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Summary record of the 1389th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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(A/CN.4/293 and Add.1, para. 121), and Mr. Reuter's suggestion [10] to the Drafting Committee, for consideration in the light of the discussion.

It was so agreed.

The meeting rose at 1.10 p.m.

[10] See para. 36 above.

1389th MEETING

Monday, 14 June 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Most-favoured-nation clause (*continued*) (A/CN.4/293 and Add.1, A/CN.4/L.242)

[Item 4 of the agenda]

SETTLEMENT OF DISPUTES

1. The CHAIRMAN invited the Special Rapporteur to introduce the paragraph of his report relating to settlement of disputes (A/CN.4/293 and Add.1, para. 132).

2. Mr. USTOR (Special Rapporteur) said that, in the first sentence of paragraph 132 of his report, he had mentioned the obvious fact that questions connected with the application of most-favoured-nation clauses might lead to international disputes. He now wished to withdraw the second sentence of that paragraph, because the set of draft articles was considered to be autonomous and not very closely connected with the Vienna Convention on the Law of Treaties. He thought the Commission should not adopt special measures for the settlement of disputes concerning most-favoured-nation clauses, because the general rules of international law and, more particularly, Article 33 of the United Nations Charter would be applicable. Moreover, it was not the Commission's practice to include provisions on the settlement of disputes in its drafts.

3. Mr. KEARNEY said he agreed with the Special Rapporteur that the second sentence of paragraph 132 of the report was inappropriate. On the other hand, the Commission had sometimes included provisions on the settlement of disputes in the draft conventions that it had prepared.

4. The logical consequence of the statement contained in the first sentence of the paragraph would be that the Commission should concern itself with disputes that might arise regarding the application of the draft articles. Article 65 of the Vienna Convention on the Law of Treaties [1] established the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; but the type of dispute which commonly arose in connexion with a treaty containing a most-favoured-nation clause—in other words, a commercial treaty that was of great importance to the two parties to the dispute—did not usually result in termination or suspension of the treaty. Even where a State considered that one of its nationals had been wronged and that the other State was not interpreting the treaty correctly, it would not, generally speaking, wish to see the treaty suspended or terminated. Consequently, the system adopted in the Vienna Convention was not the best one to apply in disputes relating to a most-favoured-nation clause.

5. Another aspect of disputes involving considerable economic advantages or disadvantages was that they were usually dealt with by courts or tribunals of one or other of the parties and, if the dispute was sufficiently serious, dealt with almost invariably by courts or tribunals at a very high level. Great difficulties arose, and high-level political decisions were usually required if a State sought to differ with the decision reached by its own supreme court or high-level tribunal on the interpretation of the clause in dispute because of international considerations—when the disagreement would injure the interests of an internal economic group. Cases of that type could best be handled by international judicial settlement because, in a situation where, in the interests of settling a dispute, the decision of a State's own supreme court or tribunal was not followed, an adverse ruling by an international tribunal provided the most reasonable grounds for that State to make the necessary changes in its interpretation, its internal legislation or its administrative regulations.

6. For that reason, a provision should be included in the draft specifying that, failing settlement by any other means, a party to a dispute arising out of a most-favoured-nation clause involving the interpretation or application of the draft had the right to refer the matter to the International Court of Justice. He was fully aware of the objections that could be raised, but he believed that that was by far the best means of settlement available and that the Commission should adopt it for disputes arising out of a set of articles on the most-favoured-nation clause.

7. Mr. USHAKOV said he thought that there was a misunderstanding about the first sentence of paragraph 132, which referred to international disputes arising out of the application of most-favoured-nation clauses. The Commission was not called upon to deal, in its draft articles, with disputes arising out of the application of particular most-favoured-nation clauses; it was only concerned with disputes which might result from the application of certain general rules relating to the most-favoured-nation clause.

8. It was necessary to distinguish between two types of possible disputes; those which might arise in connexion

[1] For the text of the Convention, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

with the application of a most-favoured-nation clause contained in a particular treaty, and those which might arise from the interpretation of the general rules stated in the draft articles. In the first case, the dispute would be between the parties to the treaty containing the clause, whereas in the second, it would be between the parties to the future convention resulting from the draft articles. Those were two entirely separate matters which should not be confused. Only the second matter, that of disputes relating to the application of the future convention, concerned the Commission. He believed that the measures provided for in general international law could be applied to it.

9. Mr. YASSEEN said that the question of the settlement of disputes relating to treaties had been settled once and for all by the 1969 Vienna Convention. In his opinion the system of settlement provided for in the Vienna Convention should apply to all disputes arising out of treaties, including treaties containing a most-favoured-nation clause. The convention on the most-favoured-nation clause would itself also be subject to that system of settlement. It might not be ratified by the same States as the Vienna Convention, but the Commission must be consistent and should not forget that it was working to build an international legal order. If the system of the Vienna Convention was acceptable, it must apply to the present draft and to all treaties containing a most-favoured-nation clause. Consequently, there was no need to add an article on the settlement of disputes regarding the present draft.

