

Document:-
A/CN.4/L.251

Draft articles on succession of States in respect of matters other than treaties: texts adopted by the Drafting Committee - title of section 2 of part I and articles 3 (f) and 12-16 - reproduced in A/CN.4/SR.1405

Topic:
Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

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71. Mr. AGO said that, as Mr. Yasseen had pointed out, new rules in favour of developing countries could, indeed, be created either by convention or by custom. But he did not see how the adoption of a convention could arrest the development of custom.

72. Mr. TSURUOKA said he thought that the word "establishment" covered the supervision of new customary rules; but it was usually through the adoption of conventions that new rules came into being.

73. Mr. USHAKOV noted that article 5 spoke of "treatment accorded by the granting State . . . to persons or things in a determined relationship with that State", but also of "treatment extended by the granting State . . . to persons or things in the same relationship with a third State". Article 7 also referred to "treatment extended . . . to persons or things in a determined relationship with a third State". In his opinion, the words "a third State" should, in each case, be "that State". The matter was of some importance for translating the text into Russian.

74. Sir Francis VALLAT agreed that the matter was important, but precisely because the words "a third State" might well signify a different State. The same State was not necessarily involved in each case. The point could best be considered by the Drafting Committee.

75. Mr. USHAKOV said that there was no immediate difficulty. The problem could be examined during the second reading of the draft articles.

76. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 21 *bis*.

It was so agreed.

RESOLUTION ADOPTED BY THE COMMISSION

77. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had decided not to stand for re-election to the Commission. In many years of long friendship, he had always admired the scholarship and ability of Mr. Ustor, a man who combined wisdom with humility. It had been a very great pleasure to know him and work with him, for he was an outstanding member of the Commission and had made a great contribution not only to the work of the Commission itself, but also to the cause of international law during a difficult period in international relations.

78. In appreciation of the work of the Special Rapporteur, he wished to submit the following draft resolution:

The International Law Commission,

Having adopted provisionally the draft articles on the most-favoured-nation clause,

Desires to express to the Special Rapporteur, Mr. Endre Ustor, its deep appreciation of the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the most-favoured-nation clause.

79. Mr. TABIBI proposed that the draft resolution should be co-sponsored by all the members of the Commission.

It was so agreed.

The draft resolution was adopted by acclamation.

80. Mr. USTOR (Special Rapporteur) said that he was very touched. His ten years as a member of the Commission had been a great experience and had strengthened his belief that friendship could exist despite differences of creed, colour and origin. He was particularly pleased that it had been possible to complete the first reading of the draft articles on the most-favoured-nation clause and hoped that it would be possible to conclude the codification of the topic later. The resolution adopted by the Commission was something in which he took great pride.

The meeting rose at 5.15 p.m.

1405th MEETING

Tuesday, 13 July 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*concluded*) * (A/CN.4/292, A/CN.4/L.251)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles proposed by that Committee (A/CN.4/L.251), beginning with the new subparagraph (*f*) of article 3.

ARTICLE 3 (Use of terms), subparagraph (*f*)

2. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the new subparagraph (*f*) proposed for article 3 read as follows:

Article 3. Use of terms

[For the purposes of the present articles:

...]

(*f*) "newly independent State" means a successor 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.

* Resumed from the 1400th meeting.

3. Before introducing the new subparagraph (*f*) of article 3, he wished to make a few general comments on the texts proposed by the Drafting Committee. In addition to the new subparagraph (*f*) of article 3, the Committee had adopted the titles and texts of articles 12 to 16, which formed section 2 (Provisions relating to each type of succession of States) of part I of the draft, entitled "Succession to State property". The Committee had not changed the title of that section. Wherever possible it had tried to adopt wording in harmony with that of the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-sixth session¹ without thereby ignoring or dismissing the characteristic features that distinguished succession in respect of matters other than treaties, and, in particular, succession to State property.

