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Summary record of the 1661st meeting

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

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74. He would like the Drafting Committee to consider draft article 7 in conjunction with a possible new article 3 *bis* or 4.

75. Mr. CALLE Y CALLE said that the passing of State property was not such an automatic operation as it might seem to be, for it necessarily involved an identification of the property that was to pass. Moreover, the time it took for State property to pass could vary widely. The rule that in the absence of an agreement or decision the date of the passing of State property was that of the succession of States was, of course, residual. Whereas an agreement presupposed a meeting of minds, a decision could be unilateral. In his view, the reference in the article was to the decision of a court or of some body such as the Security Council or General Assembly. He considered the draft article to require no change whatsoever.

76. The CHAIRMAN suggested that draft article 7 should be referred to the Drafting Committee.

It was so decided.[18]

ARTICLE 8 (Passing of State property without compensation)

77. The CHAIRMAN read out the text of draft article 8, as follows:

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.

78. Mr ŠAHOVIĆ proposed that draft article 8 should be referred to the Drafting Committee.

It was so decided.[19]

The meeting rose at 1 p.m.

[18] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, para. 62.

[19] *Idem*, para. 63.

1661st MEETING

Thursday 28 May 1981, at 10.05 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

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

1. The CHAIRMAN invited the Commission to consider article 9, which read:

Article 9. 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.

2. Mr. BEDJAOUI (Special Rapporteur) said that in the course of the Commission's discussions it had been deemed necessary to make it clear in the draft that a succession of States had no effect on third party State property.

3. In the Sixth Committee, however, proposals had been made either to delete article 9, for it was considered to be axiomatic, or to retain it but simplify it, in particular by deleting the words "which ... are situated in the territory of the predecessor State" (see A/CN.345, paras. 71–72). It had also been proposed, as in the case of article 5, to add a reference to private international law (*ibid.*, para. 73).

4. Among the States which had made written comments, the German Democratic Republic had approved article 9 (see A/CN.4/338), whereas Czechoslovakia had considered it superfluous, because it was self-evident from the definition in article 5 that succession of States affected only the rights of the predecessor State and not those of third States (see A/CN.4/338/Add.2).

5. He was not inclined to accept those suggestions, since they were of minor importance and were not likely to improve the text.

6. In particular, the argument for deleting the words "which ... are situated in the territory of the predecessor State" could easily be turned back on itself. Obviously, third State property situated in the territory of the predecessor State must be protected from the effects of State succession. Deletion of the phrase would make article 9 completely superfluous. Furthermore, the problem of the possible effects of the succession on State property of a third State could arise only in connection with property that was situated in the territory of the predecessor State. When it was stipulated that the rights of third States could be determined only by reference to the internal law of the

predecessor State, the property must necessarily be situated in the territory of the predecessor State.

7. In the matter of inserting a reference to private international law in article 9, he believed that, as in the case of article 5, it was better to avoid complicating the text. On the other hand, it would again be possible to make it clear, as the Commission had appeared to wish in connection with article 5, that the internal law to which reference was being made was the internal law "applicable in the territory to which the succession of States relates".

8. With that clarification, he was in favour of retaining article 9 in the draft.

9. Mr. RIPHAGEN said that, in his opinion, article 9 was superfluous, and it was apparent from the last sentence of paragraph 76 of report (A/CN.4/345) that the Special Rapporteur shared that view. Stating the superfluous always created problems in law.

10. In his oral introduction, the Special Rapporteur had emphasized the value of the phrase "situated in the territory of the predecessor State", but had been referring to the territory that passed to the successor State, which was not necessarily all of the predecessor State's territory. Personally, he was also unsure about the last sentence of paragraph 77 of the report, since he did not see why any legal system had to be applicable to property, when that term was used in the sense of "property, rights and interests". For those reasons, it would be better to omit the draft article in its entirety.

11. Mr. CALLE Y CALLE said that, while draft article 9 admittedly stated the obvious—namely, that a succession of States as such did not affect the property, rights and interests owned by a third State and situated in the territory of the predecessor State—it was none the less preferable to say so.

