Document:-

A/CN.4/SR.1396

Summary record of the 1396th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1976, vol. I

question of the implementation of rules of international law. In any case, the normative development of international law must not depend on its institutional development. What was more, normative development could even influence institutional development.

48. With regard to articles 14 and 15, the inclusion in the draft articles of provisions relating to newly independent States was perfectly justified. Admittedly, the phenomenon of decolonization had reached its peak during recent decades, but there were still a number of dependent territories for whose problems it was advisable to provide solutions. In addition, the provisions drafted by the Commission could help to regularize certain situations created at the time of decolonization which were not consistent with the criteria established by the Commission. For example, there might be an agreement between a former colony and the former metropolitan country, establishing ties between them which were inequitable from the standpoint of the draft articles. Without going so far as to assert that such an agreement should be considered void, he hoped that, once the international community had accepted the criteria of the draft articles relating to newly independent States, some States would be induced to reconsider certain situations that were incompatible with those criteria and to begin negotiations for their rectification.

49. Where succession of States was concerned, the case of newly independent States should be considered separately, for it was characterized, first, by a bond of dependence between two international entities, and secondly, by the fact that succession often took place in difficult circumstances. Those circumstances often led to arrangements that were inequitable, grudging or even imposed. A Non-Self-Governing Territory was often prepared to subscribe to agreements detrimental to its essential interests as the price of its independence. It was in the economic sphere, which was now of considerable importance, that the characteristics of newly independent States were most marked.

50. In connexion with the economic sphere, the Special Rapporteur had introduced, in article 14, paragraph 3, a reservation relating to the permanent sovereignty of the newly independent State over its wealth and its natural resources. In his report, he had examined with great skill the problems which had arisen and continued to arise for peoples struggling for their independence. It was with full knowledge of the facts that he had expressed his views, since he had himself experienced the fight of the Algerian people to gain their independence. The solutions he proposed bore witness to his regard for intellectual honesty, for he had endeavoured to formulate criteria that would be acceptable to the administering Powers.

51. The reservation the Special Rapporteur had drafted concerning sovereignty over natural resources would not be sufficient, however, to protect States against themselves. There were, indeed, certain leonine situations resulting from conventions in good and due form which could not be considered void unless one of the causes of nullity accepted in international law could be invoked. Military coercion undoubtedly constituted grounds of nullity but political or economic coercion exercised to procure the conclusion of a treaty was not yet a recognized cause of nullity. Moreover, in some cases treaties incompatible with the permanent sovereignty of newly independent States over their natural resources had not been concluded as a result of coercion. Perhaps one day it might be possible to observe the emergence of a rule of *jus cogens* under which all agreements incompatible with the sovereignty of States over their natural resources would be void. International law might thus come to protect States against their own weaknesses.

52. With regard to the wording of articles 14 and 15, he reiterated the criticisms he had made of the expression "direct and necessary link" during the consideration of articles 12 and 13.[18] In his opinion, it would be sufficient to speak of a "reasonable link".

The meeting rose at 1 p.m.

[18] See 1391st meeting, para. 3.

1396th MEETING

Wednesday, 23 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, 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 14 (Succession to State property situated in newly independent States)
and
ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State) [1] (*continued*).

1. Sir Francis VALLAT thanked the Special Rapporteur for having set aside his personal preferences and followed the Commission's general wishes, particularly in articles 14 and 15. The case of the newly independent State should certainly be provided for in the present draft. Wherever possible, and especially in the case in question, the Commission should follow the pattern set

[1] For texts, see 1393rd meeting, para. 34.

by the draft articles on succession of States in respect of treaties [2] in dealing with the different cases of succession. He had no quarrel with the substance of the proposed texts, which would, of course, need some redrafting before final adoption.

2. With regard to article 14, paragraph 3, there was no doubt that the concept of sovereignty in the economic sphere had come to have a special place in the thinking of States as expressed in the resolutions of the Economic and Social Council and the General Assembly of the United Nations. Sovereignty in the economic sphere, however, was only one aspect of sovereignty and did not replace sovereignty in the territorial and political spheres. It was therefore necessary to remember that what was termed "economic sovereignty" was only one facet of the totality of sovereignty.