10. Mr. HAMBRO said he agreed with the view expressed by Mr. Kearney. Although impressed by the arguments advanced by Mr. Yasseen, he did not see why the Vienna Convention should be regarded as preventing the Commission from making other arrangements for a particular set of articles.

11. Mr. REUTER said that the question of the settlement of disputes was a very delicate one, for in every treaty there was a clause on the settlement of disputes which might arise out of the application of that treaty. Where the rules of the Vienna Convention came into conflict, in that regard, with the rules of a particular treaty, the Commission could not rest content with a simple reference to a system of judicial settlement or compulsory arbitration: it would have to introduce rules on conflict of treaties.

12. One could distinguish, as Mr. Ushakov had done, between the application of a particular treaty and the interpretation of a general convention. The Vienna Convention had provided a system for the settlement of disputes without going into details of how the general rules it had established for that purpose might combine with the rules applicable to particular treaties. It had carefully avoided that problem and had provided only for a system of conciliation. Even if a dispute relating to the application of a treaty arose between States which were parties both to that treaty and to the Vienna Convention, it was not certain that the mode of settlement embodied in that Convention would raise no problems. In that case too, it might perhaps be necessary to say, adopting the distinction made by Mr. Ushakov, that the conciliation machinery provided for in the Vienna Convention would apply to the interpretation of the rules of that Convention relevant to the dispute, but not necessarily to the application of those rules to concrete cases.

13. He therefore considered that at the present stage in the Commission's work, it would be very unwise to propose a text on the settlement of disputes. It would be better merely to state in the report that the Commission had thought it useful to study a means of settling disputes within the framework of its draft convention, and that many of its members had expressed their confidence in a system of judicial settlement and arbitration. He personally would prefer judicial settlement.

14. Mr. SETTE CÂMARA questioned the advisability of undertaking the formulation of rules for the settlement of disputes. Experience in that matter was by no means encouraging. On previous occasions the Commission had been divided in its views and it had been necessary to submit alternative texts to the General Assembly. Subsequently, conferences had sometimes considered the topic from an entirely political viewpoint, and no weight had been attached to the Commission's suggestions. In the present instance, the problem of the relationship between the draft articles and the Vienna Convention would also have to be solved.

15. Moreover, if provisions were to be adopted on the settlement of disputes arising out of most-favoured-nation clauses, the same would have to be done with regard to succession of States in respect of treaties, a matter which had been referred to the Commission by the General Assembly, but one on which the Commission had not made any concrete proposals.[2] It was difficult to formulate new provisions on the settlement of disputes; such provisions tended to be of a standard type. He therefore agreed with Mr. Yasseen that the matter should be set aside for the time being.

16. Mr. YASSEEN said that he wished to explain his views on the settlement of disputes. In his opinion, even if the draft articles contained no provision on that subject, it would be the system of settlement provided for in the Vienna Convention that would apply to disputes arising out of their application. That system could, he thought, be described as a progressive one in view of the general political situation and the attitude of States to means of settling conflicts which involved the intervention of a third party. The United Nations Conference on the Law of Treaties had, indeed, accepted the principle of compulsory conciliation and of resort to the International Court of Justice on certain matters. Could the Commission go further and provide for compulsory arbitration or judicial settlement? He did not believe so. The question was a highly political one it would be reasonable for the Commission to ascertain the views of the General Assembly on it.

17. Mr. USHAKOV emphasized that the question which concerned the Commission was not the settlement of

[2] See *Yearbook... 1974*, vol. II (Part One), p. 172, document A/9610/Rev 1, para. 75, and General Assembly resolution 3315 (XXIX), section II, para. 2.

disputes about the application of most-favoured-nation clauses as such, but the settlement of disputes regarding the application of the future convention resulting from the draft articles.

18. Mr. CALLE Y CALLE said it was obvious that the commentary should refer to the settlement of disputes, for any set of rules always gave rise to questions of interpretation and application.

19. It should not be forgotten that the convention which might result from the draft articles would cover the entire range of most-favoured-nation clauses and would not deal exclusively with economic matters. The expression "settlement of disputes" appeared to refer both to disputes arising out of the application of the most-favoured-nation clause and to disputes arising out of the draft articles. The means of settling disputes should be established by the will of the parties, however, as it was in practice in most trade treaties, which usually provided for arbitration. The Commission should not undertake the difficult and complex task of elaborating a specific system for the settlement of disputes concerning the application of the most-favoured-nation clause. As Mr. Yasseen had pointed out, the matter would in any event be dealt with by the conference adopting the future convention.

