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**Summary record of the 1390th meeting**

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

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

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

*The meeting rose at 6 p.m.*

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## 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.

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### 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*

*Continental Shelf* cases,[2] the International Court of Justice had drawn a distinction between equity, as a matter of abstract justice, and equitable principles, but that distinction did little to clarify the concept of equity.

7. The wording of article 13 might not be perfect. Subparagraph (*a*) stated such an obvious principle that it could be deleted; it was only for the sake of clarity that he had drafted it. Alternatively, subparagraph (*a*) could be supplemented by the words "except in the situations referred to in subparagraphs (*b*) and (*c*)" and those two subparagraphs could be taken as exceptions to the principle stated in subparagraph (*a*).

8. To illustrate the exceptions provided for in subparagraphs (*b*) and (*c*), he had cited, in his commentary, mainly examples relating to archives, a subject on which State practice was much richer than on other matters. As indicated in paragraphs 5 to 17 of that commentary, a distinction had sometimes been made between archives which had been removed from the ceded territory and archives which had been constituted outside that territory but which related to it. Since the arrangements adopted by States had often been embodied in peace treaties, which necessarily reflected a particular balance of power, excessive importance should not be attached to them. As far as legal theory was concerned, it had been rather hesitant, out of respect for a judgment rendered by the Court of Nancy in 1896,[3] which was really quite an isolated case.

9. Mr. KEARNEY observed that in articles 12 and 13 the Special Rapporteur relied on general statements of law to produce a division or transfer of property of the predecessor State on an equitable basis. The drafting of the articles followed the methods of the French Civil Code, in which general propositions were moulded in order to bring about a just situation.

10. In order to arrive at an equitable result the criterion proposed in both articles was that of a "direct and necessary link" of the property in question with the territory. He found the principle acceptable, but thought that the general terms in which it was drafted could lead to deadlocks between States when it was applied in practice. For instance, a predecessor State would be able to hold on to the property claimed by the successor State on the grounds that it did not have any direct and necessary link with the territory; and a successor State would be able to claim that movable property in dispute was outside the territory for temporary or fortuitous reasons.

11. If the Commission were to adopt the proposed wording of the articles, it would have to give some thought to the manner in which the principle embodied in them would be applied in practice. It was, of course, too early, at the present stage, to consider what procedures could be adopted for that purpose, but it was clear that unless such procedures were provided for, problems of interpretation were bound to arise.

12. Similar considerations applied to the provision in article 13 that State property situated outside the territory concerned should be "apportioned equitably" between the predecessor State and the successor State. That rule of substantive law required procedural provisions to be attached to it for the settlement of disputes as to whether the retention by the predecessor State of property outside the territory was compatible with the principle of equitable apportionment.

13. The Special Rapporteur would have to bear in mind that articles 12 and 13 should serve the purpose of settling problems rather than of shifting them; as the articles now stood, a dispute regarding succession to State property situated outside the territory was likely to lead, more often than not, to an argument about the meaning of "equitable apportionment". The problem was one with which he was familiar because, in the matter of international rivers, the major problem regarding water uses was that of equitable apportionment; if no procedures were established for consultation between States and the settlement of disputes, it was not possible to get the water apportioned properly.

14. The method adopted by the Special Rapporteur undoubtedly had the advantage of avoiding the problems which inevitably arose from entering into excessive detail. The Commission would recall the difficulties it had faced at the previous session when it had discussed the question of currency in connexion with State succession. With regard to archives, however, he intended at a later stage to propose more specific provisions taking into account modern means of reproduction of documents.

15. Lastly, for the opening phrase of articles 12 and 13 he preferred the variant proposed by the Special Rapporteur, which used the criterion of transfer of responsibility for the international relations of the territory concerned instead of the criterion of sovereignty or administration. He preferred that language not just for reasons of consistency, because it had been used in the draft articles on the succession of States in respect of treaties,[4] but also because the present draft might later become part of a larger body of law.

16. Mr. USHAKOV said he was aware of the enormous amount of work that had gone into the Special Rapporteur's eighth report, which was admirable in every respect. Whereas it had been possible to base the draft articles on succession of States in respect of treaties on only two principles—namely the principle of continuity and the clean slate principle—it was far more difficult to derive from judicial precedents, legal theory and State practice which were both less rich and less homogeneous, the principles applicable to succession of States in respect of matters other than treaties. The approach adopted by the Special Rapporteur in his eighth report was much more general than that adopted in his previous reports; it was, indeed, important for the Commission to establish general rules and to leave it to predecessor and successor States to settle the details in special agreements. Those

[2] *I.C.J. Reports 1969*, p. 47.

