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Summary record of the 1391st 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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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.

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.

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.

would thus be emphasized and the solution given to the problem would stand out more clearly.

3. According to the criterion proposed by the Special Rapporteur, State property situated in the territory to which the succession of States related passed to the successor State because the territory must not be stripped of the resources it needed in order to be viable. That was a logical rule, for a territory was not only an area of land, but also an organized social entity, which must be able to function after the succession of States as it had functioned under the sovereignty of the predecessor State. It was therefore logical to provide that State property passed to the successor State, since such property was an element essential to the viability of the territory. He considered that the criterion proposed by the Special Rapporteur was acceptable, but a little too strict. In his opinion, for property to pass to the successor State it was not indispensible that the link between the property and the territory should be "direct and necessary": it was enough for it to be "reasonable". He felt that, in addition to the notion of what was "reasonable", it would be useful to refer explicitly in article 12 to the notion of "good faith". The notion of good faith, which dominated the whole of international law, was directly applicable in that case and could add a positive element to the rule stated in article 12. With these comments for consideration, article 12 could be referred to the Drafting Committee.

4. Article 13 did not pose any problem, for it was merely the application of the general principle on which article 12 was based. State property might not be situated in the territory of the successor State, but that physical fact should not change the dispositions required by law. Property which belonged to the territory and which had been moved before the succession, must be returned to the territory. The principle of good faith applied in that case too: when there was, in good faith, a reasonable link between the territory and the State property, that property must be returned to the territory, even if, at the time of the succession, it was in the territory of the predecessor State or of a third State. As the Special Rapporteur had shown, that rule was based on social and political facts and on the principle of equity.

5. Mr. TAMMES commended the Special Rapporteur on his admirably clear and scholarly report, in which he had made a valuable comparative study of the concepts of movable and immovable property in the main legal systems and, from the findings in the *North Sea Continental Shelf* cases,[3] had adapted the principle of equity to the problems now under discussion.

6. The distinction between movable and immovable State property had proved to be feasible in international law and if it were incorporated in the draft, the various categories of movable property could be dealt with in the commentaries. It was understandable that, in view of the numerous precedents in State practice, much attention had been paid to archives, but it had been asserted that, because of the existence of sophisticated reproduction techniques, the question of the ownership of archives had lost much of its original significance. Archives were perhaps no longer property at all, but simply a source of information. If that was so, he wished to point out that there was a kind of movable State property which did not meet the Special Rapporteur's criteria of utility for, or viability of, the territory to which the succession related. He had in mind what was often termed the historical and cultural heritage. It was certainly discussed in the report, but should also be mentioned in the commentary as something separate from archives—an item in which it remained almost hidden as a technical matter, instead of appearing as an emotional one of the greatest importance. Under the heading of "archives", only libraries and similar collections fell roughly within the category of historical and cultural property.

7. The requirement of a "direct and necessary link" between the property and the territory appeared to be quite appropriate, for it met the Special Rapporteur's criteria of utility and viability. That link had to be tested first, and if it was found not to apply, considerations of equity would be involved. In his opinion, the formulation was as sound as the "genuine link" specified in connexion with the nationality of ships in article 5 of the Convention on the High Seas,[4] which was now generally accepted. However, the formulation might be amplified by incorporating the elements suggested by Mr. Ushakov (A/CN.4/292, foot-note 18) and the elements mentioned by Mr. Yasseen, namely, good faith and a reasonable link.

8. As to the drafting of the articles, the residual nature of the rules appeared to be expressed in different ways. For example, article 9 [5] used the phrase "unless otherwise agreed or decided", but under the terms of article 12 (*b*), agreement between the predecessor and successor States seemed to rank equally with the existence of a direct and necessary link; and article 14 gave the impression that besides agreement between the predecessor and the successor States, the passing of property was subject to other conditions.