4. Bearing in mind that the problem of the passing of State property from the predecessor State to the successor State was to be considered separately for each type of succession, the Drafting Committee had accepted as basic the position taken by the Commission in its 1974 draft articles, namely, that for the purposes of codifying the modern law of succession of States in respect of treaties, it was sufficient to arrange the cases of succession of States in three broad categories: (*a*) succession in respect of part of territory; (*b*) newly independent States; and (*c*) uniting and separation of States.² Nevertheless, in view of the characteristics and requirements of the topic being codified, the Committee had found that more precision was necessary in differentiating the types of succession. Thus, in regard to succession in respect of part of territory, it had decided that it was appropriate to distinguish, and deal separately with, three cases: the case in which part of the territory of a State was transferred by that State to another State (article 12); the case in which a dependent territory became a part of the territory of a State other than the State which had been responsible for its international relations, that was to say, the case of decolonization of a territory through integration with a State other than the predecessor State (article 13, para. 5); and the case in which part of the territory of a State separated from that State and united with another State (article 15, para. 2). Similarly, in regard to the uniting and separation of States, while dealing with those two types of succession in separate articles, the Committee had nevertheless found it appropriate to distinguish between the "separation of part of the territory of a State" (article 15) and the "dissolution of a State" (article 16).

5. As to categories of property, the Committee had maintained, throughout the texts adopted, the distinction between movable and immovable property. However, while accepting the relevance of the distinction between property situated in the territory to which the succession of States related and property situated outside that territory, it had concluded that those two situations did not necessarily call for treatment in two separate articles

for each type of succession, as originally proposed by the Special Rapporteur in his eighth report (A/CN.4/292), but could conveniently be dealt with in a single article for each specific type of succession. Consequently, those two situations, which had been covered in the Special Rapporteur's draft by articles 12 and 13, on the one hand, and articles 14 and 15, on the other, were now provided for in draft articles 12 and 13 proposed by the Drafting Committee.

6. In the light of the discussions in the Commission, the Committee had decided to formulate articles of a general character for each type of succession, but to make special provision for certain specific kinds of State property, in particular archives. It had been understood that the question of archives would be taken up at a subsequent stage, on the basis of specific proposals to be submitted by the Special Rapporteur in a future report.

7. With regard to the criterion of the link between the property and the territory as determining the passing of property, in the case of immovable State property the Committee had chosen the geographical situation of the property, in conformity with the provisions of article 9 (General principle of the passive of State property) as adopted by the Commission at its twenty-seventh session.³ In the case of movable State property, the geographical situation was not very significant, because of the mobility of the property, so the Committee, while bearing in mind the concept proposed by the Special Rapporteur, in subparagraph (*b*) of his draft article 12, of a "direct and necessary link" between the movable property and the territory to which the succession of States related, had provisionally concluded that that concept should be made more precise. After having considered various expressions such as "property pertaining to the activity of the State and its sovereignty over the territory" and "property connected with the exercise of the sovereignty and activity of the State in the territory", the Committee had opted in article 12 for the criterion "property . . . connected with the activity of the predecessor State in respect of the territory to which the succession of States relates", which had been included in the text of a proposal submitted by a member of the Commission at the twenty-seventh session. The word "activity" should be understood as meaning essentially a governmental activity or the exercise of a governmental function. In adopting that formula, however, the Committee did not wish to imply that there might be no need to continue to search for improved language. It had been agreed that the wording chosen would be illustrated by specific examples in the commentary.

8. With regard to the new subparagraph (*f*) of article 3, he observed that the general feeling of members of the Commission had been that a definition of the term "newly independent State" was necessary. The Drafting Committee had found no reason to depart from the definition contained in article 2, paragraph 1 (*f*), of the 1974 draft articles on succession of States in respect of treaties

¹ *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

² *Ibid.*, p. 172, para. 71.

