

Document:-  
**A/CN.4/SR.1240**

**Summary record of the 1240th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
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draft a provision which would meet the wish, expressed by most of the members of the Commission, that the draft articles should indicate, but not expressly fix, a date for the passing of State property upon a succession. The date which the Committee had considered most appropriate was the date of succession, which was defined in another article. However, the rules the Commission were formulating were not mandatory; the parties could always decide otherwise. But since an agreement was not possible in some cases, it was also necessary to provide for the possibility that the date would be fixed by a competent body in the international legal order. The Drafting Committee had merely followed the trend of the discussion in the plenary Commission.

60. The clause in square brackets was a saving clause which derived from the very nature of the rule laid down. Whether the Commission decided to retain it or not, would really make no difference. States would always be free to fix, by mutual agreement, a date other than that of succession, just as a competent body in the international legal order could always decide on a different date. If the Commission decided to delete that clause, however, it would have to give the necessary explanations in the commentary.

61. The CHAIRMAN observed that the majority of the members of the Commission were in favour of retaining the clause in square brackets, subject to the replacement of the word "decided" by a more appropriate term. The Commission was only giving the draft articles a first reading, however, and would be free to go back on its decision later. At all events the Special Rapporteur would mention all the objections in the commentary.

62. Mr. KEARNEY said that the Commission should not rely on the commentary to indicate the need for correcting a word like "decided", to which valid objection had been raised by most of the members. His own suggestion was that it should be replaced by the word "agreed", which was used in article 8, and that the commentary to article 7 should indicate that the Commission nevertheless had in mind such special circumstances as decisions of United Nations organs which might deal with the passing of State property.

63. The CHAIRMAN said that the commentary would make it clear that the Commission's decision was not final and that it would take its final decision when it gave the draft articles their second reading.

64. Mr. BILGE said he maintained his reservation on the word "passing", which was not correct once the principle of the extinction of the predecessor's rights had been recognized.

65. Mr. EL-ERIAN said he shared Mr. Kearney's apprehensions regarding the use of the word "decided" in article 7, as opposed to the word "agreed" in article 8. It might perhaps be possible to construe the word "agreed" broadly enough to cover cases decided in United Nations organs, since in a sense those decisions represented agreements.

66. In any event, he was not in favour of leaving the opening proviso in square brackets. It was true that on a few occasions the Commission had adopted that method in the past to offer governments and the General Assembly

alternative texts, but that had always been done by way of exception, and the practice should remain exceptional.

67. The CHAIRMAN said that the commentary would state that the Commission had hesitated between several terms.

68. Mr. USHAKOV said he was in favour of retaining the square brackets. The article did not specify who could take the decision in question. To delete the square brackets would be absurd from the legal standpoint. Their retention, on the other hand, would indicate that the Commission had deliberately selected a very vague form of words whose meaning it intended to clarify later.

69. The CHAIRMAN said the Commission need only ask the Special Rapporteur to state in the commentary that several members had opposed the opening proviso and that the Commission would take a decision on it at the second reading, when it had received the comments of governments.

70. If there were no objections, he would take it that the Commission decided to approve article 7 as proposed by the Drafting Committee, to retain the words appearing in square brackets and to delete the brackets.

*It was so agreed.*<sup>5</sup>

The meeting rose at 1 p.m.

<sup>5</sup> See also next meeting, para. 53.

## 1240th MEETING

*Wednesday, 4 July 1973, at 10.5 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*later:* Mr. Jorge CASTAÑEDA

*Present:* Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Succession of States in respect of matters other than treaties

(A/CN.4/267; A/CN.4/L.196/Add.1)

[Item 3 of the agenda]

*(continued)*

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE  
*(continued)*

#### ARTICLE 8

1. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that article 8 replaced articles 8 and 9 submitted by the Special Rapporteur in his sixth

report (A/CN.4/267) and in document A/CN.4/L.197.<sup>1</sup> The purpose of the article was not to determine what State property passed to the successor State, but to lay down the substantive rule that the successor State received that property free.

2. As the Special Rapporteur had pointed out during the discussion, some writers distinguished in that respect between the public and private domains of the State, and held that only property in the public domain passed to the successor State free, while property in the private domain gave rise to compensation. That doctrine had never been universally applied, because many legal systems made no distinction between the public and private domains of the State. Moreover, in the systems which did make that distinction, the greater part of the State property, as defined in article 5, belonged to the public domain.