9. Mr. HAMBRO said he was grateful to the Special Rapporteur for having succeeded in reducing an extremely complex topic to reasonable dimensions and for having simplified the problems that arose. He fully endorsed the method followed by the Special Rapporteur, who had emphasized in his report the need to avoid the danger of making statements that were too general and the danger of becoming lost in technical details when dealing with extremely complicated matters such as currency and archives. The Special Rapporteur had made a very commendable effort to avoid those two extremes and had found a satisfactory compromise between too much generality and too much detail. It was not possible to rely entirely on States to settle questions relating to the passing of State property and the Commission must formulate rules to be applied when the parties did not agree.

[3] *I.C.J. Reports 1969*, p. 3.

[4] United Nations, *Treaty Series*, vol. 450, p. 84.

[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.

10. With regard to the wording of articles 12 and 13, he was in favour of retaining the text proposed by the Special Rapporteur. He recognized the usefulness and wisdom of some proposals, such as those made by Mr. Yasseen, but thought it should be left to the Drafting Committee to improve the present text. Mr. Ushakov had been right in saying at the previous meeting, that the period of decolonization was almost a thing of the past and that the Commission should rather think of the future. Mr. Kearney had also been right in reverting at the same meeting, to questions of procedure and the settlement of disputes, for those questions could acquire great importance. But he thought it would be difficult to incorporate Mr. Kearney's observations in an article and that it would be better to mention in the commentary that a member of the Commission had wished to draw the attention of States to the questions of procedure and settlement of disputes which could arise.

11. He fully agreed with the Special Rapporteur that it was necessary to stress the importance of the principle of equity. He was glad to note that the Commission tended to attribute increasing importance to that principle in all its work on the progressive development of international law.

12. Mr. QUENTIN-BAXTER expressed his appreciation of the great scholarship displayed in the Special Rapporteur's eighth report and of the idea of formulating simplified and more general articles. Nevertheless, although the best course might be to adopt a general approach, it was necessary for the Commission to consider whether its task was being made easier at the expense of the content of the articles, for it was essential to consider their scope.

13. The rules embodied in the draft articles did not in any sense inhibit the freedom of contract or the sovereignty of States in regard to their territory. They related to the consequences in law of the fact that a State had, for some time, exercised sovereignty over a territory and used its sovereign power in ways that engaged its responsibility with regard to the treatment of certain types of property. It had to be remembered that the rules would operate within the framework of power, since a sovereign State had control over the property within its territory and any set of rules which failed to heed the primary importance of power was not likely to be honoured in practice.

14. At the same time, the Special Rapporteur had rightly emphasized the principle of equity, which tempered power. In fact, the Commission was required to suggest the manner in which a State should deal with property in which another sovereign State had real, substantial and perhaps overriding interests. Consequently, the basic classification established by the Special Rapporteur was not only right, but inevitable. A distinction had to be made between movable and immovable property and between property situated inside and outside the territory concerned.

15. As Mr. Ushakov had pointed out, the draft articles were designed mainly to deal with the moving treaty-frontier situation. They would, in their present form, cover only one aspect of decolonization, namely, cases in which a former colonial territory chose to become part of an existing sovereign State. He had not yet formed a clear view as to the need for a distinction between decolonization and the case of newly independent States, which was covered by articles 14 and 15. A difference in emphasis was to be seen in the rights established under articles 12 and 13 on the one hand, and articles 14 and 15 on the other. In the matter of movable property, under article 12 ownership was said to pass to the successor State if a direct and necessary link existed; under article 14, ownership of such property was said to pass to the successor State unless the property had no direct and necessary link with the territory. That difference in emphasis was difficult to assess and he wondered whether the rules set out in article 12 might not be rather too severe. He questioned whether it was right that property situated in the territory concerned should pass to the successor State only if there was a direct and necessary link between the property and the territory. Should not the primary assumption be that the property would pass, with the qualification that it would not do so if there was a sufficient link with the predecessor State?