3. A further consideration to be borne in mind was that the somewhat mystical ideas of sovereignty which had been current in the nineteenth and early twentieth centuries were not so popular today. The idea of the indivisibility of sovereignty, for example, was no longer accepted by many thinkers and by many States. In many modern multilateral institutions, States agreed to surrender their sovereignty in particular fields. In fact, the right of a State to modify its sovereignty, and even to surrender part of it, was an aspect of the notion of sovereignty itself. It was also an aspect of the principle of self-determination; for that principle must necessarily include the right of a State to align itself with other States, even to the point of relinquishing its sovereignty in whole or in part.

4. It was therefore necessary to exercise caution in approaching the concept of economic sovereignty. It was possible that that concept might have legal implications, but it remained essentially a political and economic concept, which made it difficult to translate into legal drafting. He therefore believed that the provisions of article 14, paragraph 3, in their present form, were really unsuitable for inclusion in a draft article concerned with a particular case of succession to State property.

5. Moreover, the language used was very vague. It was difficult to see what was the precise legal meaning of the adjective "permanent", which qualified the term "sovereignty". He himself had misgivings on that point. In the Foreign Office of the United Kingdom, the "Permanent" Under-Secretary of State was far from permanent. The Permanent Court of Arbitration had lasted since the beginning of the century, but the Permanent Court of International Justice was no more. If the word "permanent" was being used in the sense of "inalienable", it would be difficult for him to accept its implications. Surely, States must be free to make any treaty arrangements they wished, to enter into a confederation of States, or even to merge with other States to form a federation. States should also be able to develop their resources by granting concessions to those who had the necessary equipment and knowledge. Very few States would consider that they were inhibited from availing themselves of that possibility by the concept of permanent sovereignty.

6. The principle stated in article 14, paragraph 3 had some relevance to State succession, however, because it concerned the future of a State. He therefore agreed that it should be reflected somewhere in the draft articles. In his view, it was eminently suitable for a preamble, where it would exercise a flexible influence over the interpretation of the draft articles themselves. Moreover, in a preamble it was not necessary that every word should have a precise and definite meaning. Another possibility would be to embody the principle in a general article having a preambular character. But it was certainly quite out of place in article 14.

7. A definition of a "newly independent State", should be included in the present draft, as it had been in the draft articles on succession of States in respect of treaties adopted in 1974, otherwise there would be difficulties in interpreting the meaning of that expression in the two drafts. The definition in article 2, paragraph 1 (*f*) of the 1974 draft could be used as the starting point for formulating a suitable definition for the present draft.

8. Since provision was being made for the case of the newly independent State, it was also necessary to provide for cases which could be assimilated to it, as had been done in article 33, paragraph 3 of the 1974 draft. It was easy to visualize circumstances in which part of the territory of a State broke away from it and became a State itself in circumstances comparable to those existing when a newly independent State was formed. The relevance of the principle of self-determination in that case had been very properly stressed by Mr. Quentin-Baxter.[3] If, as he suggested, provision was made for additional cases of that kind, it would perhaps be necessary to deal also, as Mr. Ushakov had suggested,[4] with the case of two or more previously dependent territories which merged to form a single newly independent State.

9. Another point to be considered was that of property belonging to local authorities. If the title to the property was already vested in those authorities, the question could be regarded as being outside the scope of succession of States and could perhaps be left to be covered in the commentary. He thought, however, that the point deserved to be examined by the Drafting Committee to see whether a saving clause might not be needed to deal with it. Difficulties could arise, for instance, if the predecessor State had made a large contribution of funds for the construction of a building, even though the title was vested in the local authorities.

10. On the question of devolution agreements, he agreed that as a matter of principle, an agreement arrived at before independence could not be regarded as a treaty binding on the newly independent State. That proposition was correct both for the present draft and for the 1974 draft. Nevertheless, questions of State succession involved many equitable factors which sometimes weighed in favour of the successor State and sometimes in favour

[2] See *Yearbook... 1974*, vol. II (Part One), p. 175 *et seq.*, document A/9610/Rev. 1, chap. II, sect. D.

[3] See 1394th meeting, para. 33.

[4] *Ibid.*, para. 39.

of the predecessor State. Some arrangements between the two parties concerned were necessary for the orderly handing over of all the strings of government. Articles 14 and 15 should therefore not exclude the possibility of such arrangements. The proper procedure was for the two parties concerned to discuss their problems before independence and to incorporate the arrangements then made in a formal agreement concluded after independence. That procedure had been followed in many cases with which he himself had been concerned.