20. Mr. KEARNEY said that his earlier statement appeared to have led to some misunderstanding. He had not suggested the insertion of an article applicable to the settlement of disputes relating to provisions contained in treaties on most-favoured-nation treatment as between two States. He was merely proposing that a settlement procedure should be established for disputes over a most-favoured-nation clause which involved the present draft articles, in the sense that the latter were used to determine the treatment to which a State was entitled under a most-favoured-nation clause. Consequently, his proposal related exclusively to the application of the draft articles.

21. His sole reason for suggesting a procedure different from that specified in the Vienna Convention was that it would be preferable to obviate the need for suspension or termination of a treaty. Disputes arising out of a most-favoured-nation clause were precisely the type of dispute in which it should not be necessary to suspend or terminate a treaty in order to arrive at a third-party decision on the merits of an interpretation of a given clause.

22. If most of the members of the Commission did not wish to advocate third-party settlement, that was understandable; in recent years, the Commission had not shown any strong inclination to do so. In his opinion, one of the weaknesses of the Commission was a belief that it could propose codification of law without having to consider how the law was to be interpreted or how disputes were to be settled; it would function at far less than full efficiency until it took those matters into consideration.

23. Mr. RAMANGASOAVINA said he agreed with Mr. Yasseen and Mr. Calle y Calle. Every treaty had a margin of uncertainty and could raise a problem of interpretation. Thus the convention the Commission was preparing could raise problems of interpretation concerning its own terms or its relationship with the Vienna Convention and with treaties between States containing most-favoured-nation clauses. Since the Commission had prepared a general convention which settled the problem of the interpretation of treaties, there was no need to include in the present draft a provision on disputes which might arise over its interpretation, especially as it was closely linked with the Vienna Convention.

24. The first sentence of paragraph 132 of the Special Rapporteur's report seemed to show some scepticism about the usefulness of the draft articles. But any convention, however perfect, could give rise to disputes over its interpretation and its practical application. In his view, any disputes which might arise over the present draft articles should be settled in accordance with the Vienna Convention. There was thus no need to provide for a special system, and it would be wiser not to mention the question of settlement of disputes in the draft articles.

25. The CHAIRMAN observed that the discussion had revealed divergent views, but the balance was clearly in favour of the Special Rapporteur's position that the draft should not include a provision on the settlement of disputes and that the question should be discussed by the General Assembly or by a conference convened to adopt the draft articles in the form of a convention. In dealing with the topic of succession of States in respect of treaties, the Commission had decided not to incorporate a proposed article on the settlement of disputes, but to include a substantive statement on the matter in the introduction to the draft articles.[3]

26. If there were no further comments, he would take it that the Commission agreed to instruct the Special Rapporteur to follow a similar course by including, in the introduction to the draft articles on the most-favoured-nation clause, an account of the discussion which had taken place and the suggestions made.

It was so agreed.

Succession of States in respect of matters other than treaties (A/CN.4/292)

[Item 3 of the agenda]

27. The CHAIRMAN invited the Special Rapporteur to introduce his eighth report (A/CN.4/292).

Introductory statement by the Special Rapporteur

28. Mr. BEDJAOUI (Special Rapporteur) said that his eighth report on the succession of States in respect of matters other than treaties reflected a new choice of method as compared with the previous report. The present report still dealt with State property—excluding communal, parastatal and other property—but it no longer referred, as the seventh report[4] had done, to particular categories of State property such as currency, treasury, and public funds, State archives and libraries.

[3] *Ibid.*, p. 173, document A/9610/Rev.1, paras. 79-81.

[4] *Ibid.*, p. 91, document A/CN.4/282.

29. There were several ways of approaching the question of succession of States in respect of State property. First, the approach could be based on the type of succession and draft articles containing rules appropriate to each type could be formulated. He had covered the three types of succession which the Commission had already adopted in its draft articles on succession of States in respect of treaties: succession relating to part of territory, succession relating to newly independent States and succession relating to the uniting or separation of States. It was also possible to consider the specific nature of the property in question—currency, archives, treasury, public funds, etc.—and make a special rule for each of those types of property. Again, a distinction could be made on the basis of the category of property under consideration, separating movable property from immovable property. Finally, State property could be distinguished according to its location and be given different treatment depending on whether it was in the territory to which the succession of States related or outside it, in the territory of the predecessor State or of a third State.

30. In the five earlier reports which he had devoted to succession of States in respect of public property, he had tried to combine several of those approaches. In his seventh report, submitted in 1974, he had referred to particular types of property, considered *in concreto*, such as currency, archives and public funds, but that had raised extremely complex technical problems. In none of the previous reports, however, had he distinguished between movable and immovable property.

31. In his eighth report he had, for the first time, made a distinction based on categories of property, between movable and immovable property. He had abandoned distinctions based on the specific nature of the property —currency, archives, treasury, etc.—with separate rules for each type, and had preferred to submit general articles. He had thus combined three possible methods by making a triple distinction based on the type of succession, the category of property and the location of the property. Consequently, for each of the three types of succession of States adopted by the Commission in its draft articles on succession in respect of treaties,[5] the Commission would have to examine the nature of the succession of States according to whether the property in question was movable or immovable and whether or not it was situated in the territory to which the succession of States related.