16. It was difficult to obtain clear guidance from the drafting of articles 12 and 13 and of articles 14 and 15. He was not in any way seeking to arrive at a firm conclusion regarding the need for different articles to deal with those different situations. Obviously, however, there was a vital difference between the moving treaty-frontier situation, when property passed from the territory of one existing State to that of another existing State, and the situation in which a new State was created. In the first of those situations, it was to be assumed that, where territory was transferred from one existing State to another, the terms of the transaction would usually be settled beforehand, and little use would be made of the draft articles. In the case of the creation of new States, on the other hand, the rules stated in the articles would be extremely important. Nevertheless, articles 12 and 13 related to the transfer of property between existing States, in other words, to the least problematical case of State succession. He therefore considered, as did other members, that those articles could now be referred to the Drafting Committee.

17. Mr. RAMANGASOAVINA said that, in the various reports he had submitted, the Special Rapporteur had always tried to find the best possible formula, sometimes even at the expense of his personal convictions. Thus, in his sixth [6] and seventh [7] reports, taking account of the comments of the International Law Commission and the Sixth Committee of the General Assembly, he had, for the sake of greater clarity, introduced distinctions between types of State succession and between types of State property, according to whether or not such property was situated in the territory to which the succession of States related, while at the same time referring specifically to particular items of property such as currency, archives, treasury and public funds, which were of major importance for young States. In his eighth report (A/CN.4/292), however, the Special Rapporteur

[6] *Yearbook... 1973*, vol. II, p. 3, document A/CN.4/267.

[7] *Yearbook... 1974*, vol. II (Part One), p. 91, document A/CN.4/282.

had abandoned the distinction based on the specific nature of State property, because he had realized the difficulties and even the danger that would be involved in going into the details of technical and extremely complex questions which went beyond the competence of the Commission. With the new articles 12 and 13, he had therefore submitted general articles which took into account the existence of different categories of State property, according to whether that property was situated in the territory or outside the territory to which the succession of States related, and according to whether it was movable or immovable. That distinction between movable and immovable property was not made in all legal systems and was understood in different ways. The Special Rapporteur had tried to clarify the situation in his report and had shown that, in regard to State property affected by a succession of States, the meaning given to the terms "movable property" and "immovable property" was almost uniform.

18. Article 12, which dealt with property situated in the territory to which the succession of States related, was an application of article 9, which stated the general principle of the passing of State property. Article 12, subparagraph (*a*), merely repeated and developed the principle stated in article 9, affirming that immovable property situated in the territory to which the succession of States related passed to the successor State, unless otherwise agreed. Movable property passed to the successor State if the two States so agreed. In the absence of a spontaneous agreement between the two States, there had to be a "direct and necessary link" between the property and the territory to which the succession of States related. The criterion thus used to justify the passing of property to the successor State was a very fair one. The Special Rapporteur had said that, in that connexion, two essential elements should be taken into account: the principle of the viability of the territory and the principle of equity. It was not really necessary for the property to be attached to the territory by a physical or legal link; in his opinion a patrimonial link would be enough to justify the passing of State property to the successor State.

19. When property was situated in the territory of the successor State on the date of the succession of States, its passing to the successor State was practically automatic. The problem of the date of the succession of States was thus very important and presupposed a minimum of good faith, especially in the case of movable property, since such property could be moved between the time when the succession was decided on and the time when it actually took place. If the date of the succession was not set in good faith, the interests of the successor State could thus be seriously injured. He regretted that the general formulation of articles 12 and 13 had not allowed the Special Rapporteur to go into details regarding some particular types of property, such as currency and archives, which were essential to the viability of the territory and were of prime importance to young States.

20. In article 13, which referred to State property situated outside the territory to which the succession of States related, the Special Rapporteur had not made any distinction between movable and immovable property, because the criterion for the passing of such property did not relate to its location, but to its "belonging" to the territory. He considered that subparagraph (*a*) was unnecessary, since it was merely a reminder. The criteria set out in subparagraphs (*b*) and (*c*), on the other hand, were fully justified.