12. Article 9 posed two conditions: first, the property must be owned by the third State in accordance not with the law of that State but with the law of the predecessor State; and second, such property must be situated in the territory of the predecessor State. So far as the second condition was concerned, it seemed to him that the property in question should be the property that was situated in the territory to which the succession related, and not in the territory of the predecessor State, but it was the internal law of that State that was to govern the status of the property.

13. On that point, he would be grateful for clarification from the Special Rapporteur.

14. Mr. SUCHARITKUL said that article 9 was useful and met the specific objective of safeguarding the rights of the third State over its property. Of course, the effect of that safeguard was confined to the property situated in the territory of the predecessor State at the time of the succession.

15. Article 9 raised the particularly interesting question of the balance between the interests of the third State and those of the successor State. At the 1660th meeting, Mr. Jagota had spoken of the supremacy of the rule of international law over the rule of internal law with respect to the validity of a title to State property. Mr. Tabibi had raised the question of the permanent sovereignty of a newly independent State over its natural resources even before the transfer of sovereignty. In that respect, his own view was that the Commission must take account of such an important matter, which reflected a principle proclaimed by the United Nations General Assembly.

16. In his opinion, article 9 should not contain any reference to private international law.

17. Mr. USHAKOV said that draft article 2, like article 14 of the 1978 Vienna Convention[1] stated something that might seem obvious, as did draft article 9. Nevertheless, it would be advisable to retain draft article 9 in order to remove any legal doubts.

18. For all that, changes of form could be made in the proposed wording. First of all, in response to Mr. Sucharitkul's comments, he pointed out that the expression "as such" afforded an opportunity to invoke the application of general principles such as that of permanent sovereignty over natural resources. On the other hand, the expression "at the date of the succession of States" seemed ill-advised since, in theory, the date of the succession of States was the date on which the property passed, and some confusion could ensue with regard to the property, rights and interests referred to in article 9. It would be better to say "before the date", for the succession of States produced its effects from the actual date of succession.

19. Furthermore, the phrase "in the territory of the predecessor State" excluded a dependent territory, which, under modern international law, was not the territory of the predecessor State before the date of the succession of States. That formula thus excluded from article 9 property which might be situated in a territory under the trusteeship of the predecessor State. He suggested adopting the formula: "which have been or are situated in the territory of the predecessor State or in the territory to which the succession of States relates".

20. Finally, he agreed with the Special Rapporteur that the words "or according to the internal law applicable in the territory to which the succession of States relates" could be added at the end of article 9.

21. Mr. JAGOTA said that he had no difficulty with article 9 and could accept the Special Rapporteur's comments as set forth in paragraphs 76 and 77 of the report. He would, however, be grateful for clarification on three points of drafting.

22. First, did the use of the word "affect" mean that the provision was couched in neutral terms, or did it imply protection? Second, what was the precise

[1] See 1658th meeting, footnote 2.

meaning of the word "owned" in reference to property, rights and interests? For instance, what about rented property let on a long lease? Third, how was the phrase "according to the internal law of the predecessor State" to be interpreted? Did it cover encumbrances? Specifically, would article 9 cover the kind of right referred to in paragraph 46 of the report, namely, the right arising out of a concession granted for the instalment of kiosks and snackbars in the stations of the predecessor State's State-owned railway system?

23. Mr. ALDRICH said he agreed with those who thought that it would be better to delete article 9.

24. Initially, his feeling had been that, if a saving clause was necessary for the protection of third States, why was some provision not needed to protect private parties? He had then realized that Part II of the draft dealt solely with State property. He therefore assumed that the type of question raised by Mr. Jagota was not really one to be dealt with in the draft since, in any event, private rights were not affected by the provisions relating to the passing of State property. If, however, State property and State property alone was involved, he could understand why the State property of some other State might be thought to be affected; yet, given the very clear definition of State property contained in article 5, it was difficult to see how State property owned by third States could be affected in the slightest. Admittedly, it was always possible to be doubly protective by stating the obvious for the benefit of those who did not read all the definitions, but because article 9 also raised obvious drafting problems, it would be better to omit it. On the other hand, if the article was retained, he agreed that the drafting required careful examination.