[3] See A/CN.4/292, chap. III, paras. 10 and 11 of the commentary to article 13.

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

general rules should facilitate the conclusion of such agreements, which were absolutely necessary: it was not, for example, enough to state that ownership of the property of the predecessor State passed to the successor State. If the predecessor State was not willing to cede the property, it did not automatically pass to the successor State; consequently, an agreement between the States concerned was essential.

17. The general approach adopted in the eighth report involved a division of State property into two main categories: movable property and immovable property. With regard to that distinction, the Special Rapporteur had referred, *inter alia*, to Soviet law. In paragraph 37 of his report, he had quoted Jean Carbonnier, who observed that with the abolition of private ownership of the land in the Soviet Union, the distinction between movable and immovable property had also been abolished. That statement was incorrect, for in the Soviet Union a distinction was made between immovable property, which was attached to the land, and movable property, which was not. That distinction had no effect on the ownership of the land, but it existed nevertheless.

18. He was entirely in favour of drafting general provisions based on the definition of State property given in article 5.[5] Articles 12 and 13 did, however, raise a question of typology of succession. In paragraph 13 of his eighth report, the Special Rapporteur had said that, with a view to harmonizing the draft relating to succession of States in respect of treaties and the draft which was in process of formulation, he had decided to adopt the three types of succession already chosen by the Commission, namely, succession in respect of part of territory, succession in the case of newly independent States and succession in the case of the uniting and separation of States. Although the two drafts were to some extent parallel, it could not be denied that that typology had been established specially for the topic of succession of States in respect of treaties. Referring to article 14 of the draft articles on succession of States in respect of treaties,[6] he pointed out that the title of that provision, "Succession in respect of part of territory", did not correspond to its contents. In the wording adopted on second reading, that provision referred both to the transfer of part of the territory of a State to another State and to the decolonization of a dependent territory which united with a pre-existing State. In the first case, there was necessarily an agreement between the States concerned, since contemporary international law could not allow another mode of transferring part of a territory. The second case was that of a dependent territory which became independent otherwise than by constituting itself a newly independent State. That second case was obviously not covered by the title of article 14, because it related to a whole territory, not part of a territory which united with an existing State. The reason why the Commission had put those two cases together in the same provision, was that a single principle, that of moving treaty-frontiers, was applicable to both of them.

19. Articles 12 and 13 of the draft ought each to be divided into two provisions dealing, respectively, with the case in which part of the territory of a State became part of the territory of another State, and the case of decolonization of a territory by union with a pre-existing State. He was not sure, however, that the Commission should now concern itself with questions of decolonization or, more particularly, with the fate of State property when a dependent territory united with a pre-existing State. When the Commission had begun its study of succession of States in respect of treaties, in 1967, there had still been a number of Non-Self-Governing Territories in existence, but such Territories had now become very rare. Consideration would also have to be given not only to State property, but also to property belonging to the Non-Self-Governing Territory—or to its people—which was not really State property. The question might become more complicated, for example, when the Non-Self-Governing Territory had previously been an independent State possessing genuine State property. As the Special Rapporteur had pointed out in his report (A/CN.4/292, foot-note 18), he (Mr. Ushakov) had suggested, in 1975, an article 12 dealing only with the case in which part of the territory of a State became part of the territory of another State. He had, indeed, then already taken the view that the case of a dependent territory which united with an existing State came under the heading of decolonization and should be dealt with separately.

20. In draft articles 12 and 13, as proposed by the Special Rapporteur, the term "territory", which was used in the opening phrase, could apply to the whole of a territory, especially in the variant proposed by the Special Rapporteur. In his opinion, those provisions should relate only to the case of transfer of a small part of the territory of one State to another State by mutual agreement between the two States. Cases of self-determination by referendum should be excluded. The cases he had in mind were those in which economic, social or other reasons led to the transfer of a small part of the territory of one State to another, without any need to consult the population. Generally, the inhabitants of the transferred territory could opt for the nationality of either State, and measures were taken to compensate them for any loss of property they might suffer.

