, p. 383) granted Italy the right to request that companies engaged in production or transport in territory ceded to Italy should transfer their headquarters to the territory of Italy, register in Italy and remove their names from the Austrian commercial registers.

[46] United Nations, *Materials on Succession of States in Respect of Matters Other than Treaties* (ST/LEG/SER.B/17) (Sales No. E/F.77.V.9), p. 81.

[47] General Assembly resolution 52/156, para. 5.

[48] Ibid., para. 12.