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Summary record of the 1568th meeting

Topic:
<multiple topics>

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word "fait" could mean an action or an omission, a "simple" act or a "continuous", "composite" or "complex" act, and that in English the word "act" had always been used in the draft as the equivalent of the word "fait" in French. On the other hand, the word "specified", in the English text of paragraph 1, might be taken to imply that the act referred to was a single act. He wondered whether it would not be better to replace it by the word "given".

48. Mr. NJENGA said that, since the article referred to a specified act subject to consent, it was only rational for the consent to precede the act. He would have difficulty in accepting the notion of simultaneous or subsequent consent—which was not what the Commission had in mind. However, he was prepared to agree that the title should be left unchanged on the understanding that it referred to prior consent.

49. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted the text of article 29 proposed by the Drafting Committee, as well as the title of chapter V: "Circumstances precluding wrongfulness".

It was so decided.

ARTICLE 30 [7] (Countermeasures in respect of an internationally wrongful act) [8]

50. Mr. USHAKOV said that the article was very clear and could be adopted by the Commission without difficulty.

51. Mr. REUTER welcomed the fact that the Drafting Committee had introduced the word "countermeasures" in the title.

52. The CHAIRMAN said that if there were no objections he would take it that the Commission adopted the text of article 30 proposed by the Drafting Committee.

It was so decided.

The meeting rose at 12.30 p.m.

[7] For the text initially submitted by Mr. Ago, see 1544th meeting, paras. 8 *et seq.*, and 1545th meeting, paras. 3 *et seq.*

[8] For text, see para. 1 above.

1568th MEETING

Friday, 13 July 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/322 and Corr.1 and Add.1 and 2, A/CN.4/L.299/Rev.1)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 1–23

1. The CHAIRMAN invited the Chairman of the Drafting Committee to present the results of the Committee's work on the first 25 articles of the draft,[1] which the Commission had provisionally adopted at its twenty-fifth session and from its twenty-seventh to thirtieth sessions, and which it had referred to the Drafting Committee at the current session (1560th meeting, para. 30) for review as a whole on completion of the first reading.

2. The results of the Drafting Committee's work were presented in document A/CN.4/L.299/Rev.1, which contained the titles of part I, of part II and sections 1 and 2 thereof, of part III and sections 1 and 2 thereof, and the titles and texts of articles 1 to 23.

3. The texts proposed by the Drafting Committee read:

PART I

INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the effects of succession of States in respect of matters other than treaties.

Article 2 [3].*[2] *Use of terms

1. For the purposes of the present articles:

(*a*) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(*b*) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(*c*) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(*d*) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(*e*) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(*f*) "third State" means any State other than the predecessor State or the successor State.

* Resumed from the 1565th meeting.

[1] See 1560th meeting, foot-note 1.

[2] The number in square brackets refers to the number of the corresponding article in the original draft (for reference, see 1560th meeting, foot-note 1).

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Article 3 [2]. Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

PART II

STATE PROPERTY

SECTION 1 GENERAL PROVISIONS

Article 4. Scope of the articles in the present part

The articles in the present part apply to the effects of a succession of States in respect of State property.

Article 5. State property

For the purposes of the articles in the present part, "State property" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

Article 6. Rights of the successor State to State property passing to it

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State property as passes to the successor State in accordance with the provisions of the articles in the present part.

Article 7. Date of the passing of State property

Unless otherwise agreed or decided, the date of the passing of State property is that of the succession of States.

Article 8. Passing of State property without compensation

Subject to the provisions of the articles in the present part and unless otherwise agreed or decided, the passing of State property from the predecessor State to the successor State shall take place without compensation.

Articles 9 [X]. Absence of effect of a succession of States on third party State property

A succession of States shall not as such affect property, rights and interests which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

SECTION 2 PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Articles 10 [12]. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of State property of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.

Article 11 [13]. Newly independent State

1. When the successor State is a newly independent State:

(*a*) movable property, having belonged to the territory to which the succession of States relates and become State property of the predecessor State during the period of dependence, shall pass to the newly independent State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State other than the property mentioned in subparagraphs (*a*) and (*b*), to the creation of which the dependent territory has contributed, shall pass to the successor State in proportion to the contribution of the dependent territory;

(*d*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State.

2. When a newly independent State is formed from two or more dependent territories, the passing of the State property of the predecessor State or States to the newly independent State shall be determined in accordance with the provisions of paragraph 1.