21. If the transfer of part of a territory was made by mutual agreement between the predecessor State and the successor State, there was no reason why questions relating to the passing of State property should not also be settled by mutual agreement between the two parties. He thought it preferable to leave it to the two States to settle all questions relating to the passing of State property; besides, that was the most prevalent practice. That was why, as the Special Rapporteur had indicated in his report, he (Mr. Ushakov) had suggested an article 12 in which paragraph 1 provided that:

> If part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

[5] 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.

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

Thus, if there was agreement between the predecessor State and the successor State, no problem arose; it was only in the absence of agreement between the two States that there was a problem. For that case, certain general rules could be established, which would help the two States to conclude an agreement on the passing of State property. That was the situation contemplated in paragraph 2 of his suggested article 12.

22. He did not know why the Special Rapporteur had not followed the same method in article 13 as in article 12, where he made a distinction between movable and immovable property. The condition for the passing of State property rested on the link between that property and the territory to which the succession of States related. In the case of immovable property, the link was both physical and legal, since immovable property was physically attached to the land. But article 13, as proposed by the Special Rapporteur, dealt with the question of immovable property in quite a different way. For subparagraph (*b*) of that article provided that immovable property situated outside the territory to which the succession of States related, should pass to the successor State if it was established that the property had "a direct and necessary link" with that territory. The question arose what that "direct and necessary link" consisted in. Could there exist between the immovable property and the territory any link other than the physical and legal link of attachment to the land? It was difficult to imagine such a link, except perhaps in the case of archives which, incidentally, were not in his opinion State property in the strict sense of the term. It was, indeed, difficult to see what direct and necessary link could attach to a territory a factory or an airport which was not situated in it.

23. Article 13 introduced another distinction by providing, in subparagraph (*c*), that immovable property should

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

It might be asked why that distinction was not also made in article 12, subparagraph (*a*), for if a certain criterion was adopted for the passing of State property, it must be applied to all State property, whether it was situated in the territory to which the succession of States related or not. That criterion was not valid, moreover, for where real State property was concerned, it was the whole society of the State that had contributed to its creation. It would therefore be necessary to apportion all State property—which was not possible in the case of immovable property.

24. Lastly, article 13, subparagraph (*a*), provided that movable or immovable property of the predecessor State situated outside the territory to which the succession of States related "shall ... remain the property of the predecessor State". But the Commission's task was to determine the property which passed to the successor State, not that which did not pass. In his opinion, only immovable property situated in the transferred territory should pass to the successor State. Other immovable property, which was not physically and legally attached to the land of that territory was not affected by the succession of States. That was why, in the text of article 12 which he had submitted to the Special Rapporteur, he had suggested saying, in paragraph 2 (*a*), that in the absence of the agreement referred to in paragraph 1 of that article,

> the immovable State property of the precedessor State situated in the territory to which the succession of States relates shall pass to the successor State.

25. In the case of movable property, the situation of the property was of little importance. What was the link which must attach to the transferred territory property situated outside that territory? According to article 13, subparagraph (*b*), that link was again a "direct and necessary" one. But as in the case of immovable property, it might be asked what that link consisted in. For example, what link could there be between wagons outside the territory and a railway operating in the territory? Perhaps a more precise criterion should be applied. That was why, in paragraph 2 (*b*) of his draft of article 12, he had suggested saying that

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

It was indeed possible to take as the criterion, what was necessary for the activity of the State. For example, the equipment necessary for the operation of a mine situated in the transferred territory passed to the successor State.

26. In his opinion, the same criteria should be used in both article 12 and article 13, and it was not necessary to make a distinction between property situated in the territory and property situated outside the territory. It would be preferable to replace articles 12 and 13 by a single article covering all State property whatever its concrete nature, as the Special Rapporteur had done, distinguishing only between immovable property and movable property, and taking as the criterion for the passing of the former its physical link with the land of the territory, and as the criterion for the passing of the latter its link with the activity of the State in the territory.

27. He therefore proposed that articles 12 and 13 should be referred to the Drafting Committee for merging into a single article if appropriate.

28. Mr. MARTÍNEZ MORENO said he was glad to note that in dealing with enormously complex problems which were something new in the codification of international law, the Special Rapporteur had skilfully arrived at a synthesis and, in seeking to harmonize different systems of law, had established a distinction between movable and immovable property. On that point, the Commission's work would certainly be facilitated by Mr. Ushakov's statement that a clear distinction between movable and immovable property did exist in Soviet law.