³ For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. III, sect. B.

and it had accordingly adopted the same wording for the new subparagraph (f) of article 3. He drew attention to the following passage in the commentary to article 2 of the draft on succession in respect of treaties, which was equally relevant to the present draft articles:

... the definition given ... includes any case of emergence to independence of any former dependent territories, whatever its particular type may be. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case ... of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".⁴

9. The CHAIRMAN said that, if there were no comments, he would take it that the Commission agreed to approve the new subparagraph (f) of article 3 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 12⁵ (Transfer of part of the territory of a State)

10. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 12:

Article 12. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

11. Two of the cases which had originally come under article 12, as proposed by the Special Rapporteur, had been excluded from the provisions of the present text: the case of decolonization of a territory through integration, in other words, the case of a dependent territory which became part of the territory of a State other than the State which had been responsible for its international relations; and the case in which part of the territory of a State separated from that State and united with another State. Those two cases were now dealt with in the new texts proposed by the Committee for articles 13 and 15 respectively. The new text of article 12 was thus confined to the classical cases of transfer of part of a territory from one State to another. The word "transfer", in the title, and the words "is transferred", in paragraph 1,

were intended to specify that new scope of article 12. The situation covered by article 12 was that of territory either small in area, as in the case of a frontier rectification, or at least unimportant from the economic or political standpoint, for example, a large area of desert territory. In that situation, the problem of currency, treasury, archives and so on did not arise, or not in an acute form, so that the principle was primacy of the agreement between the States. Obviously, in the case covered by article 12, there was practically no need to consult the inhabitants, because there were either very few of them or none at all; moreover, in accordance with article 2 (Cases of succession of States covered by the present articles), the cases in question were cases of succession occurring in conformity with international law and the Charter of the United Nations. The situation covered by the text proposed by the Drafting Committee for article 15, paragraph 2, on the other hand, related to the separation of a large province and the resulting problems concerning archives, currency and treasury. That second situation was not always settled by agreement. Moreover, it was not agreement between the States which prevailed, but the decision taken by the people of the part of the territory which separated, in the exercise of their right of self-determination.

12. Paragraph 1 of the text proposed by the Drafting Committee for article 12 provided that, in the case of transfer of part of the territory of a State, the passing of State property of the predecessor State to the successor State was settled by agreement between those two States. It was understood that, in accordance with paragraph 1, the passing should, in principle, be settled by agreement and that the agreement should govern the disposition of the property, no duty to agree being thereby implied. In the absence of an agreement, the provisions of paragraph 2 applied.

13. Paragraph 2 (a) stated the general principle of the passing of State property embodied in article 9, with particular reference to immovable property. Its wording was basically the same as that of subparagraph (a) of the original draft proposed by the Special Rapporteur. The word "ownership" had been deleted as unnecessary, since the concept of the "passing of ownership" was implied, by reason of the provisions of draft articles 5 (State property), 6 (Rights of the successor State to State property passing to it) and 9 (General principle of the passing of State property).

14. In paragraph 2 (b), relating to movable property, three changes had been made to the original text: first, the distinction previously made according to the location of movable property had been dropped; secondly, the criterion of the "direct and necessary link" had been replaced by that of connexion with the activity of the predecessor State in respect of the territory to which the succession of States related; and thirdly, the words "on the date of the succession of States" had been deleted, since in article 5 State property was already defined by reference to that time element.

15. Mr. KEARNEY said that the words "movable State property of the predecessor State connected with the activity of the predecessor State in respect of the

⁴ Yearbook... 1974, vol. II (Part One), p. 176, document A/9610/Rev.1, chap. II, sect. D, para. 8, of the commentary to article 2.

⁵ For the discussion of the text originally submitted by the Special Rapporteur, see 1389th to 1393rd meetings.

territory” in paragraph 2 (b) seemed to constitute a difficult and amorphous test to apply to practical situations. He could agree to that wording as a basis for consideration by Governments, but wished to make it clear that he had some doubts about the usefulness of paragraph 2 (b) as a test for determining title to property.

16. Mr. TSURUOKA said he thought the term “activity” was too broad. The Drafting Committee had used it for want of a better one, and it could be accepted provisionally, but it would subsequently have to be replaced by a more appropriate term.