3. When a dependent territory becomes part of the territory of a State, other than the State which was responsible for its international relations, the passing of the State property of the predecessor State to the successor State shall be determined in accordance with the provisions of paragraph 1.

4. Agreements concluded between the predecessor State and the newly independent State to determine succession to State property otherwise than by the application of paragraphs 1 to 3 shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

Article 12 [14]. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts, shall be governed by the internal law of the successor State.

Article 13 [15]. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property of the predecessor State, other than that mentioned in subparagraph (*b*), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 14 [16]. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(*c*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(*d*) movable State property of the predecessor State other than that mentioned in subparagraph (*c*) shall pass to the successor States in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

PART III

STATE DEBTS

SECTION 1. GENERAL PROVISIONS

Article 15 [17]. Scope of the articles in the present part

The articles in the present part apply to the effects of a succession of States in respect of State debts.

Article 16 [18]. State debt

For the purposes of the articles in the present part, "State debt", means:

(*a*) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(*b*) any other financial obligation chargeable to a State.

Article 17 [19]. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present part.

Article 18 [20]. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights and obligations of creditors.

2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State or an international organization asserting a claim unless:

(*a*) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present part; or

(*b*) the agreement has been accepted by that third State or international organization.

SECTION 2. PROVISIONS RELATING TO EACH TYPE OF SUCCESSION OF STATES

Article 19 [21]. Transfer of part of the territory of a State

1. When part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

Article 20 [22]. Newly independent State

1. When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The agreement referred to in paragraph 1 should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should its implementation endanger the fundamental economic equilibria of the newly independent State.

Article 21 [23]. Uniting of States

1. When two or more States unite and so form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to its component parts.

Article 22 [24]. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant circumstances.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

Article 23 [25]. Dissolution of a State

When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant circumstances.

4. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in reviewing the 25 articles provisionally adopted by the Commission, the Drafting Committee had addressed itself in particular to those articles or parts of articles on which the Commission had not yet taken a position, and which had been left in square brackets. The Committee had also tried to ensure conformity of the draft articles with those of the 1978 Vienna Convention on Succession of States

in respect of Treaties.[3] Finally, it had kept in mind that the draft was still at the first reading stage and that certain points of substance or drafting could better be settled at the second reading, in the light of the comments of Governments.

5. With regard to the general structure of the draft, to ensure concordance with the 1978 Vienna Convention and with the Vienna Convention on the Law of Treaties,[4] the Drafting Committee had decided to subdivide the draft not into two but into three parts, entitled respectively "Introduction", "State property" and "State debts", and to reverse the order of articles 2 and 3 of the original text so that the article on "Use of terms" immediately followed article 1 (Scope of the present articles).

6. Having reviewed the 25 articles drafted at successive sessions of the Commission, the Drafting Committee had come to the conclusion that article 9 of the original draft, entitled "General principle of the passing of State property", had become unnecessary and might even give rise to serious problems of interpretation, since in the new part II the passing of State property, both movable and immovable, was dealt with in detail for each type of succession of States. The article had therefore been deleted, as had article 11, which had been placed in square brackets in view of the reservations expressed and which had provided essentially that debts owed to the predecessor State were an exception to the physical situation rule set out in article 9. In the absence of articles 9 and 11, the provisions of the draft concerning the passing of movable property would apply to the passing of debt claims. The remaining 23 articles had been renumbered accordingly.

7. With regard to the draft articles proposed by the Drafting Committee, he pointed out that the text of article 1 of the original draft and the title of the draft itself had been retained without change. The Committee had however been aware that, in view of the Commission's decision to restrict the contents of the draft to the effects of succession of States in respect of State property, State debts and State archives, the title of the draft and the text of article 1 no longer accurately reflected the real scope of the draft articles. If the Commission decided to restrict the draft to the three aforementioned matters, the title of the draft and the text of article 1 could be recast without great difficulty. Various forms of words had been proposed in the Drafting Committee, such as "succession of States in respect of State property, State debts and State archives". However, the Committee had not wished to prejudge the Commission's decision, which would be taken in the light of its own views on the future programme of work and the comments of Governments on the subject.

8. In article 2 [formerly article 3], the order of subparagraphs (*e*) and (*f*) had been reversed, in conformity with the corresponding article of the 1978 Vienna Convention, and a new paragraph 2 had been added, which was identical to that in the corresponding articles of the Vienna Convention on the Law of Treaties and the 1978 Vienna Convention.

