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Summary record of the 1399th 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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the article to the statement of a very simple residuary rule.

47. In real life, however, the situation was not so simple, because intermediate cases existed. Cases could occur of unions of States in which the component States surrendered only part of their international personality to the union thus set up and continued to exercise the remainder. In that connexion Mr. Kearney had mentioned the case of his own country, in which the component States had a treaty-making capacity which was subject to supervision by the United States Congress.

48. If article 16 was confined to international unions of States, the question would arise as to how those unions were to be defined. Would it be by reference to similar cases? The Drafting Committee might be able to find an acceptable formula. However, the Commission would undoubtedly experience great difficulty in defining international unions of States satisfactorily.

49. Mr. Ushakov had mentioned the hypothetical example of the Canton of Geneva joining France by an act of self-determination. In his own view, that would be a case of part of the territory of a State joining a neighbouring State, a situation which was governed by articles 12 and 13. If the Canton of Geneva were to set itself up as an independent State, the case would be governed by article 17. At all events, the example given by Mr. Ushakov was not referable to article 16. Nevertheless, he himself had difficulties with that example because, in his view, articles 12 and 13 could only relate to the case of a very small portion of territory joining a neighbouring State.

50. In conclusion, he proposed that article 16 should be referred to the Drafting Committee to see whether it was possible to confine the case of uniting of States exclusively to that of international unions of States and at the same time keep the draft in line with the draft articles on succession of States in respect of treaties.

51. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 16 to the Drafting Committee for consideration in the light of the discussion.

It was so decided.[5]

The meeting rose at 12.35 p.m.

[5] For consideration of the text proposed by the Drafting Committee, see 1405th meeting, paras. 43-53.

1399th MEETING

Monday, 28 June 1976, at 3.10 p.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, 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 17 (Succession to State property in cases of separation of parts of a State)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 17 (A/CN.4/292), which read:

Article 17. Succession to State property in cases of separation of parts of a State

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

1. its immovable property shall, except where otherwise specified in treaty provisions, be attributed to the State in whose territory the property is situated;

2. its movable property shall:

(*a*) be attributed to the State with whose territory it has a direct and necessary link, or

(*b*) be apportioned in accordance with the principle of equity among successor States so formed, or among them and the predecessor State if it continues to exist;

3. movable and immovable property of the predecessor State situated outside the territory of that State shall be apportioned equitably among the successor States and the predecessor State if the latter continues to exist, or otherwise among the successor States only.

2. Mr. BEDJAOUI (Special Rapporteur) said that draft article 17 covered two possible cases. The first was the converse of the case covered by article 16: failure of the uniting of States, dissolution of the State thus formed and return to the situation before the union. It made little difference whether the uniting of States referred to in article 16 had resulted in the creation of a unitary State or of a federal or confederal State; what mattered was the return to the *status quo ante*, through the total elimination of the international personality of the State which had resulted from the uniting of States. It was found, however, that dissolutions usually involved unions of States, rather than unitary States. Moreover some members of the Commission appeared to wish to confine article 16 to international unions of States. Thus, in the first case the united State disappeared completely and there was a return to the situation before the uniting. In the second case, on the other hand—that in which one of more parts of a State detached themselves from it to form new States—the original State retained its international personality.

3. The 1972 draft articles on succession of States in respect of treaties had followed the same typology, distinguishing between two cases: that of dissolution and that of separation of States. But in the first case, that draft appeared to refer to the disappearance of a State rather than to the dissolution of a union. To judge from the definition of dissolution given in article 27 of the 1972

draft,[1] what was meant was the total dismemberment of a unitary State which broke up and was replaced in each part of its territory by so many new States. However, the examples given in the commentary clearly showed that what was meant was the dissolution of unions. With regard to the case of separation, the Commission had associated it with that of secession, by assuming, in article 28 of its 1972 draft, that it occurred "If part of territory of a State separates from it and becomes an individual State", and by specifying, in paragraph 1 of the commentary to that article, that the State from which the part of the territory concerned had sprung—that was to say, the predecessor State— "continues in existence unchanged except for its diminished territory".[2]

4. Those two cases had been contested in 1973 by certain members of the Sixth Committee, who had found that the distinction between the dissolution of a State and the separation of part of a State was quite nebulous and that differentiation based on the disappearance or survival of the predecessor State was entirely nominal. He believed that the distinction should be maintained, however, because of the special character of succession to State property in the case dealt with in article 17 of the draft under consideration. For if the distinction was valid for treaties, it was also, and especially, valid for property. If the predecessor State survived it could not be deprived of all its property; and if it disappeared, its property could not be left uninherited. The distinction seemed even more fundamental for property than for treaties, in regard to which it had been maintained, for although article 33 of the 1974 draft made no distinction, article 34 referred to the position if the predecessor State continued to exist after the separation.[3]

5. The two cases—dissolution and separation—could, however, be dealt with in a single article, as he had done in article 17, while maintaining the distinction between them in the body of the article. There were three reasons for that. First, the criterion for distinguishing between separation and dissolution being the disappearance or survival of the predecessor State, the two cases were the same when there was dissolution of a union or total dismemberment of a unitary State, for in both cases the predecessor State disappeared.