17. Mr. BILGE said he had difficulty in accepting the new criterion proposed by the Drafting Committee in paragraph 2 (b); he proposed that it should be placed in square brackets since the Commission was considering alternative wording.

18. Mr. HAMBRO said he agreed with the view expressed by Mr. Kearney. In his opinion, however, there was no need to place the proposed wording of paragraph 2 (b) in square brackets, since the Commission was quite free to reconsider the articles on second reading in the light of the debates in the Sixth Committee and of the comments by Governments.

19. The CHAIRMAN said that, if there were no objections and if Mr. Bilge did not press his proposal, he would take it that the Commission agreed to approve article 12.

It was so agreed.

ARTICLE 13⁶ (Newly independent States)

20. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 13:

Article 13. Newly independent States

When the successor State is a newly independent State:

1. If immovable and movable property, having belonged to an independent State which existed in the territory before the territory became independent, became State property of the administering State during the period of dependence, it shall pass to the newly independent State.

2. Immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

3. (a) Movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(b) Movable State property of the predecessor State other than the property mentioned in subparagraph (a), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory.

4. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor States to the newly independent State shall be determined in accordance with the provisions of paragraphs 1 to 3.

5. When a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraphs 1 to 3.

6. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of the foregoing paragraphs shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

21. That article dealt with the passing of State property when the successor State was a newly independent State. It covered three situations: that of newly independent States; that of States formed from two or more dependent territories; and that of the decolonization of a territory through integration with another State. In its 1974 draft the Commission had dealt with succession relating to the transfer of territory and decolonization of a territory through integration under the same heading, but the two cases were separated in the draft under consideration.

22. Paragraph 1 was a new provision stating the rule on property of a dependent territory which had belonged to it as an independent State before it became dependent; the Special Rapporteur had mentioned that case in his eighth report (A/CN.4/292), but had not taken it up in the draft article he had proposed.

23. Paragraph 2, relating to immovable property, corresponded to paragraph 1 of the original article 14, except for the omission of the saving clause “Unless otherwise agreed or decided”, which might have the effect of attaching an absolute legal obligation to devolution agreements. The paragraph was in conformity with the solution adopted in article 9 and applied in respect of each type of succession. The Drafting Committee had taken the view that the case of immovable property situated outside the territory should not be covered in article 13. It should be noted that the Committee had deleted the references to “the date of the succession of States” and to “ownership”, which had appeared in the original text, because State property was already defined with reference to the time element in article 5.

24. Paragraph 3 (a) stated the same rule as paragraph 2 (b) of the new article 12, and thus required no comment.

25. Paragraph 3 (b) dealt with movable property other than that connected with the activity of the predecessor State in respect of the territory to which the succession of States related. There, the Drafting Committee had introduced the concept of equity by referring to the contribution of the dependent territory to the creation of the property, as originally provided for in article 15, subparagraph (b) of the Special Rapporteur’s draft. The Committee had considered, however, that the rule should apply regardless of the location of the property, unlike the rule proposed by the Special Rapporteur in article 15.

26. Paragraph 4 simply provided that the same rules applied when a newly independent State was formed from two or more dependent territories—a case which clearly came within the definition of a “newly independent State” given in subparagraph (f) of article 3.

⁶ For the discussion of the text originally submitted by the Special Rapporteur, see 1393rd to 1397th meetings.

27. Paragraph 5 related to another specific case; that of decolonization by integration. For the purposes of determining the passing of State property, that case was assimilated to the cases involving newly independent States.

28. Paragraphs 4 and 5 of article 13 might well form a separate article but the Drafting Committee had considered it unnecessary to combine them in an article at the present stage.

29. Paragraph 6 corresponded to paragraph 3 of the original draft article 14 proposed by the Special Rapporteur. Different opinions had been expressed in the Commission on the question of the permanent sovereignty of a newly independent State over its wealth, natural resources and economic activities. The Drafting Committee had come to the conclusion that in order to make the rule in paragraph 3 of the original draft article 14 more widely acceptable, it must be made less general and kept strictly within the context of the article in which it appeared.