9. In article 3 [formerly article 2] and articles 4 and 5, minor drafting changes had been made to bring the English and Spanish texts into conformity with the corresponding articles of the 1978 Vienna Convention.

10. In article 6, for the sake of consistency throughout the draft, the words "the present articles" had been replaced by the words "the articles in the present part".

11. Article 7 was unchanged.

12. Article 8 had been redrafted to bring out more clearly the rule it laid down. The phrase "subject to the provisions of the articles in the present part" had been adopted to replace the words "in accordance with the provisions of the present articles", and had been placed at the beginning of the article. It was followed by the words "unless otherwise agreed or decided" which, in the original draft, had appeared at the end of the article. In addition, the words "without prejudice to the rights of third parties" had been deleted as being superfluous; that point was covered by article 9 [formerly article X].

13. The Drafting Committee had considered that article 9 [X] should be retained in its original place in the draft because of its general nature and in view of the deletion of the former articles 9 and 11. The words "predecessor State", which had appeared in square brackets in the original draft, had been retained to avoid any ambiguity in regard to the interpretation or application of the rule. The words "of the successor State" immediately following, and in consequence the words in square brackets at the end of article X, had been deleted.

14. Article 10 [formerly article 12] remained unchanged.

15. Article 11 [formerly article 13] had been redrafted to improve its presentation. The new article consisted of four paragraphs instead of six, the introductory clause being numbered paragraph 1, to conform to treaty practice. Former paragraphs 1, 2 and 3 (*a*) and (*b*), which had been renumbered paragraph 1, subparagraphs (*a*), (*b*), (*c*) and (*d*), had been rearranged to separate the provisions relating to movable property (new subparagraphs (*a*), (*b*) and (*c*) of paragraph 1) from the provision relating to immovable property (new subparagraph (*d*) of paragraph 1). It had also been decided that there was no need to refer to immovable property in new subparagraph (*a*) of paragraph 1 (formerly paragraph 1), since the passing of such property

[3] See *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), document A/CONF.80/31. The Convention is hereinafter referred to as the "1978 Vienna Convention".

[4] 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. 287.

was covered by subparagraph (*d*) of paragraph 1 (formerly paragraph 2). In the same subparagraph (*a*) of paragraph 1, the phrase "an independent State which existed in the territory before the territory became dependent" had been replaced by the words "the territory to which the succession of States relates", so as to give the rule its proper scope and avoid the difficulties created by the reference to an independent State existing prior to dependence; and the words "administering State" had been replaced by the words "predecessor State", in conformity with the terminology adopted throughout the draft. Lastly, in the new paragraph 4, the words "the foregoing paragraphs" had been replaced by the words "paragraphs 1 to 3", in accordance with the usage followed in the 1978 Vienna Convention. Similar changes had been made elsewhere in the draft.

16. The Drafting Committee had seen no compelling reason to retain the square brackets enclosing article 12 [formerly article 14], and had aligned the text with that of the new article 21, which was the corresponding provision in part III of the draft. In paragraph 1, the words "subject to paragraph 2" had been deleted in order to strengthen the rule laid down, but the phrase "without prejudice to the provision of paragraph 1" had been added at the beginning of paragraph 2. Some minor drafting changes had also been made to bring the text of article 12 into line with the 1978 Vienna Convention.

17. Some minor changes had been made in article 13 [formerly article 15] and in article 14 [formerly article 16], as well as at other points in the draft, again to bring the text into conformity with that of the 1978 Vienna Convention.

18. Articles 15 to 23 formed part III of the draft, relating to State debts. The Drafting Committee had endeavoured to ensure its consistency with the structure and drafting of part II, on State property.

19. Article 15 [formerly article 17] was unchanged.

20. With regard to article 16 [formerly article 18], he reminded members that in the original text the word "international", preceding the words "financial obligation", had been placed in square brackets to indicate that opinions in the Commission had differed regarding the scope of the article in regard to creditors. In an endeavour to narrow the gap, the Drafting Committee had decided to delete the word "international" and divide the single paragraph of the original provision into two subparagraphs: subparagraph (*a*), which was aimed at covering the situations referred to by the word "international" by the reproduction, with the necessary drafting changes, of the relevant passage from the Commission's commentary to article 18 of the original draft; and subparagraph (*b*), which reproduced, with some drafting changes and the omission of the word "international", the rule laid down in the original text. The words "at the date of the succession of States" had been deleted, as they had been considered unnecessary in an article whose purpose was to define the term "State debt". On the inclusion of subparagraph (*b*), however, the Drafting Committee had not been unanimous.