11. He was glad that Mr. Martínez Moreno had raised the question of archives,[5] which constituted a very real problem not only for the successor State but also for the predecessor State. Sometimes the locally kept archives were more complete than those of the predecessor State on matters regarding the administration of the territory before independence. At the same time, much of the background material which was important for the administration of the territory would be in the archives of the predecessor State. Occasionally, the local administration had allowed archives to deteriorate, thus creating serious problems for both States. Another important consideration in all cases was that the predecessor State would need the archives in the future for certain purposes, such as solving problems arising out of its accountability for the administration of the territory. The test of the "direct and necessary link" with the territory would give rise to difficulties in the case of archives. That test was based on the assumption that a precise dividing line could be drawn between material of interest to the predecessor State and material of interest to the successor State. In fact, documents in the archives of the predecessor State relating to the transferred territory could be of interest to both the successor State and the predecessor State. The considerations which had been put forward on that question during the discussion on articles 12 and 13 were equally relevant to the present articles.

12. Lastly, he stressed the desirability of including in the draft some machinery for settling questions which arose out of succession to State property, where the two States concerned could not settle them by agreement.

13. Mr. CASTAÑEDA said he strongly supported the Special Rapporteur's conclusions and his treatment of the subject-matter of articles 14 and 15. The first merit of his approach was of a methodological character. He had shown that the cases covered by articles 14 and 15 were essentially different from the other cases of State succession. The case of the newly independent State was quite distinct from that of a uniting or separation of States, not only historically, but also by reason of the very nature of the newly independent State.

14. The Special Rapporteur, in his rich commentary, gave very cogent reasons for treating newly independent States separately. The most important of those reasons was that, contrary to the situation in other cases of State succession, the territory concerned had a legal status of its own, which was distinct from that of the territory of the State administering it. He welcomed the stress placed by the Special Rapporteur on the very important factor of the ethnically different character of the people of a Non-Self-Governing Territory from that of the inhabitants of the metropolitan country. The General Assembly had attached great importance to that factor when it had drawn up a list of factors to determine the cases in which a situation could be described as colonial, and the territories which ought to be given independence. In the present instance, however, the most important factor was that of the legal status of the territory concerned, which was protected by international law. The metropolitan Power which had previously administered the Non-Self-Governing Territory had not exercised sovereignty over it; that sovereignty belonged to the people of the territory. For those reasons, the rules applicable to the particular case of the newly independent State must be different from those applicable in other cases of succession of States; basically, the former rules must be more strict because they were intended for the protection of the newly independent State.

15. He was in full agreement with the texts of articles 14 and 15 and had no amendments to propose. He did not believe that it was necessary to include a definition of a "newly independent State". The category of newly independent States was more of a political than of a legal character and was easy to identify, as Mr. Njenga had pointed out.[6] Whether the territory had the status of a "dependent territory" or whether it was a Trust Territory administered under the Charter, it would still be a "newly independent State". Moreover, it would be difficult to formulate a precise definition of that type of State.

16. He did not think it necessary, either, to include in the draft a definition of the property of the successor State. In regard to the predecessor State, the Commission had adopted a definition of "State property" in article 5,[7] but that was hardly a suitable model; it merely stated that the property of the predecessor State consisted of the property, rights and interests which were owned by that State on the date of the succession of States.

17. It had been argued that the provisions of article 14, paragraph 3 really applied to all States, not only to newly independent States. It had been suggested that they should form part of a general provision because they were applicable to all States irrespective of succession, since permanent sovereignty over natural resources was an attribute of the State as such. As he saw it, the Special Rapporteur's placing of the principle of permanent sovereignty in article 14 had a very special meaning. It was precisely in the case of a newly independent State that the problems covered by that article appeared in a particularly grave form. History showed that it was quite common for Non-Self-Governing Territories to enter into a complex set of agreements with the metropolitan country at the time of accession to independence. In many cases, those agreements could run counter to the principle of permanent sovereignty, and a provision on

[5] See 1395th meeting, para. 30.

[6] *Ibid.*, para. 37.

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

the lines of article 14, paragraph 3, was necessary to protect that sovereignty.