30. Mr. TSURUOKA said he doubted whether paragraph 1 of article 13 really concerned succession of States. Although he approved of the substance of the provision, he doubted whether it was appropriate to refer to a situation which had obtained several generations before the succession. Paragraph 1 was likely to cause more difficulties than it settled. Furthermore, it should be possible to settle many aspects of the case dealt with in that paragraph by a broad interpretation of paragraphs 2 and 3 of the same article. However, he would not oppose the retention of paragraph 1.

31. Mr. RAMANGASOAVINA, referring to paragraph 6, which provided that agreements concluded between the predecessor State and the newly independent State must not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, observed that the wealth and natural resources in question were not those of the people, but those of the territory over which the people exercised sovereignty. As a superstructure on the territory, the people itself had no wealth or natural resources. He therefore proposed that the paragraph should refer to "the principle of the permanent sovereignty of every people over the wealth and natural resources of its territory".

32. Mr. USHAKOV pointed out that the articles proposed by the Drafting Committee had been drafted hastily, and that there were consequently certain awkwardnesses in their wording. For instance, the word "If" at the beginning of paragraph 1 of article 13 was unnecessary. In the same paragraph, the expression "in the territory" was not sufficiently precise; it was necessary to refer to the commentary to find out what territory was meant. At the end of that paragraph, the expression "newly independent State" could be replaced by the words "successor State". To understand what dependent territory was referred to in paragraph 3 (b), it was again necessary to refer to the commentary. The first phrase of paragraph 4, which was taken from the corresponding provision in the draft articles on the succession of States in respect of treaties (article 29), described the territories forming a newly independent State as being "dependent".

The term "successor State" could again be substituted for the expression "newly independent State" where that expression was used for the second time in paragraph 4. The same substitution could be made in paragraph 6.

33. Mr. YASSEEN said he approved of the substance of article 13. It was the result of great efforts on the part of the Drafting Committee and took full account of reality. The drafting left something to be desired; but it could be improved and, in particular, condensed at a later stage. In his view, the expression "an independent State which existed in the territory" was inaccurate, since the territory was one of the constituent elements of the State.

34. With regard to paragraph 6, he hoped that Mr. Ramangasoavina would not press his proposal. The Commission ought to use the language employed by other United Nations organs, and most of the relevant resolutions of the General Assembly and the Economic and Social Council referred to sovereignty over wealth and natural resources, without specifying that they were those of the territory.

35. Mr. QUENTIN-BAXTER said that when the Commission had discussed the subject of newly independent States it had been aware that when, for example, the courts of a third State had to deal with a question of title to property under a succession of States, they encountered two problems: that of ascertaining the relevant successor sovereign, and that of referring to the law of that sovereign State in order to determine the title to the property. The Commission's discussions had dealt almost exclusively with the problem of ascertaining the successor sovereign. A uniting of States presented no problems as to the ascertainment of the sovereign, but did present considerable problems as to reference to the law of the successor State. Article 14 had been placed in square brackets in the Drafting Committee's text precisely because it did not cover the situation which the Commission had primarily discussed.

36. With regard to the question of ascertainment of the sovereign, he believed that the draft articles, as revised by the Drafting Committee, represented a great step forward. Article 13 might be said to be the very heart of the draft articles under consideration, just as the corresponding provisions of the draft articles on succession of States in respect of treaties had been considered to be the heart of that draft. In regard to article 13, the Commission owed something to the Special Rapporteur's insistence on the need for separate treatment of the cases of newly independent States and self-determination. The Drafting Committee had fully respected that distinction, dealing not only with the typical case of the newly independent State, but also assimilating to it the case in which a newly independent State was formed from more than one dependent territory and the case in which a colonial territory found its permanent status not in independence, but in integration or association with an existing State. Consequently, in article 13, the Commission now had a consistent category which corresponded entirely to United Nations doctrine and experience.