21. Article 17 [formerly article 19] remained unchanged.

22. With a view to resolving the differences of opinion in the Commission regarding the last part of paragraph 2 of article 18 [formerly article 20], the Drafting Committee had deleted the words "or against a third State which represents a creditor", appearing in square brackets in the original draft, and had replaced the words "a creditor third State or international organization" by the words "a third State or an international organization asserting a claim", the latter wording being intended to cover representation or diplomatic protection. The order of subparagraphs (*a*) and (*b*) of paragraph 2 had been reversed to make it clear that, if the agreement was to be invoked, its consequences must be in accordance with the other applicable rules in part III. Similarly, for the sake of greater precision, the words "concerning the passing of the State debts of the predecessor State" had been replaced by the words "concerning the respective part or parts of the State debts of the predecessor State that pass".

23. Articles 19 to 23 [formerly articles 21 to 25] had been retained without change, except for a few minor drafting amendments to ensure consistency. In particular, the introductory phrase of article 20 [formerly article 22], which had not been numbered in the original draft, had been embodied in the text of paragraph 1.

24. The CHAIRMAN suggested that the articles proposed by the Drafting Committee should be considered successively, beginning with article 2, since article 1 should be considered last.

PART I (Introduction)

The title of part I was adopted.

ARTICLE 2 (Use of terms)[5]

Article 2 was adopted.

ARTICLE 3 (Cases of succession of States covered by the present articles)[6]

Article 3 was adopted.

PART II (State property)

The title of part II was adopted.

SECTION 1 (General provisions)

The title of section 1 was adopted.

ARTICLE 4 (Scope of the articles in the present part)[7]

Article 4 was adopted.

ARTICLE 5 (State property)[8]

[5] For text, see para. 3 above.

[6] *Idem.*

[7] *Idem.*

[8] *Idem.*

25. Mr. VEROSTA observed that during the discussions in he Commission and in the Drafting Committee he had drawn attention to the fact that "State property" was defined in article 5 as "property, rights and interests", whereas articles 10 and 11 made a distinction between movable and immovable property. He also drew the Commission's attention to the problem of the relationship between State archives and State property.

26. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 5 proposed by the Drafting Committee.

It was so decided.

ARTICLE 6 (Rights of the successor State to State property passing to it)[9]

Article 6 was adopted.

ARTICLE 7 (Date of the passing of State property)[10]

27. Mr. BARBOZA proposed that in the Spanish version the word "paso" should be replaced by the word "traspaso", which was used in the title of article 10.

28. Mr. VALENCIA-OSPINA (Secretary of the Drafting Committee) said that two different concepts were involved, which called for two different translations into Spanish. The word "traspaso", in the title of article 10, was the translation of the English word "transfer", whereas the word "paso", in article 7, was the translation of the word "passing".

29. Mr. DÍAZ GONZÁLEZ fully agreed with Mr. Barboza. The words "traspaso" and "paso" were not at all the same; whereas the former indeed meant "transfer", the latter implied physical motion of some kind.

30. Mr. USHAKOV observed that, if the word "paso" were replaced by the word "traspaso" in the Spanish version of the draft articles, it would be necessary to amend the Spanish text of all the commentaries approved by the Commission in its previous reports.

31. Mr. REUTER also had doubts about the exact meaning of the word "passage" in the French text. In his opinion, "passage" would take place almost automatically, whereas "transfert" implied a decision.

32. Mr. VALENCIA-OSPINA (Secretary of the Drafting Committee) said that the Spanish version of the draft could be reviewed at the second reading. The point raised could then be considered in the context of the draft as a whole and in the light of the comments submitted by Governments.

33. Mr. BARBOZA pointed out that the same difficulty arose in the case of State archives. He would therefore reserve the right to revert to the matter later.

34. Sir Francis VALLAT said there was indeed a difference between "passing" and "transfer". "Passing" took effect by the operation of law, whereas "transfer" might involve the intervention of the predecessor State. It was important for the structure of the draft to maintain that distinction, in English at least.

35. The CHAIRMAN proposed that if there were no further comments the Commission should adopt article 7 proposed by the Drafting Committee.

It was so decided.