18. Apart from the principle of permanent sovereignty stated in paragraph 3, the essential provision of article 14 was the opening clause of paragraph 1, "Unless otherwise agreed or decided". The absence of that proviso in paragraph 3 clearly showed that the principle of permanent sovereignty could not be affected in any way by agreements entered into by the predecessor State with the newly independent State. The Special Rapporteur had shown in his commentary that, contrary to what the position might have been in the past, the principle of permanent sovereignty over natural resources was no longer in the nature of a residuary rule. It could in fact be said to constitute a rule of *jus cogens* from which it was not possible to derogate by an agreement. The Special Rapporteur had drawn the necessary legal consequences when he had pointed out that the validity of treaty relations established by devolution agreements "should be measured by the degree to which they respect the principles of political self-determination and economic independence", adding that

> Any agreements which violate these principles should be void *ab initio*, without its even being necessary to wait until the new State is in a position formally to denounce their leonine character.[8]

19. He himself would go further than the Special Rapporteur. Believing that the principle of permanent sovereignty constituted a rule of *jus cogens*, he thought a provision should be inserted in the text of article 14, paragraph 3, to the effect that any agreement which violated that principle was void *ab initio*. A rather similar result could be achieved by adopting Mr. Njenga's proposal that subparagraph (*a*) should be deleted [9] from paragraph 2, but he would prefer it to be expressly provided that the agreements in question were void *ab initio*.

20. The principle itself was, in a sense, one of long standing, since it was an expression of the sovereignty of the State. It could be said to constitute a rule of customary international law, which the United Nations had evolved through a long series of decisions and resolutions. The formula embodied in article 14, paragraph 3, however, had certain new elements. One of them was the key word "permanent", with regard to which he understood the difficulties mentioned by Sir Francis Vallat. The term had, however, a very profound meaning and was necessary to show that a State could not divest itself completely of its sovereignty over its natural resources. International law was reaching a point in its development at which it would have to protect the State against itself, or rather against its legal representatives, in order to avoid the plundering of its national wealth through the acts of misguided rulers. There was a former colony, one of whose first rulers after independence had actually granted a company a concession for all the mineral resources of the country for 99 years. An agreement of that kind could not possibly be regarded as valid in international law. It should be considered null and void because it violated the sovereignty of the newly independent State. A State was free to grant concessions—and even to restrict the exercise of its sovereign rights thereby—but it could not go so far as to surrender its sovereignty over its resources completely. Thus, it could grant concessions for the drilling of oil wells and the extraction of oil, but it could not relinquish the ownership of its oilfields altogether. Of course, the scope of the principle of permanent sovereignty—and of the exceptions to it—would have to be determined in the course of practical application, but it constituted a principle of international law which had to be asserted in forthright terms.

21. The Special Rapporteur had drawn attention to the long series of resolutions on the subject of permanent sovereignty over natural resources. It was worth noting that General Assembly resolution 1803 (XVII), which had categorically asserted that principle had been adopted by the Assembly practically without dissenting votes. The principle had been reaffirmed in article 1 of the two International Covenants on Human Rights [10] and had been included in the Charter of Economic Rights and Duties of States[11] as one of its most important principles. Article 2, paragraph 1 of that Charter, which embodied the principle, had been adopted by 119 votes to 9. Moreover, the nine States which had voted against the provision had not been opposed to the principle itself; they had only disagreed with the use made of the terms "wealth" and "economic activities". They had considered that the term "wealth" was synonymous with "natural resources"; he himself agreed with the majority that it covered more than just natural resources: it included, for example, works of art.

22. The principle of permanent sovereignty over natural resources was based on the general concept of sovereignty, but was a creation of United Nations practice. It constituted the nucleus of economic independence, which was absolutely necessary for the political independence of newly independent States. Hence, he fully supported its inclusion in article 14.

23. Mr. KEARNEY said that Mr. Ushakov's remarks at previous meetings reviewing the writings of revolutionary authors of the twentieth century, had reminded him of such earlier revolutionary authors as Jefferson, Washington, Franklin and Madison, some of whose writings had served as a basis for United Nations actions. He was thinking, in particular, of the proclamation, which those writers had embodied in the Declaration of Independence of the belief that all men were born free and equal, as constituting a self-evident truth.

24. Turning from the question of political independence to that of economic problems, he said he was not at all certain that the Commission would make much progress by engaging in a discussion on economics. In any case, it was difficult to see how a State could be economically independent, unless it were to live on its own resources without relying on exports or imports. Many countries

[8] A/CN.4/292, chap. III, para. 75 of the commentary to article 14.