6. Secondly in both dissolution and separation, the basic criterion for the attribution of property was that of its equitable apportionment among all the States concerned: among the successor States if the predecessor State disappeared, and among the successor State or States and the predecessor State if the latter survived. Qualification as a predecessor State or a successor State lost its importance, since the same criteria of viability and equity were applied to all parties. That being so, it was pointless to inquire whether the predecessor State had disappeared or continued to exist, except to determine whether property should be left to it. For the purposes of attribution of property, the predecessor State was, in a sense, treated as one successor State among the others. In the case either of separation or of dissolution, it was a question of apportioning a common patrimony equitably among all the parties, their status, as successor or predecessor State, having no effect on the principle of apportionment, which was equity.

7. Thirdly, if the distinction based on the survival or extinction of the international personality of the predecessor State was, as some claimed, purely nominal where succession in respect of treaties was concerned, it must be even more so in regard to succession to State property.

8. It was for those reasons, and especially because the solutions for succession to State property were practically identical in the cases of dissolution and separation, that he had to make no distinction between those cases and to combine them in a single article.

9. What were the solutions proposed in article 17? He had excluded from the application of the article property belonging to each of the States concerned and had distinguished between movable and immovable property and between property situated in the territory and property situated outside it. He had also drawn a distinction, in the commentary, between the disappearance and the survival of the predecessor State.

10. When the predecessor State ceased to exist, the attribution of immovable property to the State in whose territory it was situated (paragraph 1 of the article) did not preclude application of the criterion of equity, for if other States had contributed to the acquisition of that property, they could be compensated proportionately to their contribution, if it could be determined, or in a just and equitable proportion if the share they had contributed could not be evaluated.[4] That rule in article 17 and the reference to the principle of equity were equally valid if the predecessor State continued to exist.

11. With regard to movable property, the two criteria stated in article 17, paragraph 2—the direct and necessary link and equity—were not mutually exclusive, but applied simultaneously, according to the nature of the property. When the link between the property and the territory was obvious there was no problem. But if the link was insufficient or could indicate two beneficiary States, the criterion of equity was applied.

12. With regard to movable or immovable property situated outside the territory of the predecessor State, both doctrine and State practice showed that the obvious solution was the rule of equitable apportionment stated in paragraph 3. That was the rule which had prevailed, in the dissolution of the Union between Sweden and Norway, with regard to consular and diplomatic property, both movable and immovable; in the dissolution of the Austria-Hungarian Empire, particularly with regard to the vessels on the Danube claimed by Czechoslovakia; and in the dissolution of the Federation of Rhodesia and Nyasaland, with regard to Rhodesia House in London.[5]

[1] See *Yearbook... 1972*, vol. II, p. 292, document A/8710/Rev.1, chap. II, sect. C.

[2] *Ibid.*, pp. 295 and 296.

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

[4] See A/CN.4/292, chap. III, para. 22 of the commentary to article 17.

[5] *Ibid.*, paras. 47, 50 and 51 of the commentary.

13. Cases of secession, in which the predecessor State continued to exist, were rare: the only ones that could be cited at present were those of Pakistan which had separated from India, of Bangladesh, which had separated from Pakistan, and of Singapore, which had separated from Malaysia.[6] The rules stated in article 17 applied in those cases too, the essential criterion still being equity.

14. Mr. YASSEEN said that, in his report and in his oral presentation of article 17, the Special Rapporteur had clearly shown that a single solution could be applied to the different types of succession covered by article 17. That arrangement seemed acceptable and fully justified by the explanations the Special Rapporteur had given. Immovable property raised no problem: it passed to the State in whose territory it was situated. That was a general principle which could be accepted, as it already had been for other types of succession. But in regard to movable property the Special Rapporteur had not rested content with the criterion of the direct and necessary link: he had also introduced the criterion of equity. Those two criteria should not be mutually exclusive, but on the contrary, should both contribute to the solution of the problems which might be raised by the types of State succession covered by article 17. It should, however, be made clear, in the text of the article, where the application of the criterion of the direct and necessary link ceased and where the application of the criterion of equity began. The Drafting Committee would have to show how those two criteria combined to produce a solution acceptable to all the parties.