25. Sir Francis VALLAT, endorsing the remarks made by Mr. Aldrich, said that, having regard to the definition of State property, which was clearly limited to property owned by the predecessor State at the date of succession, article 9 stated something that was clearly unnecessary. In a treaty it was extremely unwise to say the same thing twice in different ways. If article 9 was in fact unnecessary in the light of the definition of State property, by implication its sole purpose must be to extend the effects of the succession to private interests in the property concerned, something which would be very unwise indeed. Assuming, for example, that a foreign bank, which was a private concern, had a lien over gold bars that belonged to the predecessor State and were deposited in another bank, the clear effect of article 9, according to his reading of it, was that the foreign bank's interest in those gold bars would be affected by a succession of States; they were the property not of a third State but of a private concern, whose rights and interests must necessarily be affected by the succession of States.

26. Hence, article 9 was not only superfluous but, in his opinion, positively objectionable.

27. Mr. USHAKOV said that it was easy to admit the obvious facts that State succession did not affect State property situated in the territory of the predecessor State or in the territory to which the succession related. On the other hand, article 9 could in no way be interpreted as applying to private property and it could not be claimed that it was equally obvious that State succession did not affect private property. The provision under discussion had nothing to do with private international law.

28. Just as article 14 of the 1978 Vienna Convention

> Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the validity of a treaty,

no provision of the draft articles prejudged in any respect the validity of private law contracts which fell under civil law and not public international law. Nevertheless, the silence maintained on that point did not mean that succession of States changed nothing with respect to contracts, but it should be obvious that succession of States as such did not affect the rights of private persons. The draft articles, however, sought to regulate the situation regarding the State property of the successor State and of the predecessor State, and the question naturally arose as to whether succession of States as such affected third party State property, rights and interests in the territory of the predecessor State, which alone justified the existence of article 9.

29. Again, the definition of State property in article 5 of the draft—which applied only to the property of the predecessor State that passed to the successor State—was not valid in the case of article 9, which related to different property.

30. In his opinion, article 9 did not infringe the private rights of foreign individuals. At the same time, it was impossible to introduce into the draft articles concepts that were alien to public international law.

31. Sir Francis VALLAT said that the relationship between article 5 and article 9 was at the very root of the difficulty, for in that respect the Commission stood at the cross-roads between public international law and private law.

32. If the argument that the Commission was concerned only with international law was taken to its logical conclusion, article 5 would contain no reference to property which, at the date of the succession, was "according to the internal law of the predecessor State" owned by that State. The situation regarding property, rights and interests under internal law was the very substance of the draft, and that was why he had always been concerned to ensure that nothing was done to imply that the rights of private persons could be adversely affected by the succession. His worry about article 9 was that those rights did seem to be affected, for the article was directly related to article 5. In the light of the definition contained in article 5, it was clear that article 9 was unnecessary since, by definition, succession of States did not affect

the property, rights or interests of a third State. Consequently, by implication, article 9 meant that the passing of the property to the successor State could or would have the effect of extinguishing the rights of private persons who were nationals of third States.

33. He believed in the preservation of such rights and, therefore, could not possibly advise a Government to accept draft articles 5, 6 and 9 unless it was made quite clear that those articles were without prejudice to the interests of private persons.

34. Mr. ŠAHOVIĆ said that, before taking a position on the matter of deleting article 9, he would like to know whether there was a connection between article 9 and article 18[2] and between the effects of those two articles.

35. Mr. RIPHAGEN, noting that the first of the three questions which Mr. Jagota had put to the Special Rapporteur was particularly relevant, pointed out that articles 11 and 12 of the 1978 Vienna Convention employed exactly the same formula—in the English text—as did draft article 9. The two articles in question were in fact protection articles and the question therefore arose whether draft article 9 was not a protection article too. It was difficult to see how it was possible to provide that a succession of States should not have certain specific effects when it involved a change of sovereignty which affected everybody. A superfluous provision would only lead to difficulty, since it would inevitably give rise to *a contrario* reasoning.

36. Accordingly, he would reiterate his suggestion that the draft article be deleted.

37. Mr. QUENTIN-BAXTER said he agreed that there was nothing to be gained by retaining an article which did not serve a definite and logical purpose within the draft.