ARTICLE 8 (Passing of State property without compensation)[11]

36. Sir Francis VALLAT said that unfortunately article 8, as proposed by the Drafting Committee, significantly omitted the phrase "without prejudice to the rights of third parties". The remarks made by the Chairman of the Drafting Committee on that point should be reflected in the commentary, since the problem was further complicated by the terms of article 9, which spoke of property "owned by a third State". The purpose of that phrase had been to preserve the rights of third parties, such as those that were mortgagees or had some lien on property, but were not owners of the property. Consequently the terms of article 9 tended to imply that article 8 in its present form would prejudice the rights of third parties. It was very important that the commentary should make it clear that, when State property passed to the successor State, it passed without prejudice to the rights of third parties in that property.

37. Mr. USHAKOV said he had suggested that the Drafting Committee should introduce in article 9 the reservation concerning the rights of third parties that had been deleted from article 8, for he believed that, although the problem of the property of third parties did not arise in article 8, it might, on the other hand, arise in connexion with article 9. But the other members of the Drafting Committee had considered it self-evident that the property of third parties was not affected by a succession of States.

38. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that article 8 dealt with the passing of State property without compensation. The phrase "without prejudice to the rights of third parties" had been deleted simply to emphasize the principle underlying the article, namely, that the passing of State property did not give rise to the payment of compensation by the successor State to the predecessor State. The problem to which Sir Francis Vallat had referred could be dealt with in article 9, but the Drafting Committee had taken the view that article 9, formerly article X, required only minor drafting changes.

39. Mr. NJENGA said that he would have no objection to including in the commentary the remarks made by the Chairman of the Drafting Committee. However, the commentary should not imply that property passing to the successor State could be encumbered by the rights of third parties; that would run counter to the terms, for example, of article 11, paragraph 1 (*d*).

[9] *Idem.*

[10] *Idem.*

[11] *Idem.*

40. Sir Francis VALLAT said that article 8, which specified that State property passed without compensation, in fact implied the extinction of the rights of third parties. In his view, it was a general principle of law that one State could pass to another only what it actually had. Its property interest was its title to the property, subject to the rights of third parties. He could not accept Mr. Njenga's view that, on the passing of State property, the rights of third parties were automatically extinguished. The problem would have to be discussed in the commentary to article 8 or article 9 if those articles were to command general acceptance.

41. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 8 proposed by the Drafting Committee.

It was so decided.

ARTICLE 9 (Absence of effect of a succession of States on third party State property)[12]

Article 9 was adopted.

SECTION 2 (Provisions relating to each type of succession of States)

The title of section 2 was adopted.

ARTICLE 10 (Transfer of part of the territory of a State)[13]

Article 10 was adopted.

ARTICLE 11 (Newly independent State)[14]

42. Sir Francis VALLAT said that he experienced difficulties not with the underlying principles of article 11, but with the way in which those principles were reflected in the terms of the article itself. If a literal interpretation were to be placed on paragraph 1, the provision went much too far and became virtually unworkable. For example, it was questionable whether the words "having belonged to the territory", in paragraph 1 (*a*), could be properly defined, and they were open to such a broad interpretation that they could even include any property that had its origin in the territory concerned. The implication of such an interpretation was that paragraph 1 (*a*) would cover movable property originating in the territory that had changed hands in the ordinary course of trade and had come, however indirectly, into the possession of the predecessor State. For instance, it could cover a gift from the Queen of Tonga to the Queen of the United Kingdom of Great Britain and Northern Ireland, a gift that could, in a sense, be regarded as State property. That was surely not the intention behind the paragraph, which presumably reflected the idea that in some instances the predecessor State had removed property in a manner that could be regarded as morally improper. The principle underlying that idea was of course entirely acceptable, but it was too much to say that anything that had originated in the territory and, by whatever means, had become the property of the predecessor State, should pass automatically to the successor State. He was compelled to express his reservations on that point and would like to have them recorded in the Commission's report in the usual way.

43. Again, he was concerned about the practical implications of the phrase "connected with the activity of the predecessor State", in paragraph 1 (*b*). While he fully agreed with the principle involved, he thought that that principle should be more clearly expressed. The paragraph could mean, for instance, that the desk at which the Minister for Foreign Affairs had written letters concerning matters pertaining to a dependent territory should automatically pass to the successor State, for that desk had certainly been connected with the activity of the predecessor State in respect of the territory to which the succession of States related.