15. With regard to the application of the principle of equity, the Special Rapporteur had been guided by legal theory and, in particular, by the judgment rendered by the International Court of Justice in the *North Sea Continental Shelf* cases.[7] It was obvious that equity was an autonomous and independent source of law. But there was an enormous difference between the role of equity in internal law and its role in international law. In internal law, if the judge did not find a solution in positive law, he had to apply the principle of equity; but in international law, the *non liquet* existed, because it was accepted that the international legal order was not complete. Thus, in the absence of a rule, an international tribunal could refuse to give judgment without being guilty of a denial of justice. Article 38 of the Statute of the International Court of Justice allowed the Court to settle a dispute in accordance with the principle of equity only "if the parties agree thereto". There could accordingly be no recourse to equity in international law unless the parties expressly accepted it. But equity could in itself be a rule of positive law when it was prescribed as a solution by a rule of positive law. For instance, when a convention stated that the principle of equity applied in the absence of agreement between the parties, it was stating a rule of positive law. In that case, if a dispute between the parties to the convention was referred to an international arbitral tribunal, the tribunal did not need the consent of the parties to judge according to equity, because equity had become a rule of positive law. That was the method the Special Rapporteur had relied on to solve the problem of equity. Article 17 therefore represented the application of a positive rule, not the traditional recourse to the *ex aequo et bono* principle.

16. How should the rule of equity be formulated? In his opinion, it should be derived from the material sources of law, as might be done by a legislator, taking account of the principles of justice, but adapting them specifically to the circumstances of the case. In that sense, the criterion of equity was the one best suited to the cases covered by article 17—they comprised a great diversity of particular cases, which could not be strictly classified in advance and to which ready-made solutions could not be applied. The solutions must depend on the circumstances and be found by applying the principle of equity in each particular case. The diversity of the cases justified recourse to a general criterion such as that of equity. The rule stated in the article did not empower the judge to decide a case *ex aequo et bono*: it required him to find the solution to the dispute in equity. That criterion must be applied, in particular, when the movable or immovable property was not situated in the territory of the successor States.

17. Of course, the settlement of the problems must be left, first of all, to the parties, and the Special Rapporteur had referred to several cases in which the parties concerned had reached an agreement. But it was necessary to formulate a criterion which would guide the parties and help them to agree. By formulating a rule which provided for the application of the principle of equity, the Commission could help States to find an acceptable solution. He therefore proposed that article 17 be referred to the Drafting Committee.

18. Mr. TAMMES observed that, in his excellent commentary to article 17, the Special Rapporteur had made it very clear that, for the purposes of the attribution of State property in cases of dissolution or separation of States, the question of whether the predecessor State continued or ceased to exist was not of decisive importance. In paragraph 8 of his commentary, the Special Rapporteur affirmed that the predecessor State was, in a sense, treated as one successor State among all the others—a statement that contrasted with the provisions of the draft articles on succession of States in respect of treaties, under which the fate of the predecessor State played an important part from the point of view of the continuity of treaty relations. Should it consequently be inferred that the whole typology of separation employed in the draft articles on succession in respect of treaties was not relevant to the case of State property? In his opinion, the reasons which had prompted the Commission to formulate special rules for cases of separation similar to the formation of a newly independent State were pertinent in the cases covered by article 17.

19. The dissolution, in 1944, of the union between Denmark and Iceland was a typical example of peaceful and agreed separation. However, many instances of secession had not been peaceful, nor were they likely to be peaceful in the future. He did not see why, in the many cases of enforced separation, the new State, which would

[6] *Ibid.*, paras. 56 *et seq.*, of the commentary.

[7] *Ibid.*, paras. 13-14 of the commentary.

in any case find itself in difficult circumstances, should be denied the favourable presumption in article 14, paragraph 2, that the movable property situated in its territory would pass to it unless such property had no direct and necessary link with the territory or it was otherwise agreed. In those cases of unfriendly separation, there would be no agreement and he questioned why the separating State should be encumbered with the burden of proving the existence of a direct and necessary link or that it was, in equity, entitled to the property. That did not seem particularly just, in view of the often unequal position, in political terms, of the parties in dispute. A more uniform provision for presumption, and thus for burden of proof, could be incorporated in the present draft. While it might be in accordance with the practice and facts of international life to start from a presumption based on the location of the property in the territory concerned, the Commission must none the less admit that it did not know very much about the practice underlying the application of the rules stated in article 17.

20. In the famous case of the Magnusson collection,[8] for instance, it was not yet known on what grounds the Copenhagen High Court had reached its decision concerning the restitution of that cultural property. Had it been based on an interpretation of a special clause in the Danish-Icelandic agreement or had it involved the application of a general principle? In the major case of dissolution of a State into two new States which had not been the constituent parts of a union—the case of Germany in 1945—the sole example available was the unsolved problem of the allocation of the Prussian Library,[9] which merely indicated the limitations of the principle of equitable apportionment in the case of cultural property belonging to a whole people rather than to one or more successor States. As rightly stated in article 1 of the Convention concluded between the Republic of Austria and Italy on 4 May 1920,[10] such property was "indivisible".

21. Again, the court of a third State, in which property affected by a succession was situated, would not find it easy to apply the principle of equity in accordance with article 17, paragraph 3, quite apart from such impediments as the absence of recognition, which had occurred in the case of Irish funds deposited in the United States, mentioned in paragraphs 63 to 66 of the commentary.