3. Article 8 contained two clauses in square brackets, on which the Drafting Committee had been unable to agree. The first reserved the rights of third parties. Some members of the Committee had considered that unnecessary, because the draft articles would contain provisions concerning those rights. They had also maintained that, if the saving clause appeared in article 8, it would have to be repeated in many other provisions.

4. The second clause in square brackets—"unless otherwise agreed"—had attracted the same criticism in the Drafting Committee as a similar formula used in article 7.

5. The proposed article was very different from the previous articles 8 and 9, the purpose of which had been to determine State property. In view of the difficulty of doing so, since State property varied according to the type of succession, the Drafting Committee had decided, in agreement with the Special Rapporteur, that the new article should not lay down any criteria for determining such property, but should simply state the rule that the property in question passed from the predecessor State to the successor State without compensation. The criterion to be applied in determining State property would be laid down later for each type of succession.

6. The new text proposed for article 8 read :

*Article 8*  
*Passing freely of State property*

[Without prejudice to the rights of third parties] State property passing in accordance with the present articles shall pass from the predecessor State to the successor State without compensation [unless otherwise agreed].

7. Sir Francis VALLAT said he supported the inclusion of article 8 in the draft, subject to some small changes. The article stated the essential principle, namely, that State property which passed from the predecessor State to the successor State did so without compensation. That principle had to be stated, because article 6 specified the effect of succession on rights to State property, but did not say whether that effect occurred with or without compensation. Experience had shown that, where no

provision was made on that point, sooner or later disputes would arise as to whether compensation should be paid or not.

8. It was necessary, however, to include two safeguards to cover certain particular cases. The first was contained in the opening proviso placed in square brackets, and concerned the rights of third parties. It was a safeguard and no more; it did not say what the effect of those rights would be. Its purpose was simply to state that the absence of compensation as between the predecessor State and the successor State did not mean that the rights of third parties could be disregarded. Under some systems of law there might be no private rights, so the rights of private individuals would not survive. Under other systems, where private rights did exist, the saving clause would protect them. The question was one to which the Commission would have to revert in connexion with later articles.

9. The second safeguard was embodied in the concluding proviso "unless otherwise agreed", also in square brackets. In that connexion, Mr. Bartoš had drawn attention to the fact that in certain cases a tribunal might have to decide the question of compensation. Hence it seemed desirable—although normally the purpose of the proviso would be to safeguard variation by agreement—to make provision for the possibility of variation by decision. He therefore suggested that the concluding proviso should be expanded to read: "unless otherwise agreed or decided" and that a suitable explanation should be included in the commentary.

10. Lastly, to be consistent with article 6, he proposed that the words "in accordance with the present articles" should be amplified to read "in accordance with the provisions of the present articles".

11. Mr. USHAKOV suggested that the second proviso should be retained without the square brackets and that, for the sake of clarity, the words "by the predecessor State and the successor State" should be added after the words "unless otherwise agreed".

12. With regard to the substance of the article, he supported the principle that the property should pass without compensation, but he doubted whether it was possible to draft a general rule applicable to all cases of State succession. Such a rule would not be applicable, for example, to the case of transfer of territory, which was governed by the general principle of agreement between the parties, or to the case of fusion of two States, in which there could be no compensation since all the property of each State became the property of the State resulting from the fusion. In addition, the proviso expressed by the words "unless otherwise agreed by the predecessor State and the successor State" would not be applicable in the case of accession to independence, since there could be no question of agreement between the former metropolitan Power and the former colony. A rule ceased to be general once it was outweighed by exceptions. The Commission would therefore have to provide for each case of succession separately.

13. The first proviso in square brackets was meaningless. It specified neither what third parties nor what rights were meant and was therefore open to the broadest, and

<sup>1</sup> For previous discussion see 1229th meeting, para. 48 and 1231st meeting, para. 67.

even to absurd, interpretations. If the Commission thought it necessary to safeguard certain rights of certain third parties, it should state clearly what rights and third parties they were.

14. Mr. EL-ERIAN supported Sir Francis Vallat's suggestion that the words "or decided" should be added at the end of the concluding proviso. During the discussion on article 7, he had suggested that the word "agreed" might perhaps be construed broadly enough to cover the case of a decision.<sup>2</sup> On further consideration, however, he thought that such an interpretation would be reading too much into the word "agreed".