[9] See 1395th meeting, para. 42.

[10] General Assembly resolution 2200 A (XXI), annex.

[11] General Assembly resolution 3281 (XXIX).

which were considered wealthy, including his own, were not, and could not be, economically independent. The present age was one in which all States were necessarily economically interdependent. He did not believe it was the purpose of the present set of draft articles to attempt to establish broad economic principles. Their purpose was rather to lay down a practical set of workable rules to govern the transfer of property, rights and claims from the predecessor State to the successor State, with the least difficulty for all concerned. That modest approach seemed to him more sound and reasonable than using the topic under study to promote sweeping economic reforms.

25. He believed that articles on newly independent States were needed in the draft, because the problems they were intended to cover were still likely to occur in the future. Ten years previously, he himself might have thought that other types of State succession were more important, but the trend towards considering the principle of self-determination as a rule of *jus cogens*, which would prevail over other forms of law opposed to it, was likely to create very difficult situations in the future.

26. One difficulty was that of determining what constituted a "people". The concept was a highly subjective one: any group of persons akin by race, language or location could lay claim to constitute a people and hence to be entitled to self-determination. If that claim was going to be recognized as having an overriding force in international law, a great many newly independent States were likely to emerge in the future. In most cases they would not be former colonies; they would probably result from the breaking up of States, old and new. The example could be given of one of the oldest States of Europe in which separatist movements were gathering force.

27. In broad term he was prepared to accept the rules stated in articles 14 and 15, but he thought they raised drafting problems. One of those problems lay in the difficulty of determining the precise meaning of the expression "direct and necessary link" (he was not at all certain, for example, that the formula "has no direct and necessary link" was its direct opposite). His major concern, however, related to article 14, paragraph 3. He had serious doubts about the usefulness of a provision which would mean, in effect, that all agreements between the predecessor State and the newly independent State must be considered void or voidable. It would have been better to state the rule in precise language and to inform States whether the agreements in question would be regarded as void or as voidable.

28. In any case, he did not believe that a voidability rule would have the effect of reducing friction between the States concerned. The existence of a rule of that type might very well lead the predecessor State to protect itself as best it could, because any agreement it reached with the newly independent State would be invalidated later. The predecessor State would thus be induced to take advantage of the situation at the time of accession to independence and leave the newly independent State in the worst possible position. He believed, however, that it was necessary to work on the assumption that there would be an element of good faith on the part of the predecessor State and that the problems which arose would be settled by agreements that would have some degree of permanence. Experience showed that in fact most of the problems of succession of States in the past 20 or 30 years had been solved by agreement. If a devolution agreement which adversely affected a newly independent State was unfair or unjust, or had been obtained by means of coercion, it should certainly not be accepted. It would be easy to devise rules on that point if the matter was not already covered by the Vienna Convention on the Law of Treaties;[12] and nothing that he had heard during the discussion had convinced him that, for purposes of the application of treaty law, devolution agreements were outside the scope of the Vienna Convention.

29. The text of article 14, paragraph 3, was far too vague as to its scope and effect to serve as a good rule. If the intention was to make a new law, that law had to be made precise, particularly since it contained many seeds of dispute.

30. Mr. TABIBI said that he had derived much benefit from the Special Rapporteur's convincing and scholarly commentary to articles 14 and 15, which explained the contemporary problems of independence and described the tragic circumstances in which newly independent States came into existence and began their life in the community of nations. Without economic strength, political independence was but an empty word, and he had therefore been greatly interested to hear Mr. Kearney's remarks on the early history of the United States of America. It was worth noting that the 13 colonies had revolted against the mother country largely for economic reasons and because of taxation problems. The lofty aims embodied in the Declaration of Independence and in the United States Constitution had been formulated by men who had begun by asserting the economic independence of their nation.

31. It was important to retain articles 14 and 15 in the draft, because the colonial era was not yet over; there were still a number of colonies, enclaves and other territories waiting to gain their independence. He was also sure that, as other speakers had pointed out, those articles would be useful for future co-operation between predecessor and successor States. The rules stated in the articles would serve to solve problems arising out of the allocation of State property as between the predecessor State and the successor State.