37. The matter did not end there, however. In article 12, the Commission had recognized, in accordance with a

distinction made by Mr. Ushakov,⁷ that sovereign States could make small adjustments to frontiers or other arrangements to their mutual benefit. The Commission had thus provided for the case in which there was a change of sovereignty because that was the wish of the population of the territory. That seemed to be a particularly important distinction, which had been only latent in the Commission's earlier discussions, but was now manifest in the new texts of articles 15 and 16, which dealt with cases in which a change of sovereignty could take place only because it was in accordance with the will of the population of the territory affected by the transfer. There again, the Commission had assimilated the case of a separation of States, or of dissolution of a predecessor State, to the case in which a territory joined another sovereign State. There again, too, the categories were true, corresponded to reality and did not create any artificial distinction between the case of the newly independent State and other cases. The draft articles thus contained a new threefold categorization, which he considered to be rock-solid and to provide a basis for the further work of the Commission and the General Assembly.

38. That categorization had two consequences. When the Commission dealt with rules relating to immovable property, it could, for the most part, content itself with the simple and almost inevitable rule that the property passed to the successor State in whose territory it was situated, but when necessary, as in articles 15 and 16, it could make that passing subject to the rule of equitable allocation. In the case of movable property, however, the Commission had adopted a test which would no doubt require refinement. In his opinion, the purpose and general correctness of the test were not in doubt, but its detailed application would be difficult. At first glance, the wording of article 13, paragraph 3, did not seem to place enough emphasis on the geographical location of the movable property, although that location of the property would, in most cases, be an indication of its connexion with the territory to which the succession of States related. He agreed with other members of the Commission who thought that the draft articles would still require considerable refinement, but nevertheless believed that they marked an extremely important breakthrough in the work on the topic of succession of States in respect of matters other than treaties.

39. With regard to article 13, paragraph 1, he agreed with Mr. Tsuruoka that the question of the restitution of property which had cultural or historical significance for a State was perhaps not very closely connected with the heart of the matter of a succession of States, but it was extremely important for newly independent States which believed that their heritage had in some way been dissipated before they themselves had been in a position to look after it. The idea behind paragraph 1 therefore justified further attention.

40. He regretted that the provision was limited by the words "having belonged to an independent State",

because those words imported a severe and arbitrary limitation which would, in practice, give rise to disputes. He thought the Commission was aware that there were many cases in which it was difficult to say whether, before colonization, a territory had possessed sovereignty in the sense recognized by international law, and whether an independent State had actually existed. Often, the difference was accidental and formalistic, rather than real. Sometimes the colonizing Power had dealt with the territory as though it already had independent sovereignty, without necessarily believing that it actually possessed such sovereignty and without necessarily attaching to the treaties it had made the same status as it would have attached to treaties concluded under international law. He therefore believed that for every newly independent State which saw some element of justice in paragraph 1, there would be twice or three times as many which would be disappointed by the reference to "an independent State". If the thought behind that paragraph had any place at all in the draft, article 13 would have to be drafted on a more equitable basis. It might be sufficient, since the Commission was dealing primarily with cultural property, or property of prestige, to think more in terms of the identification of the property with the people before colonization, rather than in terms of "an independent State".

41. The CHAIRMAN said that, with regard to the question of wealth and natural resources referred to in article 13, paragraph 6, he could assure Mr. Yasseen that his memory was still good and that many United Nations bodies dealing with the question of permanent sovereignty over wealth and natural resources tended to use such wording. A recent example was to be found in the Charter of Economic Rights and Duties of States.⁸

42. If there were no objections, he would take it that the Commission agreed to approve article 13, as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 14⁹ (Uniting of States)

43. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 14:

Article 14. Uniting of States

[1. When two or more States unite and thus form a successor State, the State property of the predecessor States shall, subject to paragraph 2, pass to the successor State.