21. He endorsed the principles stated in articles 12 and 13, but was not satisfied with the way in which the problem was approached in those articles. He would have preferred the method adopted by the Special Rapporteur in his previous report, which consisted in devoting special articles to certain matters that were very important for young States, such as currency and archives. He appreciated the technical difficulties such articles involved, however, and thought that general articles such as articles 12 and 13 could cover the matters in question. He therefore proposed that articles 12 and 13 should be referred to the Drafting Committee.

22. Mr. TABIBI said that the Commission should be grateful to the Special Rapporteur for the manner in which he had approached a complex and delicate problem: it was not easy to find rules that would satisfy the predecessor State, the successor State and even third States whose interests were involved. The method adopted by the Special Rapporteur in his eighth report was more logical, and he himself found it more acceptable, than that followed in the previous reports. The Special Rapporteur was to be commended for the flexibility he had shown in taking full account of the views of members of the Commission.

23. The Special Rapporteur had submitted rules couched in general terms, for application to any type of State succession, and had supplied three "reference keys" (A/CN.4/292, para. 3) which made for a clearer approach and would make draft articles 12 and 13 easier to accept. He (Mr. Tabibi) suggested that, in addition to those keys, other factors of prime importance should be taken into account, such as physical, social and economic links, and the need for procedures for the settlement of disputes, freely chosen by the parties. In view of the fact that, as pointed out by Mr. Njenga at the previous meeting, separation and independence were now often brought about by violent means, procedures for the settlement of disputes on the passing of State property were especially necessary.

24. He had no objection of principle to Mr. Ushakov's suggestion that articles 12 and 13 should be combined and that the distinction between movable and immovable property should be dropped.[8] For the purpose of presenting the proposed rules to the General Assembly, however, he thought it would be more satisfactory to keep the two articles separate for the time being; they could be merged on second reading.

25. With regard to the distinction between movables and immovables, he had been particularly impressed by the study of comparative law made by the Special Rapporteur (A/CN.4/292, paras. 30-40). He agreed with the Special Rapporteur that in Islamic jurisprudence (*fiqh*) separate terms were used for movables (*manqul* or *ghavi*)

[8] See 1390th meeting, para. 26.

and immovables (*asl* or *aqar*), but that both were recognized as pertaining to the unified concept of the patrimony (*al mal*). All four great schools of interpretation of Islamic law adopted that approach, particularly the Hanafi school of Iman Abu Hanifa. He mentioned in that connexion the extensive treatise on the rules to be applied to property, written by the theologian Abu-l-Fazl, Prime Minister of the Mogul Emperor Jalal-ud-din Akbar.

26. He supported both the method followed by the Special Rapporteur and the régime provided for in articles 12 and 13, subject to some clarification of the wording by the Drafting Committee.

27. Mr. SETTE CÂMARA said that the Commission should be particularly grateful to the Special Rapporteur for reviewing and adapting his earlier proposals, which had been based on State property considered *in concreto*, and for introducing a most useful distinction between movable property and immovable property. While article 12 dealt separately with movable and immovable property, article 13, for obvious reasons, did not. Nevertheless, it would be advisable to remove the square brackets in the text of article 13 in order to indicate clearly that it covered both types of property.

28. The criterion of the linkage between the property and the territory concerned was very sound. Moreover it was balanced by two further concepts, namely, the viability both of the territory to which the succession of States related and of the predecessor State, and the principle of equity in the apportionment of the property. In regard to the principle of equity, however, he urged some caution, because States mistrusted it. For instance, article 13, paragraph 2 of the Statute of the International Court of Justice, which provided that the Court could decide a case *ex aequo et bono* if the parties agreed thereto, had never gained acceptance by States. Equity was, in effect, the absence of law. It represented natural justice, as opposed to legal justice. If the concept of equity was to be incorporated in the draft articles, great care should be taken, for the misgivings of States would certainly become apparent when the draft came to be submitted to the General Assembly. Moreover, it was not clear who, in the absence of a written agreement, would decide what was equitable and what was not, and who would decide whether the territory was in fact viable.