32. In framing the rules in the three paragraphs of article 14, the Special Rapporteur had shown great understanding for the views of his colleagues. As Mr. Yasseen had said at the previous meeting, it was worth recalling that the Special Rapporteur had been an outstanding leader in the struggle for the independence of his country—Algeria—in the course of which one quarter of the Algerian people had sacrificed their lives.

33. With regard to the rule in article 14, paragraph 1, he was opposed to the saving clause "Unless otherwise

[12] 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.

agreed or decided". The paragraph should state clearly that all immovable property in the territory which had become independent passed to the successor State. The saving clause would protect devolution agreements which were not negotiated on an equal footing: the predecessor State took advantage of the fact that it controlled the territory and the administration and that the leaders of the dependent territory did not have sufficient experience.

34. The same arguments applied with regard to the rule on the passing of movable property in paragraph 2. All the property, whether movable or immovable, which was in the territory of the successor State at the date of accession to independence should pass to that State. If the predecessor State had a claim to any item of property, it should enter into negotiations with the newly independent State and, if necessary, resort to the machinery for the settlement of disputes. As he saw it, the question of the transfer of State property and of the recognition of the right of ownership of the successor State was as important as independence itself. The conclusion of a devolution agreement with the predecessor State prior to independence meant that the newly independent State was made to pay a price for its independence. The predecessor State left by the front door and re-entered by the back. Independence was not just a new flag and a national anthem. Political self-determination without economic self-determination had no value. The right of ownership of a newly independent State over State property, both movable and immovable, should therefore be fully safeguarded. Without that property, the newly independent State could not make a satisfactory start in life in the international community.

35. Turning to the question of archives, he stressed that, although they were not like public funds or immovable property, they were vital both for studying the history of the newly independent State and for its future administration.

36. During the discussion on articles 12 and 13, Mr. Ustor had spoken in favour of the right of the predecessor State to retain the archives as part of its history.[13] His own view was quite the opposite: the history of the predecessor State was recorded in its own archives in the home country; but so was everything that had been done in the colonial and dependent territories. For the newly independent State it was important to have access to the archives of the predecessor State in that State's territory. The secret documents in those archives, once released to the newly independent State, would enable its people to learn the secret history of the colonial era. They would thus learn the story of suffering and intrigue which had led to the assassination and disgrace of real national heroes. They would also learn who were the false heroes of that time and understand the patterns of colonial domination; they could thus shape their future policies, building on the true history of the colonial era which was to be found in those archives. He had spent a number of years in India and, from his research in the national archives of that country, particularly the nineteenth century documents of British India, had been able to learn its real history. From that experience he could say that the transfer of archives of that kind to the predecessor State would be a tragedy for the newly independent State concerned.

37. He supported the provisions of article 14, paragraph 3. It could not be denied that the rule in that paragraph on economic sovereignty and economic self-determination was a rule of *jus cogens*. Perhaps, however, such a vital principle should have a better position in the draft. His own view was that it should constitute the introductory rule in section 2 of the draft and precede the articles on succession to State property. A rule which was the foundation of relations in the present society of nations should receive independent treatment; it should not form a sort of foot-note to the rules in article 14. The Special Rapporteur and the Drafting Committee should examine the question of the proper placing of the rule.

38. He approved of the régime established by article 15 and suggested that it should be referred to the Drafting Committee together with article 14.

39. Mr. CALLE Y CALLE said that convincing arguments had been advanced in support of articles 14 and 15, which related to newly independent States. It was appropriate to include provisions concerning such States, because the General Assembly had expressly instructed the Commission to take into account the experience of countries that were no longer colonies and had now acquired full international legal personality as free and sovereign States.

40. It was true that colonialism was drawing to a close. In making solemn declarations concerning the principles that were to govern relations between nations, States had recommended that everything should be done to put a rapid end to colonialism; but colonialism continued to exist on more than one continent. Many peoples, enclaves and areas, even in the Americas, were still under colonial or quasi-colonial régimes. It would be remembered that the observer for the Inter-American Juridical Committee had said that the topic of colonialism in the Americas remained on that Committee's agenda.[14] For various reasons, the Commission's progress on the present item had been slow, but nobody could challenge the need for rules relating specifically to newly independent States. Clearly, the fundamental rule for such States was automatic, complete, free—and even unconditional—transmission to them of all State property.