32. The new articles 12 and 13 which he was submitting (A/CN.4/292, chap. III) accordingly referred to succession in respect of part of territory; article 12 related to State property situated in that territory and article 13 to State property situated outside it.

33. The question arose why legal writings, judicial precedents and the practice of States all recognized that State property passed from the predecessor State to the successor State in the vast majority of cases. The reason was that, when a successor State took possession of a territory, it took possession not only of the territory itself, but also of everything in the territory. Obviously, the predecessor State could not remove from the territory fixed "installations" such as roads, railways, airports, barracks, military bases, public buildings, etc. But even in the case of movable property, the predecessor State could not transmit a territory to the successor State having previously removed all such property. The territory must be ceded as a going concern, and any withholding of property by the predecessor State which would impair the viability of the territory would be unacceptable. That was the basic moral and political principle underlying the legal principle of the transfer of State property.

34. The reason why property must pass to the successor State was rooted in the principle of the attachment of the property to the territory and the principle of equity. To determine whether property should pass to the successor State or not, it was therefore necessary to apply a material criterion: that of the relationship which existed between the territory and the property because of the origin, nature and geographical situation of the property. In the Sixth Committee of the General Assembly, Mr. Lauterpacht, the representative of Australia, had said on 16 October 1975 that a general principle should be formulated acknowledging the right of the successor State to such assets as were attributable to or associated with the administration of the territory to which the succession of States related.[6] That meant property "allocated" to the territory before the succession of States, in other words, property linked by its nature to the territory —and hence directly attached to it—or property permanently situated in the territory. That principle of the allocation or attachment of the property to the territory was only the expression of the principle of viability of the territory to which the succession of States related.

35. Movable property, on the other hand, was impossible to localize. Hence the problem it raised could only be solved by the principle of equity. The application of that principle underlay all the articles, particularly article 17 (Succession to State property in cases of separation of parts of a State).

36. As he had explained in paragraphs 16 to 27 of his eighth report, he had abandoned the presentation he had adopted the previous year in his seventh report, in which the nature of the property—currency, treasury, archives, etc.—had been considered *in concreto*; he had been induced to give up that method not so much because it could involve artificial, arbitrary or inappropriate choices but rather because of the excessively technical nature of the articles which he would have had to propose on such complex subjects as currency, treasury, public funds and archives. In the present report, therefore, he had reverted to a method which he had already adopted in previous reports, when he had tried to find general rules that could be applied to all kinds of property, whatever its specific nature.

[5] *Ibid.*, p. 174, document A/9610/Rev.1, chap. II, sect. D.

[6] *Official Records of the General Assembly, Thirtieth Session, Sixth Committee*, 1541st meeting, para. 5.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned)

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned)

37. Mr. BEDJAOUI (Special Rapporteur) introduced article 12, for which he proposed the following wording:

Article 12. Succession in respect of part of territory as regards State property situated in the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State: *

(*a*) the ownership of immovable property of the predecessor State situated in the territory to which the succession of States relates shall, unless otherwise agreed or decided, pass to the successor State;

(*b*) the ownership of movable property of the predecessor State which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall also pass to the successor State:

(i) If the two States so agree, or

(ii) If there is a direct and necessary link between the property and the territory to which the succession of States relates.

* *Variant :* **When part of the territory of a State, or when any territory not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State....**

38. That provision was the first of those relating to the particular type of succession of States constituted by succession in respect of part of territory. The definition it gave of succession in respect of part of territory was that adopted by the Commission on first reading of the draft articles on succession of States in respect of treaties.[7] As a variant, he was also proposing the definition adopted by the Commission on second reading.[8]

39. Article 12 comprised a subparagraph (*a*) and a subparagraph (*b*) referring to immovable and movable property respectively. Subparagraph (*a*) called for application of the principle of the passing of State property, as formulated in article 9.[9] Since that subparagraph dealt with immovable property, it was not absolutely necessary to add the words "on the date of the succession of States", which were much more important in subparagraph (*b*), because it referred to movable property. As was shown in paragraphs 5 to 16 of the commentary to the article, the content of subparagraph (*a*) was confirmed both by international legal theory and judicial decisions and by State practice. The examples he had provided in his report often went beyond what it was necessary to establish for the purposes of that subparagraph; often, the devolution of property was decided upon without any distinction being made according to the nature of the property and the place where it was situated. It could therefore be concluded that, for the category of immovable property situated in the territory to which the succession related, the principle of the passing of property was generally accepted. The words "unless otherwise agreed or decided" made it possible for States to agree on a different arrangement and did not preclude a judicial decision against the passing of State property.