29. The formulation of articles 12 and 13 took account of a number of interesting factors, such as the location of the property, the "direct and necessary link" between the property and the territory, and more particularly, considerations of equity. He wondered, however, why the last factor had not been incorporated in article 12,

as it had been in article 13 (*c*). In some cases it might, for reasons of equity, be useful to divide movable property—for example, archives or documents—between the predecessor and the successor States, bearing in mind any "direct and necessary link" or the contribution made by the predecessor State to such property.

30. Voluntary agreement between the predecessor and successor States was clearly necessary, but it was none the less desirable to establish principles and rules as guidelines for reaching a voluntary agreement. Failure to reach such an agreement sometimes led to great injustice. For instance, after the division of Central America into five countries, El Salvador had experienced great difficulties, not only in recovering, but even in examining certain documents which had remained in the archives of a neighbouring country.

31. The objective was obviously to solve problems, not to create them. It would accordingly be desirable to follow Mr. Kearney's suggestion that the Special Rapporteur should consider rules for the settlement of disputes arising in connexion with succession of States in respect of matters other than treaties.

32. Mr. NJENGA congratulated the Special Rapporteur on his extremely useful and comprehensive report on a difficult topic, for which there were few precedents in international law. He endorsed the method of laying down general guidelines, since it would be a formidable task to establish detailed rules covering the great variety of situations that might arise. Such guidelines would also be of much assistance in the settlement of disputes, for they would provide a basis for conciliation, further negotiation or arbitration—means of settlement that were not precluded by the draft articles. Modern States, large or small, very rarely agreed automatically to a procedure for compulsory settlement of disputes.

33. He too considered that the element of equitable apportionment in article 13 (*c*) should also be incorporated in article 12, since it might well prove to be even more important than the "direct and necessary link".

34. In addition, he would like to know whether the two conditions specified in article 12 (*b*), namely "if the two States so agree" and "if there is a direct and necessary link between the property and the territory to which the succession of States relates", were alternatives or must both be fulfilled. The purpose of the articles was to ensure that the property passed to the party to which it belonged. In his view, it was not really necessary to specify the first of those conditions, unless it was linked with the question of ownership—in other words, of the "direct and necessary link". For example, if a member country of the East African Community kept a number of railway wagons in its territory in anticipation of a separation or break-up of the common railway service, article 12 in its present form would establish a presumption that the wagons belonged to that country. That example was not truly one of succession of States, but the same type of problem would arise, for there would be a direct and necessary link between the property and the territory of all of the countries in the Community. Hence, article 12 would be greatly strengthened by the introduction of the element of equitable apportionment.

35. In conclusion, he thought the Special Rapporteur might well consider the useful proposal that articles 12 and 13 be merged.

*The meeting rose at 12.55 p.m.*

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## 1391st MEETING

*Wednesday, 16 June 1976, at 10 a.m.*

*Chairman:* Mr. Paul REUTER

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

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### Succession of States in respect of matters other than treaties (*continued*) (A/XN.4/292)

[Item 3 of the agenda]

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) [1]

*and*

ARTICLE 13 (Succession in respect of part of territory as regards State property situated outside the territory concerned) [2] (*continued*)

1. Mr. YASSEEN said that articles 12 and 13 related to the fate of immovable and movable State property after a succession in respect of a part of territory. Such property could be situated in the territory to which the succession related, but it could also be situated elsewhere, either in the territory remaining to the predecessor State or even in the territory of a third State. It was therefore necessary to find a rule which would make it possible to determine where such property belonged.

2. According to the solution proposed by the Special Rapporteur in article 12, immovable State property situated in the territory to which the succession related passed to the successor State. Movable property passed to the successor State "if the two States so agreed" or if there was a "direct and necessary link" between the property and the territory to which the succession of States related. In the latter case, it was a matter of formulating residuary rules which would apply when the States had not expressed their intentions. In subparagraph (*b*), it would therefore be better to use the same wording as in subparagraph (*a*), "unless otherwise agreed or decided", and to delete the words "if the two States so agree". The residuary character of the rule stated

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

[2] For text, see 1390th meeting, para. 1.