41. Article 14, paragraph 1, started with the clause: "Unless otherwise agreed or decided"; could it really be assumed that that clause referred to agreement by treaty between parties which were truly equal and in a position to express their will freely? He agreed with those speakers who thought the clause should be deleted. Paragraph 1 should state categorically that "The newly independent State shall exercise a right of ownership of all immovable property which...". Article 9, on the general principle of the passing of State property, already contained the

[13] See 1392nd meeting, para. 10.

[14] See 1389th meeting, para. 62.

saving clause in question. It would be superfluous, not to say dangerous, to include it again in article 14. The Special Rapporteur had probably had that in mind when he had sought the Commission's opinion on the role of the clause in article 14, where it merely converted a categorical rule into a residuary rule.

42. Article 14, paragraph 3, was obviously designed to afford maximum protection for newly independent States under present-day international law. Permanent and full sovereignty of the State over its natural resources and economic activities was one of the great rules developed and confirmed by the international community. It could be held that the rule was already implicitly covered by article 2, and that the sovereignty of newly independent States over their natural resources and economic activities could not be denied or made subject to conditions. In fact, the sovereign rights of newly independent States were no different from those of older States. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States [15] proclaimed that "Each State enjoys the rights inherent in full sovereignty". Natural resources were encompassed by State sovereignty, which must necessarily be full sovereignty. Hence, paragraph 3 referred to a rule of the greatest significance. In view of the enormous importance of State sovereignty, which gave rise to the right to reparation, the rule might be embodied in a separate article, possibly to be inserted after article 2; or it could remain in article 14. But he could not accept the argument that it should be omitted, merely because it applied to all States or because it was implicit in the reference in article 2 to the principles of international law.

43. He agreed that it would be advisable for articles 14 and 15 to be kept separate.

44. Mr. PINTO said that not enough weight would be given to the great importance and relevance of the principle of permanent sovereignty over natural resources if that principle was stated in article 14, paragraph 3. He endorsed the idea that it should be set out in a separate article and that the Commission should consider more carefully its general relevance to all the articles of the draft.

45. The CHAIRMAN speaking as a member of the Commission, said that he found articles 14 and 15 acceptable without any major change. He was struck by the suspicion shown by the developing countries, and more particularly the decolonized countries, regarding anything that did not emanate from them. That attitude was understandable; it was due to the fact that those countries had not got what they wanted and were doing everything possible to get it. They had been placed in such a position that they were often reduced to invoking morality or formulating aspirations instead of relying on rules of law.

46. He recognized that the conditions in which devolution agreements were concluded were not the best for safeguarding the legitimate rights of newly independent States. Moreover, in concluding such agreements, the predecessor States were often tactless, not so much because they sought to gain economic advantages for themselves, as because they failed to respect the dignity of the decolonized peoples. In the case of the residence of the High Commissioner of France in Madagascar, which Mr. Ramangasoavina had referred to at the previous meeting, France had certainly made a serious psychological error.

47. Because the constitutional régime of newly independent States was not always clearly defined, commitments were sometimes entered into on their behalf under conditions which suggested that the agreements did not express their will as nascent States. The Special Rapporteur had mentioned one agreement of that kind, but there were others, some of which had had to be rejected. Since the conclusion of the Vienna Convention on the Law of Treaties, which treated corruption as a defect of consent, a safeguard against corruption had been provided. Nevertheless, he thought it would be dangerous to reject devolution agreements altogether. Certainly, when the predecessor State sought to assimilate the future successor State, it must be acknowledged that liberation through violence was not entirely disadvantageous: it enabled the successor State to become aware of its identity. But that did not mean that peaceful methods should be excluded *a priori*. He would, therefore, be willing to accept a rule to the effect that, after two years, devolution agreements could be reviewed, whatever their stipulations, in order to ensure that they were equitable. That arrangement would be less dangerous than complete rejection of devolution agreements.

48. The provision in article 14, paragraph 3, could be viewed in two ways. A lawyer would place it elsewhere in the draft. A person who distinguished between law as it was and law as it might evolve, would see an element of hope in the provision. He himself interpreted it in that way, and saw in it a way of indicating that decolonization was not finished, that it probably never would be finished, but that something could be done, even outside the scope of purely legal assertions.