40. With regard to movable property (subparagraph (*b*)), it might be asked whether it was realistic to state a legal rule when the predecessor State could easily remove property in that category from the assets of the succession. Nevertheless, to refrain from stating such a rule although the property involved was often very extensive, would be an admission of failure on the part of jurists. Despite its mobility, he wished such property to be covered by a legal rule, and he had therefore followed the principle of the viability of the territory and the principle of equity. The movable property of the predecessor State passed to the successor State because it was necessary and equitable that it should be so. The geographical location of the property was thus of little importance: the fact that it was situated in the territory on the date of the succession of States did not make devolution to the successor State absolutely certain even though there was a rebuttable presumption in favour of the passing of the property. Conversely, the fact that the property was situated outside the territory, in the remaining part of the predecessor State or in a third State, did not mean that it remained the property of the predecessor State, although there was also a rebuttable presumption in favour of the predecessor State. As stated in paragraph 19 of the commentary to article 12

> ... the mere fact that movable property is situated in the territory to which the succession of States relates should not automatically entitle the successor State to claim such property, nor should the mere fact that the property is situated outside the territory automatically entitle the predecessor State to retain it. In order for the predecessor State to retain or the successor State to acquire property, other conditions besides the too simple and easy one of where the property is situated must be fulfilled.

41. What criterion should, then, be adopted to determine that the movable property belonged to the successor State, even if the predecessor State had transferred it to its own territory? In his opinion, the predecessor State could not unduly exploit the mobility of the State property in question, to the point of seriously disorganizing the territory which it was handing over and of jeopardizing its viability. There were natural limits beyond which the predecessor State could not go without seriously failing in an essential international duty. That raised the question of the viability of the territory and whether the property concerned was or was not necessary it. to Some movable property had a direct and necessary link with the territory. Thus, currency could circulate only in a certain territory, and that implied the full withdrawal of the predecessor State from the territory in question

[7] *Yearbook... 1972*, vol. II, p. 249, document A/8710/Rev.1, chap. II, sect. C, article 10.

[8] See *Yearbook... 1974*, vol. II (Part One), p. 208, document A/9610/Rev.1, chap. II, sect. D, article 14.

[9] For the articles already adopted by the Commission, see *Yearbook... 1975*, vol. II, pp. 110 *et seq.*, document A/10010/Rev.1, chap. III, sect. B.

and the replacement of the predecessor State by the successor State in its monetary prerogatives and authority. A territory of some size could not be transferred without metallic cover for the currency. The situation was obviously not the same in the case of mere frontier rectifications. The notion of a necessary and direct link between certain movable property and the territory to which the succession related was also found in regard to State funds and State archives. On that point, he referred the Commission to paragraphs 41 to 65 of the commentary to article 12.

42. Lastly, he pointed out that it would probably be necessary to add definitions of movable and immovable property to article 3 (Use of terms).

Co-operation with other bodies

[Item 9 of the agenda]

Statement by the observer for the Inter-American Juridical Committee

43. The CHAIRMAN invited Mr. Ruiz-Eldredge, the observer for the Inter-American Juridical Committee to address the Commission.

44. Mr. RUIZ-ELDREDGE (Observer for the Inter-American Juridical Committee) said that, over the years, the Committee had had the honour of welcoming several observers for the International Law Commission, the most recent one being Mr. Tabibi, who had informed it of the Commission's recent work.

45. World society was going through a grave crisis caused by the injustice from which the majority of the peoples of the world were suffering. The poor, the oppressed and the humble were hoping for a better future, and the efforts of international bodies like the Commission would contribute to the process of equitable change in response to deep social needs.

46. Under the impact of the demand for justice, such important economico-legal institutions as property, contracts and companies, and politico-legal institutions such as the State itself, were acquiring new dimensions which would place them at the service of mankind and make for the progress of peoples. The utilitarian values of the present time, which had sometimes been called "anti-values" should give way to ethical and logical values, without the important religious values being relegated to the background.

47. The peoples of the third world were animated by a sincere and deep desire for harmony and peace with justice; because they were engaged in a dramatic struggle for liberation, they realized that the dynamic action of a renovated law based on social and humanistic ideas was the only alternative to confrontation and insurrection, with the consequent sacrifice of young lives. It was against that background that the Inter-American Juridical Committee was making a contribution, in the realm of law, to the elimination of all forms of colonialism. The independence of the United States of America, the bicentenary of which was being celebrated, had been the first triumph against colonialism. In the eighteenth and nineteenth centuries, the other peoples of America had fought successfully for freedom, justice and independence; together with the great European, African and Asiatic revolutions, they had traced the inevitable course of justice, which it was the task of the law to facilitate.