22. It should not be assumed that his remarks contradicted the view he had expressed at an earlier meeting, namely, that the equitable principles underlying the decision of the International Court of Justice in the *North Sea Continental Shelf* cases had found their right and proper place in the present draft.[11] The notion of equity was essential in the context of article 17.

23. Mr. PINTO said it would be advisable to state explicitly that paragraph 1 of the article did not preclude the application of the principle of equity. For example, important and costly immovable property such as a dam or port installation might be placed, for development purposes, in a relatively poor area of a State and the necessary funds might come from outside that area. If the area in question later fell within the territory of a new State, some kind of compensation would have to be considered, as was noted in paragraph 22 of the commentary. In its present form, paragraph 1 did include the proviso "except where otherwise specified in treaty provisions", but that formulation was too concise to cover application of the principle of equity and no indication was given that the need for some form of compensation might arise.

24. In his opinion, it would be preferable to introduce into paragraph 1 the idea that, in cases of separation, there was at least an obligation to negotiate in order to reach agreement on the basis of equity, where it could be established that the other State had made a substantial contribution to the creation of the immovable property. The notion of a contribution to the creation of immovable property, which was certainly relevant in the case of dams or port installations, was already embodied in article 15, subparagraph (*b*) and it should be more generally applied. Consequently, the obligation to negotiate and to reach a settlement on the basis of equity should be made more explicit in relation to paragraph 1, bearing in mind the Special Rapporteur's statement that it was already implicit in that paragraph.

25. Mr. RAMANGASOAVINA said that, in article 17, the Special Rapporteur had succeeded in determining the various cases which could arise and which, to some extent, resembled those dealt with in the preceding articles. With regard to immovable property, the Special Rapporteur had found a valid formula by first bringing the criterion of presumption into play. It was, in fact, quite normal for immovable property to be attributed to the State in whose territory it was situated. Moreover, if the property of a union of States was situated in a single State—for example, in the capital of the union or in the State which was best suited to certain industrial or financial activities—there was nothing to prevent the other States from receiving compensation in proportion to the share they had contributed.

26. To some extent, that presumption also applied to movable property, but in that case there was also the criterion of equity, which was the key to the apportionment of the property which had belonged to the union. That principle was essential in the cases covered by article 17, but it was very difficult to apply, and should, therefore be made clearer. The principle of equity should be applied to a large extent in settling the disputes which could arise as a result of a separation of States, but it was also necessary to stress the elements to be used in valuing the property so that it could be equitably apportioned. With regard to archives, for example, the essential criterion to be applied was that of the direct and necessary link with the territory. But other elements could also come into play in the apportionment of movable property. When it was necessary to apportion property such as currency, which was essential to the viability of a State, the criterion of equity should introduce such elements

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[8] *Ibid.*, para. 43 of the commentary.

[9] See *Yearbook... 1970*, vol. II, p. 161, document A/CN.4/226, part II, para. 49 of the commentary to article 7.

[10] See A/CN.4/292, chap. III, para. 39 of the commentary to article 17.

[11] See 1391st meeting, para. 5.

as the size of the territory, its income and its budget. The principle of good faith should also be introduced, particularly in cases of arbitration, where it was often necessary for the application of the principle of equity.

27. He considered that article 17 was perfectly acceptable and that, subject to some drafting changes to clarify the scope of the terms used, it could be referred to the Drafting Committee.

28. Mr. KEARNEY said that among the many points raised in an extremely fruitful discussion, the Commission would inevitably have to take into consideration the question posed by Mr. Tammes concerning the way in which cases of separation were treated in the present draft and in the draft articles on succession of States in respect of treaties. As he had already pointed out in connexion with articles 14 and 15, cases of separation of parts of a State would continue to occur in circumstances very similar to those involving the creation of newly independent States.[12] To a large extent, the rules concerning newly independent States in the draft articles on succession of States in respect of treaties were designed to cover instances in which a metropolitan and a dependent territory separated. Obviously, the situation was different in the case of a single territory which broke up into two or more States. One possibility might be to formulate a somewhat modified rule concerning the direct and necessary link, that was to say, to create a presumption that the area in which the property was situated at the time of the dissolution or separation of parts of a State would be presumed to have the direct and necessary link, unless it was established otherwise.

29. With regard to paragraph 1, Mr. Pinto's highly pertinent comments concerning a contribution to the creation of immovable property and the need for compensation had also foreshadowed another problem, that of succession to public debts—a matter that was likely to be intimately bound up with equitable apportionment of the property in question. It would be interesting to learn the Special Rapporteur's views on whether a cross-reference should be made to public debts, indicating that the problem would be examined at a later stage, or whether it should be considered at the present time.

30. It had also been suggested that, where movable property was concerned, there should be an interplay between the principles of the direct and necessary link and of equitable apportionment. The difficulty inherent in the concept of a direct and necessary link was that movable property might have such a link with all the parties concerned, and application of the principle of equitable apportionment might be the only way to decide which of the competing links was the most important. It might prove necessary for the Commission to develop further the interrelationship between those two principles; otherwise, it would be very difficult to determine which was to be the governing factor.