44. Lastly, paragraph 1 (*c*) more clearly reflected the intentions of the Commission, but its practical application would undoubtedly raise the extremely difficult problems of how to assess the proportion of the contribution made by the dependent territory and what factors were to be taken into account in that assessment.

45. Mr. NJENGA considered the formulation of article 11 entirely satisfactory and did not share any of the doubts expressed by Sir Francis Vallat. The article dealt with a situation involving two very unequal States: the predecessor State and a newly independent State. Unfortunately, at the time of succession, newly independent States had often suffered from bad faith on the part of the predecessor State, which had frequently plundered the property of the territory during the colonial period. Hence if paragraph 1 erred in any way, it was only right that it should err on the side of protection of the interests of newly independent States, so that they would be in a position to acquire property that rightfully belonged to them but that they had been unable to protect during the period of dependence. He too would like to have his view included in the records of the Commission.

46. The CHAIRMAN proposed that if there were no objections the Commission should adopt article 11 proposed by the Drafting Committee.

Article 11 was adopted.

ARTICLE 12 (Uniting of States),

ARTICLE 13 (Separation of part or parts of the territory of a State), *and*

ARTICLE 14 (Dissolution of a State)[15]

Articles 12, 13 and 14 were adopted.

PART III (State debts)

SECTION 1 (General provisions)

The title of part III and that of section 1 were adopted.

ARTICLE 15 (Scope of the articles in the present part)[16]

Article 15 was adopted.

[12] *Idem.*

[13] *Idem.*

[14] *Idem.*

[15] *Idem.*

[16] *Idem.*

ARTICLE 16 (State debt)[17]

47. Mr. QUENTIN-BAXTER said that the problems inherent in the definition of State debt contained in article 16 were so far-reaching and confusing that, unless they were resolved satisfactorily, they might well prejudice the fate of the entire set of draft articles.

48. Unlike the articles on State property, the articles on State debts had not been examined at great length, as they had been considered and adopted at only two sessions, the twenty-ninth and the thirtieth, at which time the work on the articles in question had proved rather easier because the categorization of State property had been established at an earlier session. However, the wider problem of the triangular relationship between a predecessor State, a successor State and a creditor, whether or not that creditor was a State, had proved extremely difficult to deal with. Part III of the draft, concerning State debts, indeed provided much more assurance for creditors, since it emphasized the idea of the continuity of rights and obligations. Article 18, in particular, despite the problems associated with it, offered creditors a good prospect of receiving fair treatment—a better prospect than they might be said to have under anything as vague as existing general law.

49. In retrospect, however, it was apparent that the Commission's discussion of the topic at its twenty-ninth session had been dominated more by the question of the creditor State than by that of the respective rights and obligations of the predecessor or successor States. That shift in emphasis was reflected in the terms of article 16, in the same way as it had been reflected in the word "[international]" contained in article 18 in its earlier form. If it was the intention to codify the rights of creditors on the occasion of a succession of States, it would be a reasonable policy choice to confine the article to the interests of creditor States by retaining subparagraph (*a*) and deleting subparagraph (*b*).

50. However, the Commission was not dealing with the codification of the rights of creditor States but with a matter that was essentially parallel to that of succession to State property. At the same time, it was obvious that the definition of State debt, unlike that of State property, was not tied to the internal law of the predecessor State or, for that matter, to any other system of law. Of course, it was questionable whether a parallel definition would in fact be entirely satisfactory and whether a reference could be made solely to the internal law of the predecessor State. At no stage in its discussion of the articles on State debt had the Commission satisfactorily examined that fundamental question. He was none the less convinced that the definition should refer to one or more systems of law, whether internal law or even international law, although in the latter case it was difficult to think of debts as being raised to the international level and existing outside some kind of system of internal law; they would then fall under the law of treaties, and an entirely different régime would apply.

51. Admittedly, the definition in its present form reflected perfectly legitimate and important concerns. For example, the Commission had been justifiably concerned that State debt might be defined so broadly as to impose unreasonable obligations on States, especially newly independent States. Fortunately, the provisions of article 20 met that concern, provided article 20 proved acceptable to the international community. Nevertheless, the definition in article 16 could be regarded as violating the rights of a successor State with respect to matters that fell within its domestic jurisdiction, such as relations between the State and its own nationals.