29. Article 13, in its present form, related to property situated outside the territory concerned, but inside the predecessor State. However, the property might be situated in a third State. He did not see why subparagraph (*c*), relating to equitable apportionment between the predecessor and the successor States, should apply to property situated in a third State if, in addition, the territory itself had contributed to the creation of that property. The most appropriate solution in that case would be for the property to pass to the successor State.

30. In general, however, he endorsed the text of articles 12 and 13 and considered that they could be referred to the Drafting Committee.

31. The CHAIRMAN, speaking as a member of the Commission, associated himself with the tributes paid to the Special Rapporteur, who had willingly followed the directives the Commission had given him at its previous session. The Special Rapporteur had chosen to study some particular questions thoroughly, which seemed to him (Mr. Reuter) to be a good method of work. The Commission, however, had asked the Special Rapporteur to follow an entirely different course, so it was the Commission which must now assume responsibility for the difficulties to which the new approach might give rise.

32. Referring to the comments Mr. Ushakov had made at the previous meeting regarding types of succession,[9] he said that those remarks indirectly concerned the draft articles on succession of States in respect of treaties and that personally he would refrain from giving an opinion on a set of draft articles which the Commission had already adopted. With regard to the draft articles under study, the Commission would in any case have to decide whether it intended to treat cases of decolonization separately. The fact that the process of decolonization was nearing its end militated against the drafting of special articles on decolonization in so far as that term was used in the sense given to it in the United Nations, namely, "European" or "Western" decolonization. None the less, it was probable that all the effects of such decolonization had not yet disappeared. In the draft articles on succession of States in respect of treaties, the Commission had never used the term "decolonization", even though all the articles dealing with newly independent States in fact referred to cases of decolonization. Moreover, the reason why the General Assembly had long ago asked the Commission to study the question of succession of States in respect of treaties was precisely because that question arose in an acute form in cases of decolonization. In that connexion, he pointed out that it had been at the moment of completing its draft articles on succession of States in respect of treaties that the Commission had decided to add a paragraph 3 to article 33, providing that:

> ... if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded... in all respects as a newly independent State.[10]

The Commission had thus shown great caution. It had avoided using the term "decolonization" and it had, stated that the rules which in fact applied to cases of decolonization were also applicable to other cases without specifying, what other cases. In his view, those cases comprised all the applications of the principle of the right of peoples to self-determination other than cases of Western decolonization.

33. In the draft articles under study, the Commission could state common general rules and then special rules derogating from them, which would cover cases of what might be termed "doubtful succession". Personally, he was in favour of following the method the Commission had adopted for the other draft, since that draft would be submitted to a conference of plenipotentiaries in the near future; but he could agree to the Commission's envisaging

[9] See 1390th meeting, para. 18.

[10] *Yearbook... 1974*, vol. II (Part One), p. 260, document A/9610/Rev.1, chap. II, sect. D.

a special category of doubtful successions. In that case, the situation dealt with in article 12 could cover the case of a change resulting from the application of the principle of the right of peoples to self-determination. That solution would seem rather rash, however; for although the right to self-determination had won full recognition so far as Western decolonization was concerned, it was not established at the universal level by general public international law. In drafting articles defining the general régime of succession of States, however, the Commission should not allow itself to be unduly influenced by the problems raised by doubtful successions. It was probable that the Special Rapporteur had himself been marked by the painful experience of decolonization and that certain articles he was presenting as general articles contained rather severe rules, which would be appropriate for cases of decolonization in the strict sense or of doubtful succession, but not for cases of neutral succession. If the Commission decided not to treat cases of decolonization separately, it should not make the general régime stricter than was necessary. It would be better to formulate a strict régime for decolonization and make the general régime more neutral. For the moment, he would assume that articles 12 and 13 did not refer to cases of decolonization or to doubtful successions.