48. The Committee, at its two most recent sessions (July-August 1975 and January-February 1976), had dealt with two subjects connected with the decolonization process: the Panama Canal and the Falkland Islands (Malvinas). On 8 August 1975, the Committee had adopted a resolution which recognized the sovereignty of the Republic of Panama over the "canal zone" and had proclaimed that the relations established by the existing treaties between the United States of America and Panama were legally in the nature of a concession relating to an international public service, in which the grantor of the concession was Panama and the beneficiary the United States, until such time as Panama took over control of the canal. He had communicated to the secretariat of the Commission the full text of that resolution and of the supporting statement of reasons, together with the separate opinions of the Argentine and Uruguayan members of the Committee.

49. On the problem of the Falkland Islands (Malvinas), the Committee had approved a Statement,[10] the full text of which he had also submitted to the Commission. In that Statement, after examining the geographical and historical background of the case, the Committee had declared that the Republic of Argentina had an undeniable right of sovereignty over the Malvinas Islands; that the unilateral action taken by the United Kingdom Government in dispatching the "Shackleton Mission" was in contradiction to General Assembly resolutions 2065 (XX) and 3160 (XXVIII); that the presence of foreign warships in waters adjacent to the American States constituted a threat to the peace and security of the continent; and that the hostile conduct intended to silence the claims of the Government of Argentina were obstructing the course of the negotiations recommended by the General Assembly.

50. The General Assembly had declared that any attempt to disrupt the national unity or the territorial integrity of a country was incompatible with the purposes and principles of the United Nations, which was thus concerned to eliminate all forms of colonialism, direct or indirect, preferably by legal means. The Committee had been working strenuously to that end.

51. The question of transnational undertakings had been discussed at length by the Committee, which had already adopted a decision on it. In 1972, when the Committee had been preparing the agenda for the Inter-American Specialized Conference on Private International Law, that question had been examined by a Working Group consisting of Mr. Rubin, the United States member, Mr. Aja Espil, the Argentine member, and Mr. Galindo Pohl of El Salvador, the Chairman of the Committee.

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[10] See *OAS Chronicle* (Washington, D.C.), vol. II, No. 2 (February 1976), p. 7.

Reports had been submitted by Mr. Caicedo Castilla, the Colombian member, Mr. Aja Espil, and himself as Peruvian member; at the July-August 1975 session a report had been submitted by Mr. Gómez Robledo, the Mexican member. In August 1975, the Committee had adopted a resolution transmitting those reports to the Secretary-General of OAS, together with the analytical report prepared by Mr. Prado Kelly, the Brazilian member. It had requested that the reports should be distributed to Governments, and to other entities or groups of experts studying the subject. The Committee had agreed that at its forthcoming session it would adopt a decision taking into account the views expressed in those reports, and had appointed Mr. Galindo Pohl as Rapporteur. Lastly, it decided to prepare for its forthcoming session a draft convention containing a number of urgently needed rules on the conduct of transnational undertakings; he had himself been appointed Rapporteur for the preparation of that convention.

52. At the Committee's most recent session in January-February 1976, its Chairman, Mr. Galindo Pohl, acting as Rapporteur, had submitted a draft decision on transnational undertakings; because of its importance, he had submitted a full text of that draft to the Commission. The Committee had decided to describe as "transnational" those undertakings which, organized as corporations, carried out operations in a number of different countries, with interdependent interests and with uniform criteria as to planning, business practices and administrative and economic policies. Transnational undertakings were recognized as bearing responsibilities in keeping with their economic and administrative possibilities, in all matters relating to bankruptcies or violations of the law. They were subject to the sovereignty, and hence to the laws and the decisions of the competent courts and authorities, of the country where they carried out their operations; they could not claim any preferential treatment because of their transnational character or because they represented foreign interests. They had a duty to carry out their activities in conformity with State policies governing such matters as investment, credit, taxation, prices and the transfer of profits. They also had a duty to supply full information on their activities. They were strictly prohibited from interfering in political affairs or with the sovereignty of States. In addition to enacting all the necessary internal legislation on the subject, States should take joint action to prevent and punish abuses by transnational undertakings.

53. Transnational undertakings and the corporations comprising them were not subjects of international law and had no right of direct access to international tribunals. The American States should refrain from becoming parties to conventions which provided for such direct access, including access to arbitration tribunals, which would give transnational undertakings an unwarrantable advantage over national undertakings. Cases relating to transnational corporations could be brought to international courts only as a result of an agreement between States on the settlement of disputes.

54. States should supervise the transfer of technology by transnational corporations, and could prohibit the payment of royalties for such transfers within a transnational undertaking. Co-operation between States to ensure uniform and efficient action in the economic area covered by a transnational corporation was a priority objective; such co-operation should take place through the machinery of the United Nations and OAS, with a view to the formulation of general rules and the consideration and settlement of disputes.