52. Despite those considerations, the basic rule undoubtedly was that, when a succession of States occurred, the internal law remained the same until the successor State changed it. No provision of the draft could affect the right of the successor State to change the internal law. Recognition of that fact meant that there would be little ground for concern if the Commission attempted to relate a State debt to all debts owed by a State. On the other hand, if article 16 were presented to the General Assembly as a straightforward matter of a policy choice, the Commission would be giving bad technical advice. For example, if an airline company of a predecessor State had acquired aircraft to be paid for over a certain period of time, was it conceivable that the draft articles should provide for the passing of the property, but not for the passing of the debt associated with the property? Was it even possible that a successor State, studying the draft articles in their final form, might find that the question whether it had an international obligation depended entirely on whether the creditor happened to be another sovereign State or an international organization? The Commission must recognize that it was dealing not with the interests of creditor States but with the status of debts owed by States faced with a situation of State succession. If the question could be pinpointed properly in legal doctrine, it would be possible to produce solutions that would allay every legitimate fear. For the time being, it should be noted that, if the definition appeared to offer Governments a policy choice, that was indeed a very misleading representation of the real situation.

Co-operation with other bodies (*continued*)*

[Item 13 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

53. The CHAIRMAN invited Mr. Nemoto, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

[17] *Idem.*

* Resumed from 1566th meeting.

54. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the Asian-African Legal Consultative Committee firmly intended to further the close relations between the Committee and the Commission, which had common objectives. The Committee, which provided the Asian-African region with a unique forum in the sphere of international law and now had a membership of 38 Governments, had engaged in activities in five different branches of law, apart from its examination of the work of the Commission on such topics as succession of States in respect of matters other than treaties, State responsibility and the most-favoured-nation clause.

55. In recent years, the Committee had placed great emphasis on a study of the law of the sea, with a view to assisting member Governments in preparing their positions on that matter. More than 40 countries had participated at a meeting of high-level experts convened in New Delhi in the summer of 1978, and the meeting had been described by the President of the Third United Nations Conference on the Law of the Sea as having made a positive contribution.

56. The Committee had had the pleasure of welcoming Mr. Tabibi as observer for the Commission at the Committee's twentieth session, held in Seoul in February 1979. At that session, the Committee had decided that it could assist member Governments by preparing model legislation for the economic zone, so as to achieve some degree of uniformity of approach, and model clauses for joint ventures in optimum exploitation of fishery resources in that zone.

57. The Standing Sub-Committee had been working for several years on standard contracts for transactions in various goods. It had already completed model f.o.b. and f.a.s. contracts for agricultural produce and minerals, and a model c.i.f. contract for durable consumer goods and light machinery.

58. Two regional centres for commercial arbitration had been established, one in Kuala Lumpur and one in Cairo. They would eventually operate as institutions arranging arbitration for the settlement of disputes arising out of international commercial transactions, including investments; they would provide facilities for *ad hoc* arbitrations and arbitration proceedings held under the auspices of other recognized institutions; and they would render assistance in the enforcement of awards. In addition, they would help to develop national arbitration institutions and promote co-operation among such institutions in the region. The secretariat of the Committee had requested Governments in Asia and Africa and other regions to recommend noted jurists who could serve as arbitrators; a list of an international panel of arbitrators would soon be made available to interested parites. In February 1979, an agreement had been concluded between the Centre in Kuala Lumpur and the IBRD International Centre for Settlement of Investment Disputes on co-operation in the settlement of disputes arising out of foreign investment and in other activities relating to international trade. A similar agreement was expected to be concluded shortly with the Centre in Cairo.

59. In December 1978, a meeting of an expert group on environmental questions had been convened in New Delhi and had been attended by delegations from 24 Governments as well as observers from the International Law Commission and UNEP. It had been decided to give urgent attention to the common problems of human settlements, land use, mountain ecology, industrialization and marine pollution.

60. In the matter of regional economic co-operation, it had been agreed at the twentieth session that the Committee could contribute greatly to industrial development and co-operation between nations by preparing model clauses for joint ventures that would facilitate and accelerate the harnessing of the resources of the region. In the future the Committee would also attempt to formulate schemes and legal arrangements for regional and subregional economic co-operation.

61. Lastly, the Secretary-General of the Committee had attended the fifth session of UNCTAD, in Manila, to emphasize the importance of practical approaches to the question of the new international economic order.

62. The support and co-opeartion of the Commission was indispensable to the Committee in playing a constructive role in Asia and Africa, and in accordance with its tradition the Committee would certainly invite an observer from the Commission to attend its next session.