34. In his eighth report, the Special Rapporteur had clearly indicated that articles 12 and 13 concerned general cases, with the exception of decolonization, and not some particular case, such as succession in the event of transfer of parcels of land. He also considered that those provisions did not concern only successions "born" of an international agreement. The problems dealt with in article 12 might arise from a treaty, for example, when two States agreed on the rectification of a frontier, but not on certain consequences of that rectification. The problems covered by articles 12 and 13 could also originate, not in a treaty, but in a judicial or arbitral decision entailing a transfer of territory liable to raise questions of State succession. They could also result from a unilateral act by a State; for instance, when a State decided to hold a referendum in a small part of its territory and the referendum resulted in a secession, but questions of State succession were left unsettled. Thus international agreements could provide a solution of the problems contemplated in articles 12 and 13, but they might also themselves be the source of those problems.

35. Following the directives given him by the Commission on that subject, the Special Rapporteur had made a laudable effort to draft general provisions. That method of work should lead the Commission to illustrate in the commentary, by three or four examples, each of the general principles it was to lay down. Some of the expressions used in the draft should also be explained by examples: for instance, it should be made clear in which cases there was a "direct and necessary link", and in which cases there was not.

36. Referring more particularly to articles 12 and 13, he observed that, in conformity with draft article 5, the notion of ownership should be understood according to the internal law of the predecessor State. On the other hand, he had the impression that in regard to the distinction between movable and immovable property, the draft did not refer to internal law, but that it was general principles of law which were decisive. If that was the Special Rapporteur's position, it should be made clear.

37. On reading subparagraph (*c*) of article 13, he noted that the Commission was called upon to take a course which he himself considered inevitable in modern international law, and which led to the application of the principle of equity, failing any other solution. During the discussion of the most-favoured-nation clause, he had already drawn attention to certain situations demanding recourse to equity. He was also convinced that the Commission should resort to the notion of equity in certain matters such as the sharing of natural resources.

38. The notion of equity made a timid appearance in subparagraph (*c*) of article 13. He would like to know whether the Special Rapporteur intended to indicate some legal criteria in articles 12 and 13 and to introduce equity as a residuary means reserved for special cases or, on the contrary, to make equity a general criterion. In the latter case, it would be necessary to clarify the notion of a direct and necessary link, which might be of a legal, economic or other nature. It seemed that the notion of a direct and necessary link included that of equity when reference was made to the viability of the territory or of the reasonable nature of the link. If the Commission decided to invoke considerations of equity, it would be necessary to qualify that notion by referring to more precise data. It would then be advisable to be rather more explicit than the International Court of Justice had been in the *North Sea Continental Shelf* cases. In its commentary, the Commission might even mention the case in which the subject-matter of the succession was not part of the territory of a State, but a public establishment which had property of its own in the predecessor State. In short, the Commission must either limit the application of the notion of equity and define that of a direct and necessary link, or erect the latter notion into an essential legal criterion, associating it with a residuary element of equity; or else it must give equity a more important place, making the notion of a direct and necessary link an application of the principle of equity, and try to clarify the idea of equity in various ways. If the Commission still considered that decolonization should be the subject of special rules, equity would in that case be assessed in the light of the injustice which a particular solution would entail, or might entail, for the territory which was the subject of the succession.

39. Mr. ŠAHOVIĆ observed that the articles proposed by the Special Rapporteur at the twenty-seventh session had given rise to lively discussion, and he was convinced that the Commission had now entered on a much more productive phase of its work. He congratulated the Special Rapporteur on the way in which he had sought to apply the Commission's directives. He endorsed his conclusions and thought that articles 12 and 13 should be approved in principle and referred to the Drafting Committee.

40. The main question raised by the articles under consideration was that of types of succession, with, in particular, reference to cases of decolonization. As he saw it, the most important point to consider was the purpose of the work of codification and progressive development of

the rules on succession of States in respect of matters other than treaties. That work formed part of a general process of evolution marked by several stages : that of the peace treaties which had followed the First World War; that of the successions of States after the Second World War; and that of decolonization, which in fact was merely one stage among others. Hence, the fact that the decolonization process was approaching its end should not affect the formulation of the draft articles.