15. He shared Mr. Ushakov's apprehensions about the problem of mentioning compensation, in view of cases of fusion of States. Those cases were by no means hypothetical: one such fusion was at present under serious discussion in the capital of his country. It was therefore necessary to clarify the point in the commentary.

16. He was not certain that a specific reference to agreement by the predecessor State and the successor State would suffice. There might be cases in which the agreement of a third State would be also necessary.

17. Mr. REUTER said that with regard to the second clause in square brackets, he would refer the Commission to the comment he had made on the similar proviso in article 7.<sup>3</sup>

18. For the body of the article he proposed the following wording: "... the passing of State property from the predecessor State to the successor State shall take place without compensation ...". That drafting change did not affect the substance of the article.

19. With regard to the substance, he could accept the principle laid down, but with many reservations and on condition that it would be stated in the commentary that in reality the rule laid down was one which generally was valid. That being so, it might be more straightforward to say in the body of the text that the passing of State property "shall generally take place without compensation", thus indicating that the Commission left room for wide departures from the principle.

20. The reservations which, in his opinion, should be made to the principle, related to the diversity of types of succession, the nature of the property, the location of the property and the real rights of third parties—the latter point being covered by the first clause in square brackets. That proviso could be interpreted in two different ways. His own interpretation was that the rights contemplated were rights created internationally by the predecessor State. If that State had granted real rights to a subject of international law, the succession did not affect them; the rights of the third parties were grounded in international law itself. The other interpretation—and that was the point on which opinions might differ—was that the rights in question might be rights of private persons created by the internal law of the predecessor State; but in so far as that law disappeared, the rights of those third parties would also disappear. The Com-

mission would be considering later whether the rights of private persons should be safeguarded, but the two hypotheses were different.

21. It would therefore be best to replace the opening proviso by the words "Subject to the provisions of the present articles", to mention in the commentary the differences of opinion to which it had given rise and to state that the Commission would consider the question of the rights of third parties later. Article 8 would read: "Subject to the provisions of the present articles, the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided".

22. The CHAIRMAN,\* speaking as a member of the Commission, said that the new wording proposed by Mr. Reuter greatly improved the drafting, without affecting the substance of the article in any way. He was therefore quite willing to accept it.

23. Mr. MARTÍNEZ MORENO said that he approved of article 8 as proposed by the Drafting Committee, but would have no objection to the rewording proposed by Mr. Reuter provided that, either in the text or in the commentary, it was made perfectly clear that the provisions of article 8 were without prejudice to the rights of third parties. He had in mind the hypothetical case of a predecessor State which had bought an island from another State and had agreed to pay the price in instalments; if its territory passed to a successor State while instalments were still outstanding, it would be necessary to safeguard the rights of the third State which was the seller. In the absence of such a safeguard, article 8 might deprive that State of the right to claim the outstanding instalments.

24. He approved of Sir Francis Vallat's suggestions that the form of words used in article 6, "in accordance with the provisions of the present articles", should be adopted, and that the words "or decided" should be added at the end of the article after the word "agreed".

*Mr. Castañeda took the Chair.*

25. Mr. RAMANGASOAVINA said he approved of the general principle laid down in article 8, as proposed by the Drafting Committee. As to the two saving clauses, he found the final one acceptable in the amended form suggested by Sir Francis Vallat and Mr. Reuter. He had serious doubts, however, about the clause reserving the rights of third parties. In his opinion, the rights and property of third parties were automatically safeguarded in the case under consideration because only State property was involved, so that the clause was not justified. On the other hand, it was open to a broad interpretation which might provide justification for such controversial notions as that of acquired rights. The idea of succession without compensation applied solely to State property which passed from the predecessor State to the successor State, to the exclusion of property of third parties; for a State could not transfer what did not belong to it. The principle of succession without compensation therefore meant that everything which belonged to the predecessor

<sup>2</sup> See previous meeting, para. 65.

<sup>3</sup> See previous meeting, para. 29.

\* Mr. Yasseen.

State must pass to the successor State without requiring, for example, the discharge of encumbrances.