55. An inter-American Centre on transnational corporations was to be set up in order to carry out continuing studies on their contributions to development and on the abuses they committed. An important report on international economic and commercial offences had been submitted to the Committee at its last session by Mr. Ricaldoni, the Committee's Uruguayan member; a discussion would be held on the subject at the next session in July-August 1976. At that same session, he would himself submit the draft convention on rules to govern the conduct of transnational corporations. He had also appeared as observer for the Committee before the Commission on Transnational Corporations of the United Nations Economic and Social Council, held at Lima from 1 to 12 March 1976.

56. At its meeting on 29 July 1975, the Committee had approved a report submitted to it by Mr. Caicedo Castilla on the revision, modernization and evaluation of the inter-American convention on industrial property. On the basis of that report, the Committee had decided to request the Secretary-General of OAS to make arrangements for a further meeting of the Group of Government Experts on Industrial Property and Technology applied to Development. It had also requested the Secretary-General to ask Governments which had not yet done so to reply to the Group's questionnaire. On that basis, the Committee would prepare one or more draft conventions on industrial property, for the purpose of revising and bringing up to date the international instruments at present in force.

57. The Committee had also dealt with the immunity of States from jurisdiction, on the basis of a report which he had submitted at the January-February 1975 session. In its decision, the Committee had invited Governments to supply it with information on the existing rules and practices in the matter and had requested the Rapporteur to submit a draft convention taking into consideration the comments made by the members of the Committee on his preliminary report and the comments by Governments.

58. Mr. Rubin, the United States member of the Committee, had submitted a report on the function of law in social change, in which he explored the possibilities of formulating positive programmes that would contribute to the development of the western hemisphere with the aid of legal instruments, and described some of the measures taken in Latin America and elsewhere. The author of the report cited the view of Friedman that legal systems were clearly a part of political, social and economic development, and that many basis questions concerning the relations between law and social change were being completely ignored.

59. At its July-August 1973 session, the Committee had prepared a draft convention on the protection of the

archaeological, historical and artistic heritage of the American nations, which had been examined by the Inter-American Council for Education, Science and Culture at a meeting held at Mexico City from 27 January to 1 February 1975. The Council had entrusted the Committee with the preparation of a final draft, taking into account the comments received from a number of member States. That draft, which had now been prepared by the Committee, would be submitted to Governments: its provisions on the identification, registration, protection and supervision of the American heritage were similar to those of the relevant UNESCO conventions.

60. The excellent results achieved at the Inter-American Specialized Conference on Private International Law, held at Panama in January 1975, had led the General Assembly of OAS to convene a second conference on the same subject; the Inter-American Juridical Committee had been entrusted with the drafting of the provisional agenda, the rules of procedure and draft conventions for that conference. Mr. Caicedo Castilla, had been appointed Rapporteur. The provisional agenda for the conference, which had been approved by the Permanent Council of OAS, included the following items: recognition and execution of foreign judgments; evidence of foreign law; conflict of laws and uniform law on cheques in international circulation; international sale of goods; international maritime transport with special reference to bills of lading, and general rules of private international law.

61. The General Assembly of OAS, taking note of the excellent results obtained by the first and second courses of study on international law organized by the Committee, had entrusted it with the organization of a third course of four weeks to be held at Rio de Janeiro, starting on 19 July 1976 and covering the following subjects: multinational corporations and transnational undertakings; the reform of the inter-American system; the law of the sea, and private international law.

62. On 12 July 1976, the Committee would begin its regular session for the second half of the present year and would deal with two priority items: the draft inter-American convention on extradition and the draft conventions for the Second Inter-American Specialized Conference on Private International Law. The other ten items on the agenda included: the draft convention on transnational undertakings; the possibility of classification of economic and commercial offences; the nationalization and expropriation of foreign property in international law; the immunity of States from jurisdiction; the settlement of disputes relating to the law of the sea; the evaluation of the international conventions on industrial property; the principle of self-determination and its field of application; territorial colonialism in America; legal aspects of harmonization of the educational systems of the American countries; and the function of law in social change.

63. In a remarkable passage, Blaise Pascal had emphasized how small man was in the face of nature and its forces, which could so easily destroy him; man, however, was more noble than the physical elements which destroyed him, because he had the power to think. Another great French thinker, Descartes, had said, *Je pense, donc je suis*. In the struggle for liberty and justice which had taken place in recent centuries, however, the disproportion was not between man and nature, but between men themselves—between powerful States and underdeveloped States, between powerfully armed countries and countries which were victims of aggression, between oppressors and oppressed. Perhaps man, in search of his dignity, should now say: "I fight, therefore I exist". For his part, he thought one might well hope for a new era in which men could say that they existed because they loved each other as brothers.

64. The international bodies entrusted with shaping the legal order were at present shouldering a great responsibility in their efforts to establish links between nations, to promote a new order respectful of the human person and to uphold the principle of the legal equality of States in a realistic manner, so that inter-State relations could fully conform with it.