2. The allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.]

44. During the Commission's discussion of the article 16 originally proposed by the Special Rapporteur, it had

⁸ General Assembly resolution 3281 (XXIX).

⁹ For the discussion of the text originally submitted by the Special Rapporteur, see 1398th meeting.

⁷ See 1390th meeting, paras. 20-21.

been generally considered, in regard to the uniting of States, that having stated the general rule that the property of the predecessor State passed to the successor State, there was no need to indicate in detail how that property was to be allocated among the component units of the successor State, since that was a matter to be determined under the internal law of the State concerned. The Commission had considered that a *renvoi* to internal law in general would suffice, and that was how the Drafting Committee had attempted to formulate article 14. Paragraph 1 stated the general rule, subject to paragraph 2, which contained the *renvoi* to the internal law of the successor State. The text of the article had, however, been placed in square brackets, because there had been differences of opinion in the Committee concerning the meaning to be attached to the *renvoi* to internal law for the purposes of allocating State property as belonging to the successor State or to its component parts, and the necessity of including such a *renvoi*.

45. Mr. USHAKOV said that the simplest case of succession of States was probably that of uniting of States. The rule that the State property of uniting States passed to the successor State, as contained in paragraph 1 of article 14, was also simple. It was stated, however, subject to paragraph 2, according to which the allocation of the State property as belonging to the successor State or to its component parts was governed by the internal law of the successor State. It followed that the State property did not pass to the successor State until it had enacted its internal law. Thus the application of the rule of international law stated in paragraph 2 finally depended on internal law.

46. If the Canton of Geneva decided to unite with France, it was article 15, paragraph 2, that would apply. The Commission was in agreement on that point. On the other hand, it had been unable to agree on the provision that would be applicable if Switzerland decided to unite with France to form a new State. That was why article 14 had been placed in square brackets. For Switzerland to be able to unite with France, it might be necessary for its 22 component Cantons to unite successively with France, in accordance with article 15, paragraph 2. At least that was the solution that would be required until the principle was established that the property of the predecessor States passed to the successor State in the event of a uniting of States.

47. Mr. YASSEEN said he was not really satisfied with the wording of article 14. The passing of the property of the predecessor States to the successor State was a completely separate operation from the allocation of that property among the component parts of the successor State. The latter operation was governed by internal law and it was perhaps not necessary to mention it; but if the Commission decided to do so, it should at least delete the words "subject to paragraph 2", which implied that the second operation was of the same nature as the first. Furthermore, the French word *appartenance* did not convey the same idea as the English word "allocation".

48. Mr. SETTE CÂMARA said that, despite the valuable criticisms of article 14 made by Mr. Ushakov and Mr. Yasseen, he thought the Drafting Committee was to

be congratulated on its efforts to revise that article. The difficulty was that the Commission always confused the idea of a uniting of States with that of a federation resulting from a uniting of States. But a uniting of States might result in something quite different from a federation, namely, a unitary State. If that occurred, and if the State had no component parts enjoying some degree of autonomy, there would be no need to mention the problem of the allocation of property to the State itself or to its component parts. In that sense, he agreed with Mr. Ushakov and Mr. Yasseen that article 14, paragraph 2, might not be necessary. But if the Commission had the idea of a federation in mind, the only solution to the problem of State property was a *renvoi* to internal law and, in that sense, he thought the Drafting Committee had been right to embody that rule in paragraph 2, thus simplifying a problem which had given rise to much confusion during the discussion of the text submitted by the Special Rapporteur.

49. He therefore found the text of article 14 entirely satisfactory and would be able to support it even if the square brackets were deleted.

50. Mr. RAMANGASOAVINA said he shared the views of Mr. Ushakov and Mr. Yasseen concerning article 14. He agreed with Mr. Yasseen that the use of the word *appartenance* was unjustified. Paragraph 2 seemed unnecessary and he proposed that it should simply be stated that the successor State received all the property that had belonged to the predecessor State.