63. The CHAIRMAN, speaking on behalf of the Commission, congratulated the Observer on his outstanding statement and pointed out how useful it was for the Commission to keep in touch with the activities of regional organizations which, like the Asian-African Legal Consultative Committee, were working on the codification and development of international law. Year after year, the Committee had been reviewing the juridical problems studied by the Commission and endeavouring to find solutions to them.

64. With regard to the other subjects considered by the Committee, he welcomed the opening of the two regional centres for commercial arbitration in Kuala Lumpur and Cairo, as well as their collaboration with the World Bank through the International Centre for Settlement of Investment Disputes. Importance should also be attached to the positive results achieved by the meeting of an expert group on environmental questions held in New Delhi.

65. He expressed the hope that co-operation between the Committee and the Commission would increase still further in the years to come.

66. Mr. QUENTIN-BAXTER said that he had been privileged to act as observer for the Commission at the meeting of the expert group on environmental questions convened in New Delhi. He had been most grateful for the hospitality shown him by the secretariat of the Committee and had left New Delhi with a deeper appreciation of the great importance to the Commission, in all its endeavours, of the active support of regional bodies.

67. Mr. TABIBI said that he had had the honour of representing the Commission at the Committee's twentieth session, in Seoul. He had been greatly impressed by the work of the Committee and the organization of its secretariat. In his opinion, one of the principal reasons for the success of the Commission was the co-operation extended to it by such valuable regional bodies. Indeed, the rules of the Asian-African Legal Consultative Committee provided that the Committee should discuss items on the Commission's agenda. The Committee had succeeded in establishing two important centres for commercial arbitration that would be of great assistance to the countries in the region, and its study of the topic of the law of the sea would make a great contribution to the negotiations at the forthcoming resumed session of the Third United Nations Conference on the Law of the Sea.

68. He was most grateful for the extremely warm welcome given him by the secretariat of the Committee and for the generous hospitality of the Government of the Republic of Korea.

The meeting rose at 1 p.m.

1569th MEETING

Monday, 16 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1–4)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)**

ARTICLE 31 (*Force majeure*) *and*

ARTICLE 32 (Fortuitous event)

1. The CHAIRMAN invited Mr. Ago to present section 4 (*Force majeure* and fortuitous event) of chapter V (Circumstances precluding wrongfulness) of his eighth report on State responsibility and, in particular, articles 31 and 32 (A/CN.4/318 and Add.1–4, para. 153), which read:

Article 31. **Force majeure**

1. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if it is absolutely impossible for the author of the conduct attributable to the State to act otherwise.

2. The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is likewise precluded if the author of the conduct attributable to the State has no other means of saving himself, or those accompanying him, from a situation of distress, and in so far as the conduct in question does not place others in a situation of comparable or greater peril.

3. The preceding paragraphs shall not apply if the impossibility of complying with the obligation, or the situation of distress, are due to the State to which the conduct not in conformity with the obligation is attributable.

Article 32. Fortuitous event

The international wrongfulness of an act of a State not in conformity with what is required of it by an international obligation is precluded if, owing to a supervening external and unforeseeable factor, it is impossible for the author of the conduct attributable to the State to realize that its conduct is not in conformity with the international obligation.

2. Mr. AGO said that *force majeure* and fortuitous event were circumstances frequently invoked as precluding the wrongfulness of an act of a State. However, the expressions "*force majeure*" and "fortuitous event" were not always used in the same sense by writers, and still less by Governments, judges and arbitrators. Sometimes, for example, the expression "state of emergency" ("état de nécessité") was used as a synonym for "*force majeure*". It should be made clear that neither of those concepts was used in its "natural" meaning; it was only by a convention that they were used to designate certain situations and to distinguish them from others. It was important, therefore, to define them at the outset, so as to avoid any misunderstanding.

3. In the first place, *force majeure* and fortuitous event differed from the other circumstances precluding wrongfulness dealt with in article 29 (Consent)[1] and article 30 (Countermeasures in respect of an internationally wrongful act).[2] In the case of *force majeure* or fortuitous event, the previous conduct of the State subjected to an act not in conformity with an international obligation was not at issue, as it was in the cases dealt with in articles 29 and 30: the State had neither given its consent to the commission of the act nor previously engaged in conduct that constituted an international offence.

4. The distinction between *force majeure* and state of emergency was less easy to draw, but practice and

* Resumed from the 1567th meeting.

** Resumed from the 1545th meeting.

[1] See 1567th meeting, para. 1.

[2] *Idem.*