26. Members of the Commission should bear in mind that article 8, as submitted by the Drafting Committee, was much watered down as compared with the corresponding texts previously proposed by the Special Rapporteur. They should avoid watering it down still further by expressly reserving the rights of third parties.

27. He found the wording proposed by Mr. Reuter perfectly acceptable, since the reservation of the rights of third parties, although implied, was not expressly stated.

28. Mr. TABIBI said he thought the wording proposed by Mr. Reuter had the drawback of not specifically safeguarding the rights of third States. It was not sufficient to include a reference to the matter in the commentary. The Drafting Committee's idea of embodying a proviso in the article itself was far preferable.

29. With regard to the rights of private persons he drew attention to grazing rights, which had existed from time immemorial in many parts of the world. It was quite common for herdsmen in semi-arid zones to have to send their beasts to graze on the other side of an international boundary. Rights of that kind were of vital importance to the people concerned and had to be preserved in the event of a succession of States.

30. Mr. KEARNEY said that on the fourth of July he could not refrain from giving the example of his own country in connexion with the statement made during the discussion that a newly independent State could not make a succession agreement with the former metropolitan Power. The United States had in fact made an agreement with its predecessor State, and that agreement had lasted, in part at least, for some 180 years. It was possibly the first agreement of that kind entered into by a newly independent State and, as such, seemed to constitute a valid precedent.

31. As to the text of article 8, he supported Sir Francis Vallat's suggestion that the concluding word "agreed" should be amplified to read "agreed or decided". Even in that form, however, the passage would remain ambiguous, and at some later stage it would be necessary to make it clear who "agreed" and who "decided". At the present stage—that of first reading—he could accept the proposed formula, provided that it was accompanied by a suitable explanation in the commentary.

32. As to the opening proviso, he urged the retention of a precise reference to the rights of third parties, as proposed by the Drafting Committee, in preference to the more general language "Subject to the provisions of the present articles", proposed by Mr. Reuter.

33. It was a common practice of the World Bank and of regional banks to make advances for the construction of such properties as dams, and to subject the resulting property to a negative pledge. The pledge did not represent a monetary claim, but carried with it the right to ensure eventual repayment by means of a limitation on the use or disposition of the property. Obviously that kind of right would continue to be attached to the property on its transfer to a successor State. It was necessary to make it clear that there was no intention of interfering

with third-party rights of that kind. An important safeguard of that nature should be placed in the text of the article itself, rather than be relegated to the commentary.

34. Mr. QUENTIN-BAXTER also supported the addition of the words "or decided" at the end of article 8. He agreed with Mr. Kearney about the ambiguity of the words "agreed or decided", but was prepared to accept that formula for the time being, on the understanding that the Commission would revert to the matter at the second reading.

35. He saw no place in article 8 for the opening proviso on the rights of third parties. Nevertheless, he would be prepared to accept its retention on the understanding that it would be kept in square brackets to draw attention to the very tentative nature of the draft. He agreed with Mr. Ramangasoavina that the property of a third party who was a private person could under no circumstances be State property, so that it would not be affected by the substantive provision of article 8. Hence there was no more reason to introduce a safeguard into that article than into many other articles of the draft.

36. The rights of third parties depended on the survival of the predecessor State's juridical order, at least until the new State chose to change it. The problem was a very real one and the Commission would sooner or later have to deal with it. The present difficulties had arisen from the fact that the Commission was dealing with a narrowly defined type of property—State property—but in the process was encountering problems of a general character which could not very well be set aside.

37. Mr. BILGE said that, as the Commission had already discussed the principle stated in article 8 when examining the new wording of article 9 submitted by the Special Rapporteur,<sup>4</sup> it was not necessary to revert to the matter. With regard to the text of article 8 proposed by the Drafting Committee, he merely reiterated the reservations he had expressed concerning articles 6 and 7.<sup>5</sup> In his view, there was neither passing nor transfer of property, but acquisition without compensation.

38. Mr. USTOR said he had reservations regarding article 8, which was almost superfluous and practically in contradiction with article 6. Article 6 specified that State succession entailed "the extinction" of the rights of the predecessor State. That being so, no problem of compensation could arise. The successor State's position could be compared to that of a person who inherited property from a deceased relative; it was obvious that the heir did not have to pay "compensation" for the property he inherited.