38. His thinking was along the lines of the views expressed by Mr. Šahović, who had asked whether there was a necessary connection between article 9 and article 18, which latter concerned State debts. His own impression was that article 9 had been included largely to reflect the fact that in the part of the draft dealing with State debts, there was an obvious need to consider the third State, whereas that clearly was not the case in the part dealing with State property. In that sense, the question raised in the views exchanged by Mr. Ushakov and Sir Francis Vallat was entirely relevant, and should be considered in substance in relation to article 18. He did not, however, think there was any need to consider it in the context of article 9 if it could be agreed that the article was superfluous.

39. Mr. BEDJAOUI (Special Rapporteur) pointed out that article 9 had been introduced into the draft by the Drafting Committee at the Commission's request. From the outset, his own intention had been to deal with all of the problems encountered by the successor State after the succession of States by covering both the relationships which derived from public international law and those which were formed between the successor State and private persons, such as creditors. He had even devoted his second report[3] entirely to the problem of acquired rights in an attempt to determine whether or not they were to be maintained by the successor State. For his own part, he had favoured the disappearance of such rights, but many members of the Commission—and particularly those from the Western countries—had wanted the draft articles to protect acquired rights. The discussions in the Commission had become deadlocked when some other members, and primarily Mr. Ushakov, had proposed as a way out that the Commission should deal only with problems pertaining to public international law. That solution had finally been adopted, but one article or another on acquired rights had appeared in the draft over the years, revealing a re-emergence of the idea of protecting private law creditors. He had repeatedly attempted to curb that trend, without always succeeding. During the second reading, it was for the Drafting Committee to decide whether to retain or delete article 9—an article which did create difficulties but was not necessarily superfluous, because it had always been maintained that the rights, property and interests of third States had to be protected.

40. Unfortunately, he could not follow Mr. Riphagen in that regard, and took the view that the *a contrario* interpretation of article 9 was neither cogent nor legitimate. Part II of the draft related to State property and article 9 therein was naturally devoted to such property, but that necessary specialization in terms of the content did not signify that protection of private rights was being renounced.

41. If the Drafting Committee decided to retain article 9, it would have to improve the wording. Like Mr. Ushakov, he deemed it advisable to adopt the formula "before the date of succession". He also endorsed the suggestion that "the territory to which the succession of States relates" should be mentioned, for in modern international law a dependent territory was not a part of the national territory of the State which administered it, as is made clear in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, approved by the General Assembly.[4]

42. The many observations made by the members of the Commission regarding article 9 showed that the concept of property, rights and interests was hard to define. It was taken from the wording of article 5, but he recognized that it left intact the question of the right of peoples to sovereignty over their natural wealth.

[2] *Ibid.*, footnote 3.

[3] *Yearbook ... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

[4] Resolution 2625 (XXV), annex.

However, other provisions of the draft safeguarded that principle by expressly reserving, in the case of newly independent States, the right to dispose of their natural resources. Furthermore, the fate of property under lease or concession would appear to be beyond the concern of the Commission if its work was confined to State property, but such property would certainly have to be protected under article 9 if the concepts of rights and interests were regarded as extending to relationships arising out of leasing.

43. He could agree either to deletion or retention of the provision under consideration, and shared Mr. Šahović's hesitations on that point. However, if the Commission decided to protect the property of third States, it would have to explain that clearly in an express provision and exclude, through the effects of the commentary, the possibility of an *a contrario* interpretation of the provision finally formulated. If instead the Commission should decide to delete article 9, it would be only logical to delete article 18, paragraph 1, as well and to reconsider article 19 and article 16 (*b*), because they too reflected the concern which had been expressed in the course of the work with respect to the fate of private debts in a case of succession of States. Paragraph 2 of article 19 in particular illustrated that tendency, because it established a link between the passing of the liabilities and the passing of the assets to the successor State.

44. In conclusion, he proposed that article 9 should be referred to the Drafting Committee.

45. Mr. VEROSTA suggested that, as an alternative to deleting article 9, a similar but slightly modified provision could be maintained in order to satisfy some apprehensions by introducing a formula which might be drafted to read: "... the property, rights and interests which ... are owned by a third State or by private persons ...".

46. Mr. BEDJAOUI (Special Rapporteur) said that the Drafting Committee might examine that proposal, one which none the less troubled him because it was unacceptable to declare that the successor State was bound hand and foot to private law debts.