31. Paragraph 3 posed the problem of which system of law was applicable. Was it the law of the particular third State, that of the predecessor State or general international law? In determining title to property, specific rules had to be applied and courts and tribunals would be inclined to apply the *lex fori*. The findings of an international tribunal might be different, but is was more than likely that, in a third State, the law of that State would apply. Consequently, it was necessary to consider the latitude to be given to the third State in determining what the equitable apportionment was to be.

32. In conclusion, he wished to point out that he agreed with the need for a general approach. He had simply mentioned questions and problems that would arise as a result of such an approach.

33. Mr. USHAKOV said that, in principle, he accepted article 17, but he wished to make three comments. First, he questioned whether the Commission should provide, as it had done in article 33, paragraph 3, of the draft on succession of States in respect of treaties, for the case in which a part of the territory of a State separated from it and became a State in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. That distinction was justified by the fact that two principles were applicable to succession in respect of treaties; the principle of continuity, which was valid in normal circumstances, and the clean slate principle, which was appropriate in the case covered by article 33, paragraph 3. For the purposes of draft article 17, it was not necessary to differentiate according to the way in which the new State was formed in the event of separation. Whether the separation took place in accordance with an agreement concluded with the predecessor State or as the result of a struggle for self-determination, the property must pass to the successor State.

34. In the case of separation, it was the solution by agreement which should take precedence. If possible, an agreement must be concluded between the predecessor State and the successor State or States or, when the predecessor State ceased to exist, between the successor States. He was not sure whether the case in which the State formed as a result of the separation possessed its own property should be treated separately. In that connexion, he reminded the Commission that, when preparing the draft on succession of States in respect of treaties, it had referred to the case of the property belonging to Syria and Egypt before the formation of the United Arab Republic.

35. Article 17, paragraph 3, related to the movable and immovable property of the predecessor State, although immovable property seemed to be covered already by paragraph 1, which applied to immovable property in general, wherever it was situated. With regard to movable property, which was referred to in paragraph 2 and had, in some cases, to be equitably apportioned, it should be noted that it was not always possible to carry out an equitable apportionment. For example, if the predecessor State agreed to lend a building for the embassy of one successor State, it was not always possible for it to do the same for other successor States. In reality, it was not so much a matter of equitable apportionment as of equitable compensation.

[12] See 1396th meeting, para. 26.

36. Mr. AGO said that the substance of article 17 called for a number of comments which had already been made in regard to previous articles. Since the Special Rapporteur consistently used the same terminology as in previous articles, he (Mr. Ago) could only repeat that he endorsed the principle of equity, but had doubts about its practical application. He stressed that article 17, even more than other provisions, would justify the introduction of an obligation to negotiate. It was because each case was different that the Special Rapporteur had suggested recourse to the principle of equity, but it was for that same reason that the obligation to negotiate would be particularly appropriate. The rules stated in article 17 should really only make up for the absence of an agreement between the parties.

37. With regard to the drafting of the article, he was not sure what subject the words "its immovable property", at the beginning of paragraph 1, related to. He thought that many drafting difficulties might be due to the fact that the Special Rapporteur had dealt simultaneously with two cases which ought to be separated: that of complete dissolution and that of simple separation. In paragraph 2, the words "its movable property shall... be attributed to the State with whose territory it has a direct and necessary link" were appropriate in the case of dissolution, since the predecessor State no longer had any property; in the case of separation, however, the predecessor State continued to exist and nothing was attributed to it: it simply remained the owner of its property.

38. Mr. MARTÍNEZ MORENO said that article 17 was the last of a set of articles which dealt with succession to State property in the various cases or types of succession of States. After disposing of that problem in the other types of succession, it was logical to deal, in article 17, with the fate of State property in cases of separation or secession.

39. He entirely agreed with Mr. Yasseen and other speakers that the principle of equity embodied in the rules in paragraphs 2 and 3 was a substantive principle, different from the procedure of adjudication *ex aequo et bono*. Whether it was to be construed, according to Aristotle, as justice applied to a specific case, or in any other manner that was generally agreed, the concept of equity should be the underlying principle of the rules in article 17.

40. The Special Rapporteur had given an exhaustive account of State practice and legal literature in support of article 17. He had been struck, however, by the fact that the Special Rapporteur had not included among his examples the case of Panama, which had become a member of the international community under very special circumstances, which had had a series of consequences. The relations between Panama and Colombia, the State from which it had separated, had for a long time been far from cordial and it was particularly impressive to note that the President of Colombia, Mr. López Michelsen, was now a staunch advocate of the Panamanian cause. As a Latin American, and as a jurist devoted to the rule of law, he (Mr. Martínez Moreno) believed that it was necessary to reassert the fundamental principle that immovable property belonged to the successor State in whose territory it was situated. The right of Panama to the whole of its territory should accordingly be acknowledged. It was, moreover, impressive to see the spirit of justice shown by the present Government of the United States of America in that regard. Despite strong opposition and considerable internal difficulties, that Government had formally adhered to its policy of negotiating with Panama as an equal. That attitude placed the United States high among countries which showed respect for the rights of others.