65. The CHAIRMAN, speaking on behalf of all the members of the Commission, thanked the observer for the Inter-American Juridical Committee for his excellent statement on the valuable work being performed by that Committee. The Commission's outgoing Chairman, who had attended the January-February 1976 session of the Committee at Rio de Janeiro, had submitted a report on the work of that session (A/CN.4/296). The Commission was gratified to note that its work was followed with such interest by the Inter-American Juridical Committee.

66. Latin America had played an outstanding part in the development of international law. Among the great Latin American authors of the past were Calvo of Argentina, Bustamante y Sirvén of Cuba and Alejandro Alvarez of Chile, as well as the Argentine statesmen Drago and Saavedra Lamas. In the United Nations era, the names of Ricardo Alfaro of Panama, Gilberto Amado and Vicente Roa of Brazil, and Alberto Ulloa of Peru, would be remembered. Latin America had contributed to the development of international law not only through the work of its jurists, but also in the field of action. Among the many conventions adopted by Pan-American meetings, he would mention only the Convention Regarding Consular Agents and the Convention Regarding Diplomatic Officers adopted by the Sixth International Conference of American States and signed at Havana on 20 February 1928, and the Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Pact), signed at Rio de Janeiro on 10 October 1933, which constituted landmarks in the codification of international law.

67. The nations of Latin America had led the struggle for the independence of former colonial peoples, a struggle which had been taken up in the present century by the peoples of Africa and Asia. Thus the world community had expanded and international law, which had once been called *le droit public de l'Europe* had become the universal law of nations.

68. He asked the observer for the Inter-American Juridical Committee to convey to that Committee the greetings of the International Law Commission, which

continued to attach great importance to co-operation between the two bodies.

The meeting rose at 6 p.m.

1390th MEETING

Tuesday, 15 June 1976, at 10.5 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Succession of States in respect of matters other than trearies (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 12 (Succession in respect of part of territory as regards State property situated in the territory concerned) [1]

and

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned) (*continued*)

1. Mr. BEDJAOUI (Special Rapporteur), continuing his presentation, said that he proposed the following wording for article 13:

Article 13. Succession in respect of part of territory as regards State property situated outside the territory concerned

When territory under the sovereignty or administration of a State becomes part of another State,* [movable or immovable] property of the predecessor State situated outside the territory to which the succession of States relates shall, unless otherwise agreed or decided:

(*a*) remain the property of the predecessor State;

(*b*) pass to the successor State if it is established that the property in question has a direct and necessary link with the territory to which the succession of States relates; or

(*c*) be apportioned equitably between the predecessor State and the successor State if it established that the territory to which the succession of States relates contributed to the creation of such property.

* *Variant:* **When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State....**

[1] For the text, see 1389th meeting, para. 37.

2. As stated in paragraph 2 of the commentary to article 13 (A/CN.4/292), that article complemented article 12. Whereas article 12 related to State property situated in the territory to which the succession of States related, article 13 related to property situated outside that territory. Moreover, article 13 covered only State property of the predecessor State: it did not apply to property belonging to the territory to which the succession of States related, and situated outside that territory. For example, a province might pass under the sovereignty of another State and might possess property of its own in the capital of the predecessor State. Such property would not be recovered by article 13, first because the succession related, by definition, to the property of the predecessor State; secondly, because the property in question was not State property, but the property of the province; and thirdly, because, never having owned that property, the predecessor State would not be entitled, merely by reason of the succession, to acquire new rights in property belonging to the province.

3. Property situated outside the territory to which the succession of States related could be either in a third State or in the territory remaining to the predecessor State. In article 13, he had made no distinction between movable and immovable property. The reason why he had placed the words "movable or immovable" in square brackets, was merely to indicate that the article applied without distinction to both categories of property; there would be no objection to deleting those words.

4. In the territory remaining to the predecessor State, there were two categories of property. The first category comprised movable and immovable property which had always belonged to the predecessor State and which had probably always been situated in the part of the territory remaining to that State. It was quite obvious that such property—referred to in subparagraph (*a*) of article 13—was not affected by the succession and remained the property of the predecessor State. It would thus be an aberration for the successor State to be able to claim the State property of the predecessor State situated in the part of its territory remaining to it. The solution based on principle in subparagraph (*a*) was therefore quite natural.

5. The second category of State property situated in the territory remaining to the predecessor State comprised property which the predecessor State might have removed from the ceded territory just before the succession of States. Since it was difficult to determine whether such property had been removed fraudulently or in good faith, or whether it had always been situated outside the ceded territory, he had relied, in article 13, subparagraph (*b*), on the criterion of the direct and necessary link between the property and the territory to which the succession related. That criterion should make it possible to determine what property should normally revert to the successor State.

6. Subparagraph (*c*) covered the case in which the territory to which the succession related had contributed to the creation of the State property. For that case, he was proposing an equitable apportionment between the predecessor State and the successor State. In the *North Sea*