49. Despite his great reluctance to refer to *jus cogens*, he could agree to consider that the restrictive rule he was proposing partook of *jus cogens*. As to the possibility of recognizing coercion as a cause of invalidity of some devolution agreements, it should be noted that the present position would hardly be any different if economic coercion had been recognized at the United Nations Conference on the Law of Treaties in 1969 as a defect of consent. All States, whether developed or developing, lived under economic coercion: it was not the existence of economic coercion that would lead, for example, to the cancellation of oil supply contracts.

50. As to the *rebus sic stantibus* clause, the United Nations Conference on the Law of Treaties had considered it essentially from the political standpoint. He regretted that the Commission had not had time to draft a provision on the relationship between that clause and economic contracts. He also regretted that no article of the Vienna Convention on the Law of Treaties provided that, in all treaties, there must be a certain balance between the contributions of the parties. The notion of an unequal

[15] General Assembly resolution 2625 (XXV), annex.

agreement, referred to in connexion with decolonization, could also be applied to economic treaties. Moreover, it was common practice to include in transnational economic contracts a clause providing for their review if economic developments made performance intolerable. The question was a delicate one, but he hoped that international law would make progress on it.

51. He wondered whether articles 14 and 15 applied specifically to newly independent States, for a comparison with articles 12 and 13, and article 17, gave the impression that it was the same rule that applied in all the situations contemplated. Articles 14 and 15 seemed to be very moderate, despite the militant nature of the commentary. At the 1395th meeting, Mr. Tsuruoka, Mr. Martínez Moreno and Mr. Njenga had raised the question of proof in connexion with those articles, asking where the burden of proof lay. In his opinion, the position regarding the burden of proof could be clarified.

52. Mr. Ushakov had referred [16] to article 5, under which the ownership of State property was determined by the internal law of the predecessor State. Obviously, it would be possible to adopt the opposite rule and provide that it was the law of the successor State which determined the régime of ownership of State property. But in that case there would be no succession of States: it would be sufficient to say that the predecessor State lost all its rights, which would amount to stating the full clean slate principle. He was opposed to that approach, since the reason why the successor State was free to establish whatever system of ownership it wished, was because it was a sovereign State, not because it was a decolonized State. In his opinion, the Commission would be making a mistake if it linked that faculty of the State with decolonization, for it would be indirectly diminishing the sovereignty of the successor State. The solution proposed by the Special Rapporteur in article 14 therefore seemed to him to be preferable. The question did not arise in article 15, since the sovereignty of the successor State played no part and it was not even possible to establish the clean slate principle.

53. The difference in wording between the titles of articles 14 and 15 raised a problem of substance. The reason why the Special Rapporteur had used the plural in the title of article 14 was that it might be necessary in order to cover some special cases. A succession of States might involve several newly independent States at the same time, and the property to which the succession related might be situated in only one of those States. For example, when a federation of colonial territories such as French West Africa acceded to independence, it was conceivable that property to which all the States in that group were entitled might be situated in only one of the territories which had become independent. Consequently, it would be dangerous to bring the title of article 14 into line with that of article 15 by using the singular instead of the plural, for that might cause difficulties in the relations between the decolonized countries.

54. Lastly, it was his impression that in articles 14 and 15, the Special Rapporteur had assumed that the origin of the contribution was taken into account in apportioning the property. There was no problem if apportionment of property in kind was possible. But if apportionment in kind was not possible, it was necessary to ensure that compensation was not prohibited by virtue of article 8.

55. Mr. BILGE said he could accept articles 14 and 15; he approved of the principles and the drafting of those articles and congratulated the Special Rapporteur on having arrived at a reasonable and sound solution. He would, however, prefer article 14, paragraph 1 to reflect the restoration of a right, since the right had been suspended and then restored. He would also prefer the principle embodied in article 14, paragraph 13 to be stated in a separate article. Lastly, although he appreciated the Special Rapporteur's feelings concerning decolonization, he thought that in his commentary, he should confine himself to investigating the facts, without making judgments.

The meeting rose at 1 p.m.

1397th MEETING

Thursday, 24 June 1976, at 10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Hambro, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, 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 14 (Succession to State property situated in newly independent States)

and

ARTICLE 15 (Succession to State property situated outside the territory of the newly independent State) [1] (*concluded*)

1. Mr. MARTÍNEZ MORENO said that articles 14 and 15, in their present form, might raise problems where a predecessor State had been replaced by an administering authority under the mandate system or the Trusteeship

[16] See 1394th meeting, para. 41.

[1] For texts, see 1393rd meeting, para. 34.