41. It did not seem necessary to change the general trend of the Special Rapporteur's study. True, problems might arise in specific cases, as some members had pointed out. In preparing the present draft articles, there was no need to depart from the types of succession adopted by the Commission for the draft articles on succession of States in respect of treaties, but the particular case of a dependent territory uniting with a pre-existing State would have to be taken into account.

42. With regard to the criteria for the attachment of State property to the territory, those proposed by the Special Rapporteur in articles 12 and 13 were perhaps a little too rigid, having regard to the legal solutions adopted by States in practice. He emphasized the need to adopt criteria which corresponded as closely as possible to practice, and to take account of the great variety of situations that might arise. Careful attention should therefore be devoted to finding suitable language to define those criteria. The notion of a reasonable link, proposed by Mr. Yasseen,[11] deserved particular attention.

43. As to the notion of equity, the Special Rapporteur should give his own interpretation of it and specify the limits within which he thought the principle should be applied. In any event, it should not be forgotten that equity could only come into play when international law provided no adequate rule.

44. Both the criteria for the attachment of property and the notion of equity should be studied more thoroughly by the Commission and by the Drafting Committee. Furthermore, recourse to those criteria and to that notion should be convincingly justified in the commentary. For its was only when the Commission had ascertained the reactions of Governments, that it would know whether it had really found solutions which met the existing needs.

45. In his report, the Special Rapporteur had made a study of the distinction between movable and immovable property in the main national systems of law, from which it appeared that that distinction was generally accepted. But the Commission would nevertheless have to define movables and immovables sooner or later.

46. He would not go into details of the drafting or articles 12 and 13, but would merely observe that article 13, subparagraph (*a*), might not be necessary or could be replaced by different wording.

47. Mr. CALLE Y CALLE said that the Special Rapporteur had shown in his eighth report the same remarkable intellectual rigour as in his seven previous reports. He was to be commended for having taken account of the difficulties encountered by the Commission at the twenty-seventh session, an obvious example of which was provided by the very technical problem of currency. If the Commission had continued to consider property *in concreto*, it would constantly have come up against technical difficulties. The Special Rapporteur was now leading the Commission towards the formulation of general rules, while avoiding excessive generality which would prejudice the solution of real problems. Between the general approach and the specific approach there was a third possible course, to which the Special Rapporteur himself had referred; that of leaving the way open for the introduction of further rules which might later prove necessary. It was much easier to derive particular rules from a good general rule than vice versa.

48. With regard to the question of types of succession, it was true to say that the process of decolonization was coming to an end. Consequently, certain rules which would have been of great help to the decolonized peoples would now come rather late. The whole work of the Commission looked towards the future, in accordance with the principle of non-retroactivity; nevertheless, when the rules it formulated applied to past situations, they would very often serve to show the soundness of the position taken before their formulation by the peoples concerned and the justice of restoring their rights. The Commission should retain the tripartite classification of types of succession adopted for the draft articles on succession of States in respect of treaties. If the conference of plenipotentiaries which examined that draft decided on an additional subdivision, the Commission would have to consider whether to adopt it or to retain the tripartite classification in the present draft.

49. With regard to the drafting of articles 12 and 13, he had comments to make on the Spanish text which had some bearing on the substance. In the text of both articles, as it appeared in chapter III of the Special Rapporteur's report (A/CN.4/292),* the formula *a menos que se haya convenido o decidido lo contrario* was used to render the proviso "unless otherwise agreed or decided". In the text appearing in the informal document ILC (XXVIII)/Conf. Room Doc. 2, a different formula was used, namely *salvo que se acuerde o decida otra cosa al respecto*. The wording in the report would mean simply that the property did not pass to the successor State, whereas the second formula seemed to refer to the possibility of attaching certain conditions to the passing of the property, or of stipulating some form of compensation. He suggested that in article 13, subparagraph (*b*), the opening words of the Spanish text should be amended to read *Pasarán a ser propiedad del Estado sucesor*, so as to indicate that it was the ownership of the property which passed to the successor State. The present formula *Pasarán al Estado sucesor* could be taken to mean that the property passed into the physical possession of the successor State, but remained in the ownership of the predecessor State.