51. Sir Francis VALLAT said that if anything was to be deleted from article 14, it ought to be paragraph 1, not paragraph 2. It might be that, where ownership of property was identified with sovereignty, the proposition advanced by Mr. Ushakov was true. But that was not the case in all States, and in many States the two concepts were quite different. In practice, when a new State was formed by the uniting of two independent States, those States usually agreed on a constitution, or at least a basis for a constitution, immediately before union took place. Thus the new State was born and the new constitution came into force concurrently, and there was no moment of time at which the property of the predecessor State in its entirety was vested in the successor State. In all likelihood, such property was vested partly in the successor State and partly in the constituent units of the successor State. Consequently, it would be fallacious to maintain that, whenever a uniting of States occurred, all the property of the predecessor States became the property of the successor State. The truth of the matter was that title was determined in accordance with the internal law of the successor State.

52. Mr. KEARNEY said he fully agreed with the views expressed by Sir Francis Vallat. While there were numerous precedents for the position taken by Sir Francis, he did not know of any precedents for the opposite position.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve article 14, retaining the square brackets.

It was so agreed.

ARTICLE 15 (Separation of part or parts of the territory of a State)

and

ARTICLE 16¹⁰ (Dissolution of a State)

54. Mr. ŠAHOVIĆ (Chairman of the Drafting Committee) said that the Committee proposed the following text for articles 15 and 16:

Article 15. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

3. Paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 16. Dissolution of a State

1. When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. Paragraph 1 is without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

55. As he had already explained, the article 17 originally proposed by the Special Rapporteur had been split into two articles by the Drafting Committee, namely, a new article 15 and a new article 16. Article 15 as adopted by the Committee dealt only with those cases of separation of part or parts of the territory of a State in which that State continued to exist. Article 16 dealt with the case in which a State dissolved and disappeared and the parts

of its territory formed two or more States. Article 15, unlike article 12, did not place emphasis on agreement. Admittedly, agreement was a factor, but the formulation was different because there were cases of violent separation; moreover, it was not agreement between the two States which must prevail, but the will of the people expressed in the exercise of their right of self-determination. A second difference between article 15 and article 12 lay in the inclusion in article 15 of a subparagraph (c) dealing with other movable State property which had to be distributed in an equitable proportion.

56. Article 15, paragraph 1 (a), stated the rule, also included in other articles, governing the attribution of immovable property to the territory in which it was situated. Paragraph 1 (b), stated the rule, also stated in other articles, relating to movable property connected with the activity of the predecessor State in respect of the territory to which the succession of States related. The provisions of paragraph 1 (c), were essentially the same as those of subparagraph (f) of the original article 17, paragraph 2. A slightly different formulation had been used in the new text for the sake of conformity with the provisions of other articles adopted by the Drafting Committee.

57. Paragraph 2 extended the provisions of paragraph 1 to the case in which part of the territory of a State separated from it and united with another existing State.

58. Paragraph 3 was a new provision intended generally to safeguard, on the basis of equity, the interests of the predecessor and successor States where questions of compensation might arise as a result of a succession of States.

59. With regard to article 16, the rules governing the passing of State property in the case of dissolution and disappearance of a State should be the same as in the case of separation of part of the territory of a State, except in regard to immovable property of the predecessor State situated outside its territory. As provided in paragraph 1 (b) of that article, such immovable property passed to one of the successor States, while the other successor States must be compensated in an equitable manner.

60. Mr. USHAKOV observed that the Drafting Committee had omitted to specify, in article 15, that the predecessor State continued to exist. It should be indicated in the commentary that that omission would be rectified on second reading.

61. In addition, in article 16, paragraph 1, the word "disappears" should be replaced by the words "ceases to exist", for if the predecessor State disappeared, nothing remained on the succession of States.

62. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve articles 15 and 16 as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 5.30 p.m.

¹⁰ For the discussion of the text originally submitted by the Special Rapporteur, see 1399th and 1400th meetings.