41. The principle that immovable property should be attributed to the successor State in whose territory it was situated should be based on respect for the full exercise of the sovereignty of that State over much immovable property, even if it represented a large area of the States territory.

42. During the debate, Mr. Kearney had drawn attention to the question of debts incurred in connexion with the immovable property that would pass to the successor State. He had rightly pointed out that where property passed to that State, any debts relating to the property should also pass to it. An example, that came to mind was the case of a dam, an irrigation system or a hydroelectric plant constructed with the aid of a long-term loan from the World Bank or a regional development organization. A successor State which, following a succession of States, became the sole owner and beneficiary of such immovable property, should logically have to bear the burden of amortizing the loan.

43. He agreed with Mr. Ago that provision should be made for an obligation to negotiate. Direct negotiation between the parties concerned was the golden rule of diplomacy. But if the negotiations were not successful, the parties should resort to other means of peaceful settlement, in particular, arbitration or adjudication by the International Court of Justice. There was no other way in which property could be equitably apportioned among the States concerned. In the case, contemplated in paragraph 3, of property situated in a third State, perhaps the safest course was to apply the *lex fori*, so that the property would devolve in accordance with the local law.

44. In view of the many problems which could arise in regard to succession to State property in cases of separation of part of a State, he believed that the draft articles should specify an obligation to negotiate and make provision for procedures for the settlement of disputes.

45. He noted that, in his valuable commentary, the Special Rapporteur had quoted chiefly from two authors: Fauchille and Bustamante y Sirvén. He therefore wished to take that opportunity of raising a point connected with article 16. In paragraph 5 of the commentary to that article, the Special Rapporteur had quoted a passage from Bustamante y Sirvén which referred to the annexation of one State by another. It was necessary to stress that, in Spanish, the expression *anexión de Estados* could be used with two meanings: the first was the complete union of States by lawful means; the second was the absorption by force of one State by another. In his books, Bustamante y Sirvén had referred to the

first case, and had never attempted to justify the illegal annexation of one State by another. He thought it necessary to draw attention to that point because of the prestige of that great Latin American writer, who had been the father of the codification of private international law. He was sure that the Special Rapporteur had intended to give a correct impression of the views of Bustamante y Sirvén, but the passage quoted could be misinterpreted.

46. He agreed that article 17 should be referred to the Drafting Committee.

47. Mr. QUENTIN-BAXTER said that article 17 completed the set of articles on State property and in a sense controlled it. The cases dealt with in article 17 had some similarity with the situations contemplated in articles 12 and 13, where a predecessor State remained. They also had similarities with the situations envisaged in articles 14 and 15, in the sense that the succession produced a new international person, and it was necessary always to bear in mind that the agreements would have to be recognized and applied after the moment when the succession of States occurred.

48. On comparing the solutions set out in article 17 with those applied to other situations, however, one was struck by the role played by the locality of the property. As article 17 now stood, the rule that property was attributed to the State in whose territory it was situated appeared to be laid down in somewhat absolute terms. Paragraph 1 concerning the fate of immovable property did contain the proviso "except where otherwise specified in treaty provisions", but those treaty provisions would be influenced by the rules which the Commission would adopt. Apart from that, the rule in paragraph 1 was not qualified in any way: the immovable property went to the State of situation.

49. As far as movable property was concerned, the question of locality was not specified as a criterion of any kind. Irrespective of location, the destination of movables was determined by other tests: linkage, contribution and equitable apportionment. In fact, each of those three criteria should be recognized as aspects of a deeper sort of equitable test, which needed to be expressed differently for different types of succession.

50. It was also of interest to contrast the rules in article 17 regarding succession to immovable property in the territory of the predecessor State, with the rules adopted for a similar situation in other articles of the draft. It should be remembered that many cases which came under aticle 17 would involve a predecessor State. In articles 12 and 13, the rule was that immovables would pass to the successor State if there was a link with, or a contribution by, that State. In the case contemplated in articles 14 and 15, such immovables passed to the successor State only if there had been a contribution by that State. Location would appear to play no part: the test was purely that of linkage or of equity.

51. If locality were the only criterion in the matter, no rule would be needed. It was also clear that, where national selfishness might intrude, locality could not be the only test. As he saw it, the rule should be that locality was not a sufficient guide to ownership in the case of a succession of States. It had to be recognized that there were cases in which much of the national wealth and public expenditure had been directed to a particular locality and to particular resources. If, unfortunately, the State broke apart, the principle of equity required that immovable property should not go without any qualification to the successor State in whose territory it was situated. It had to be recognized that there were cases in which the question of contribution would arise.