50. He believed that the distinction between movables and immovables was already implicitly recognized in article 5, under which it was the internal law of the

[11] See para. 3 above.

* Mimeographed version.

predecessor State which determined the legal status of the property, with all the consequences resulting therefrom.

51. Article 12 covered two cases: that in which the predecessor State exercised sovereignty over the territory; and that in which the predecessor State administered the territory, without having sovereign rights over it. When actual sovereignty over a territory was transferred from a predecessor State to a successor State, it was easier for the two parties to come to an agreement on the fate of State property. In the second case, if a reasonable link existed between the property and the territory concerned, it was essential from the legal standpoint, that the property should be transferred to the successor State along with the territory previously administered by the predecessor State. With regard to the criterion of a "direct and necessary link", he proposed that in the Spanish text the word *vínculo*, which meant a legal link, should be replaced by the word *vinculación*, which rendered the idea of connexion or relationship and was more in keeping with the notion of equity. He also proposed that that word should be qualified by an adjective such as *razonable* (reasonable), since equity was a principle which must always be construed within reason.

The meeting rose at 1.5 p.m.

1392nd MEETING

Thursday, 17 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

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. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*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) [2] (*continued*)

1. Mr. AGO, after congratulating the Special Rapporteur on his excellent report, said that he wondered whether articles 12 and 13 related to all types of succession, as the Special Rapporteur claimed, or whether they covered only the classical case of the passing of part of a territory from one State to another, as some members of the Commission seemed to wish. He noted that, in any case, the title of the sub-section under consideration, namely, "Succession in respect of part of territory" was too vague and that it would have to be amplified, particularly if articles 12 and 13 were to apply to all types of succession.

2. To determine whether different rules should be formulated for the different types of succession, reference should be made to specific cases. Special rules should be formulated only if cases of succession other than the classical cases warranted them. He referred first to a treaty by which a country ceded a province to a neighbouring State. That was a classical case covered by the draft articles. Some members of the Commission considered that cases of decolonization should be dealt with separately. It was certain that the case of a territory which separated from the State under whose colonial domination it had been placed and became independent, was entirely different from the case in which part of a territory passed from one State to another. The attainment of independence, however, was not the only conceivable case. It could happen that Belize, a territory now administered by the United Kingdom, but coveted by Mexico and Guatemala, might finally be attached to those two States. It was not necessary to establish special rules in a case of that kind, which really differed little from that of the cession of a province by one State to another. It did not involve the creation of a new State, as did the accession to independence of a territory under colonial domination. Surinam, for its part, had moved towards independent status in that way. The Netherlands possessed a number of islands, including Curaçao, in the West Indies; that island had not yet opted for attachment to the metropolitan country or to Surinam. If, now that Surinam had acceded to independence, Curaçao decided to become attached to that new State, the situation would be different from that of the attachment of Belize to the pre-existing States of Mexico and Guatemala. In his opinion, however, that particular situation would not justify the formulation of special rules. In the Caribbean, the Netherlands also possessed the island of Aruba, whose future was not yet decided: it might become a small independent State, unite with Curaçao, be attached to Venezuela or be annexed by Colombia. That variety of possibilities showed that it was difficult to establish a régime for the classical cases of succession and a régime for all cases of decolonization.

3. As to the variant proposed by the Special Rapporteur for the opening phrase of articles 12 and 13, which was nothing more than the text adopted by the Commission for the beginning of article 14 of the draft on succession of States in respect of treaties,[3] that wording could give the impression that the phrase "for the international relations of which that State is responsible" related to the word "State" and not to the word "territory".

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

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

[3] See *Yearbook... 1974*, vol. II (Part One), p. 203, document A/9610/Rev.1, chap. II, sect. D.