39. If article 8 was to be retained at all, the opening proviso should be expressed in the general terms proposed by Mr. Reuter: "Subject to the provisions of the present articles".

40. With regard to the last clause, he supported Sir Francis Vallat's proposal that the word "agreed" should be amplified to read "agreed or decided".

<sup>4</sup> See 1231st meeting, para. 67 *et seq.* and 1232nd meeting.

<sup>5</sup> See previous meeting, para. 48.

41. Mr. SETTE CÂMARA said that, shorn of the two provisos in square brackets, the substantive provision of article 8 amounted to very little. It simply stated a very general rule which was subject to many obvious exceptions following from the different types of succession. In a fusion of two States, of course, there was no place for the payment of compensation.

42. As to third parties, it seemed to him that the passing of State property from the predecessor State to the successor State could not possibly affect the rights of third parties, including private persons, in any way. The problems which might arise in practice should be examined in connexion with later articles of the draft.

43. Article 8 was not really necessary. If the Commission decided to retain it, however, he would support the simpler and clearer wording proposed by Mr. Reuter.

44. Mr. TSURUOKA, noting that most members of the Commission accepted the principle stated in the text proposed by Mr. Reuter for article 8, appealed to his colleagues to approve that text. At the first reading it was more important to agree on substance than on form, for it was understood that drafting changes could always be made later. Moreover, the wording proposed by Mr. Reuter ensured that provisions would be devoted to the rights of third parties. For the time being it would be better not to make any substantive changes in article 8 that might cause confusion.

45. The CHAIRMAN, speaking as a member of the Commission, said that for the opening proviso he preferred the more general formula proposed by Mr. Reuter. He shared Mr. Ustor's misgivings regarding the use of the term "compensation", which did not adequately reflect the true position. Nevertheless, he would not oppose its retention at the present stage, on the understanding that the matter would be examined with care on second reading.

46. Speaking as Chairman, he noted that there was unanimous agreement on Mr. Reuter's wording for the substantive provision of article 8: "... the passing of State property from the predecessor State to the successor State shall take place without compensation unless otherwise agreed or decided."

47. There was, however, a difference of opinion on the opening proviso. Some members preferred the Drafting Committee's formula "Without prejudice to the rights of third parties"; others preferred Mr. Reuter's more general formula "Subject to the provisions of the present articles". He therefore suggested that he should informally take the sense of the meeting on the choice between those two formulations. If there were no objections, he would take it that the Commission agreed to adopt that procedure.

*It was so agreed.*

48. The CHAIRMAN, having taken the sense of the meeting, noted that nine members favoured the Drafting Committee's wording and five members Mr. Reuter's wording of the opening proviso. The Drafting Committee's wording for the proviso would therefore be attached to Mr. Reuter's wording for the substantive provision, and the two together would form the text of article 8 adopted on first reading.

49. Mr. YASSEEN pointed out that it was necessary to insert the words "in accordance with the provisions of the present articles" after the words "to the successor State".

50. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the text of article 8 in the form which he had indicated, with the addition suggested by Mr. Yasseen.

*It was so agreed.*

51. Mr. MARTÍNEZ MORENO proposed that, in order to make the title consistent with the text of the article, the word "freely" should be deleted from the title and the words "without compensation" should be added at the end.

52. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the title of article 8 to read: "Passing of State property without compensation".

*It was so agreed.*

ARTICLE 7 (Date of the passing of State property)  
(*resumed from the previous meeting*)

53. Sir Francis VALLAT said that, in consequence of the adoption of the new text for article 8, the opening proviso of article 7 should be reconsidered. He proposed that the words "otherwise decided" in article 7 should be replaced by the words "otherwise agreed or decided".

54. The CHAIRMAN said that, if there were no objections he would take it that the Commission agreed to make the opening proviso of article 7 consistent with the closing proviso of article 8, as proposed by Sir Francis Vallat.

*It was so agreed.*

The meeting rose at 1.5 p.m.

## 1241st MEETING

*Wednesday, 4 July 1973, at 3.50 p.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Bartoš, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Question of treaties concluded between States and international organizations or between two or more international organizations

(A/CN.4/258; A/CN.4/271)

[Item 4 of the agenda]

(*resumed from the 1238th meeting*)

1. Mr. PINTO congratulated the Special Rapporteur on his admirable reports. He was fully cognizant of the variety of international organizations and of their