52. When dealing with movables, where the predecessor State survived and perhaps even where there was a total dissolution of the predecessor State, it was not realistic wholly to ignore the location. Very often, location would provide an obvious guide as to who should succeed. Movable property was in many cases associated with immovable property: sufficient examples were the furniture in a building and the maintenance equipment of a railway.

53. There was thus a natural and obvious link based on location. It was, of course, necessary to qualify the test of location by reference to linkage of particular property with a new State formed by separation or dissolution, and also by taking into account the question of equitable apportionment. Those qualifications, however, should be introduced against the background that location was not a sufficient test, not that it was no test at all. He did not believe there was any disagreement between him and the Special Rapporteur with regard to the dominant idea, but simply with regard to the form in which article 17 was presented.

54. The Commission should also consider carefully whether slightly different treatment might not be required for the case of separation, where a predecessor State remained, and the case of dissolution, where the predecessor State disappeared. In that connexion, consideration should be given to aligning article 17 more carefully and more precisely with the language used in the 1974 draft on succession of States in respect of treaties.

55. He subscribed to all the remarks which had been made regarding the duty to negotiate. The recognition of that duty, however, did not relieve the Commission of anxiety with regard to the drafting of the rules it would embody in article 17. Whether agreements were outlined before the separation of a State or whether, in the case of violent secession, the entire negotiation had to take place after the succession of States, the rules that would be adopted by the Commission would exert a certain legal and moral influence: they would be the background against which the negotiations would take place.

56. Mr. BILGE said that he approved of the substance of article 17. The solutions proposed by the Special Rapporteur were satisfactory and recourse to the principle of equity was just. It seemed, however, that that principle did not have the same role in each of the three paragraphs of the article. For the purposes of paragraphs 1 and 2, the principle of equity should serve to correct the formalistic aspect of the rules stated in those two provisions concerning the attribution of movable and immovable property. For the purposes of paragraph 3, which contained no other rule than recourse to the principle of equity, that principle should apply as broadly as possible and thus have a creative effect. It should be noted that the application of the principle of

equity involved an obligation to negotiate with a view to reaching an agreement.

57. With regard to the drafting of the article, in paragraphs 1 and 2, he would prefer a reference to the "*principles*", rather than the "principle" of equity; paragraph 3 should not be changed, though it might be made into a separate article. The same applied to article 16, paragraph 2, on which he had not had an opportunity of expressing his views.

58. Sir Francis VALLAT said he wished to stress two points in connexion with article 17. The first was that where the predecessor State continued to exist, there was, at least in internal law, a possibility of continued ownership. In the case of dissolution of a State, where the predecessor State disappeared, there could well be a vacuum creating serious legal problems.

59. Consideration should therefore be given to laying on the State where the property was located an obligation to honour the rights and interests of the successor State. Otherwise, apart from conflicts between two or more successor States, there could also be a conflict between a successor State and the local government claiming the property for itself. In many countries, there was a rule of internal law whereby *bona vacantia* became the property of the State in which they were situated. The Drafting Committee should give some thought to that point.

60. He was also concerned at the loose and general use of the term "equity". As he understood the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases,[13] the Court, when recommending parties to apply equitable principles in their subsequent negotiations, had been careful to indicate the factors they should take into account. Without a directive of that kind, a reference to "equity" would be unduly vague. Hence the Special Rapporteur's remark: "In other words, equity means everything and means nothing, and it is as well to leave its exact content to be spelt out in individual agreements".[14]

61. In the context of a succession of States, the two main factors relevant to equity were clearly the question of linkage and the contribution to an asset. That relationship should be made clear in paragraph 2 of article 17. In paragraph 3, however, it was necessary to indicate more concretely what was to be regarded as equitable for the purposes of application of that paragraph.

62. Mr. CASTAÑEDA said he approved of the Special Rapporteur's approach to the problems involved in article 17 and the basic solutions embodied in that article. He particularly welcomed the introduction of the criterion of equity, which alone could provide a solution to the problem of attributing property in the variety of circumstances and situations covered by the article.

63. The principle of equity was embodied in article 17 as a substantive rule of law and not by reference to the procedure of adjudication *ex aequo et bono*. That principle was intended to provide a guide to the parties in their negotiations, and to any authority adjudicating a dispute. The question of the law to be applied by the judge of a third State, to which Mr. Kearney had referred, was a different matter.

64. He agreed with Mr. Ago that there should be an obligation to negotiate, but he believed that the question of the peaceful settlement of disputes should be kept apart. Some separate provision on that subject, possibly in the form of an optional protocol, might perhaps be attached to the set of draft articles later.

65. He was in favour of retaining article 17 as it stood, though he could accept Mr. Ushakov's suggestion that precedence be given to agreement between the parties. That would show that the other rules set out in the article were residuary rules, to be applied only if the parties concerned did not agree otherwise.

66. On the question whether the location of the property should be the sole criterion, he had been impressed by Mr. Quentin-Baxter's remarks, but in view of the great difficulty of the problem, he doubted whether there was a better solution than that proposed in the article. Where immovable property was concerned, its location provided a strong presumption, and the only practical solution was to attribute it to the State in whose territory it was situated.

67. Reference had been made during the discussion to the case of investments made in a depressed area for purposes of development and the need to take them into account when a succession of States occurred. He believed that situations of that kind could be best settled by agreement between the parties.

68. It was also logical, when attributing the ownership of immovable property, to take account of public debts incurred to create that property. On that point, he thought that if several or all of the successor States had contributed to the cost of constructing public works which, after the succession of States, remained entirely in the territory of one successor State, the principle of equity required that the State benefiting from the property should pay an indemnity to all the other successor States which had contributed to its cost. That conclusion would be examined by the Commission when it came to consider the question of public debts, but it did not in any way detract from the soundness of the solution of attributing immovable property to the successor State in whose territory it was situated.

69. With regard to movables, the rules stated in article 17 differed from those laid down in article 15 concerning the case of a newly independent State. In the cases covered by article 17, the situation was rather different, in that there were several successor States and it was therefore logical to attribute the property on the basis of linkage and equitable apportionment.

70. He agreed with Mr. Ago on the need to clarify the wording of the article in order to cover the different situations which arose in the case of separation of part of a State and in that of the total dissolution of a State leaving several successor States and no predecessor State. He suggested that the Drafting Committee should under-

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

[14] A/CN.4/292, chap. III, para. 34 of the commentary to article 17.

take that clarification, but keep the provisions in a single article.

The meeting rose at 6 p.m.

1400th MEETING

Tuesday, 29 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, 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 (*concluded*)

ARTICLE 17 (Succession to State property in cases of separation of parts of a State) [1] (*concluded*)

1. Mr. NJENGA said that he agreed substantially with article 17, which was the last of the series or articles under consideration. It was a well-balanced article which provided a good basis for the Drafting Committee to work on.

2. He fully concurred with the Special Rapporteur's approach, which aimed at ensuring a just distribution of State property in cases of separation of parts of a State. He agreed with the Special Rapporteur that it was not necessary to specify whether the predecessor State continued to exist after the separation or whether there was a complete dissolution. The principles applicable in both situations were identical: those of justice and equitable distribution.

3. It had been said during the discussion that equity could mean anything or nothing. It was certainly difficult to specify the conditions that had to be taken into consideration in order to ensure a just outcome in every case. The situations concerned differed considerably and the factors to be taken into account varied accordingly.

4. In the present context, however, equity was not a concept of absolute justice but rather a principle of law. That point had been well brought out by the International Court of Justice in the *North Sea Continental Shelf* cases, in a passage quoted by the Special Rapporteur in his report:

> In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.[2]

That passage afforded a good basis for the application of the principle of equity as a rule of law in the cases covered by article 17.

5. Secession was usually an unhappy process and the examples given by the Special Rapporteur confirmed that. In modern times, cases of separation of part of a State were very rare. The only situations of that kind that could be mentioned were the separation of India and Pakistan in 1947, the separation of Singapore from Malaysia in 1965 and the more recent case of Bangladesh. There had been a few attempts at secession in Africa, which had constituted very unfortunate incidents. He was thinking of the case of Katanga and of the more recent situation in Angola, where mercenaries had tried to break the State into several portions to the detriment of its people. He suggested that the wording of article 17 should take into account the unhappy character of the situations which the article covered.

6. The provisions in paragraph 1 on the attribution of immovable property would not always make for a just solution. It would not be fair to attribute a dam, a hydroelectric scheme or some other major public work to the successor State in whose territory it was situated if the cost of construction had been paid by all parts of the predecessor State. He suggested that a different rule was necessary to deal with cases of that kind. The property should go to the State where it was situated, but the rule to that effect should be coupled with an obligation to work out an agreement to compensate the other States which had contributed to the formation of the property in question. There was clearly no reason to apply one and the same rule to different categories of State property such as State land and major hydroelectric schemes. He also suggested that the Drafting Committee should take into account the fact that in African law immovable property was subject to different kinds of régime, including communal ones.

7. By way of illustration, the Special Rapporteur had referred to the case of the dissolution of the East African Currency Board [3] and the treatment of the funds attributed to the three States which had been its members. Another case conceivable was that of three States forming an association of that kind and building a harbour or port in the territory of one of them as the common property of all three. In the event of the dissolution of the association, it would be totally unjustifiable to attribute the harbour or port automatically to the State in whose territory it was situated. The Special Rapporteur had not ruled out the possibility of a more just solution, since he had said that the parties concerned were completely free to settle the matter among themselves by agreement. The parties were clearly under an obligation to enter into an agreement to effect an equitable

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[1] For text, see 1399th meeting, para. 1.

[2] See A/CN.4/202, chap. III, para. 16 of the commentary to article 17.

[3] *Ibid.*, para. 28 of the commentary.