47. The CHAIRMAN suggested that the Commission should refer article 9 to the Drafting Committee.

It was so decided.[5]

ARTICLE 10 (Transfer of part of the territory of a State)

48. The CHAIRMAN invited the Commission to take up section 2 of Part II of the draft, entitled "Provisions relating to each type of succession of States" and to consider article 10, which read:

Article 10. 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.

49. Mr. BEDJAOUI (Special Rapporteur) said that article 10 of the draft had not prompted any comments in the Sixth Committee, except by one representative who had reserved his Government's position.

50. Among the States which had submitted written comments, the German Democratic Republic had expressed its agreement (A/CN.4/338), while Italy had questioned the categorization of succession adopted in section 2 and suggested that separation of part or parts of the territory of a State should be assimilated to transfer of part of the territory of a State (see A/CN.4/338/Add.1).

51. In his view, such a change was impossible because of the complexity of the situations involved. The Commission had considered that article 10 covered the case of transfer of a very small part of the territory of one State to another. Three situations had to be distinguished: the transfer of part of the territory of one State to another, covered by article 10; the case in which part or parts of the territory of a State separated from that State and formed another State, covered by article 13, paragraph 1; and the case of a dependent territory which, instead of acceding to independence, became part of a pre-existing State, covered by article 13, paragraph 2.

52. Article 10 should remain unchanged, because it had not prompted any particular comment. To review all the types of succession at the present stage in the Commission's work would be neither advisable, useful nor warranted. Article 10 could therefore be referred to the Drafting Committee.

53. Mr. USHAKOV said that he fully supported the position of the Special Rapporteur.

54. The case covered by article 10 was one in which part of the territory of a State was transferred by that State to another by agreement between the States concerned. In an instance of that kind, the State should be in a position to effect the transfer, because it involved no problem of self-determination. Article 13, however, covered a situation in which part of the territory of a State separated from that State and united with another State, a completely different situation, because the separation took place at the wish of the territory's population.

[5] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 64–67.

55. He therefore expressed the hope that the Commission would retain the categorization it had established previously.

56. Mr. QUENTIN-BAXTER said that he fully agreed with the views expressed by the Special Rapporteur and Mr. Ushakov.

57. He reminded members that when the Commission had considered the draft articles on first reading it had left open the question whether the order of the articles in Part II should be re-arranged. Possibly that question too could be considered by the Drafting Committee.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 10 to the Drafting Committee.

It was so decided.[6]

ARTICLE 11 (Newly independent State)

59. The CHAIRMAN invited the Commission to consider article 11, which read:

Article 11. 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.

60. Mr. BEDJAOUI (Special Rapporteur) said that in the Sixth Committee several representatives had noted with satisfaction that the Commission had taken full account in article 11 of the Charter of Economic Rights and Duties of States[7] and of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States. Some of them had taken the view that the rules set forth in the article were rules of *jus cogens*.

61. With regard to paragraph 1, a request had been made in the Sixth Committee that the provisions concerning movable property should be preceded by those concerning immovable property, as in the case of articles 10, 13 and 14. In connection with subparagraph 1 (*d*), one representative had raised the question of whether immovable property which had belonged to a territory forming the subject of the succession prior to the territory's colonization should revert to it once it had acceded to independence, irrespective of the location of the property.

62. As to paragraph 4, a request had been made that the Commission should refer to the permanent sovereignty of every people not only over its natural resources but also over its economic activities. In his opinion, the Commission should comply with that request.

63. In its written comments, Italy (A/CN.4/338/Add.1) had stressed that the words "movable property, having belonged to the territory" in subparagraph 1 (*a*) were unsatisfactory, since property belonged not to a territory but to a natural or legal person. It had added that the predecessor State might have temporarily loaned or ceded works of art to the dependent territory, and had taken the view that the successor State was then not entitled to keep them. That conclusion was correct, since the draft as a whole and article 5 in particular were based on the concept of ownership of State property. If the predecessor State temporarily ceded or loaned a work of art to a territory which later formed the subject of a succession of States, its right of ownership over such a work of art was in no way brought into question. Italy had also considered (*ibid.*) that the French term "*part contributive*" used in subparagraph 1 (*c*) was less clear than the corresponding English term, namely, "contribution". In his view, the term was not so imprecise as to give rise to any confusion.

64. In the written comments of Governments, the German Democratic Republic (A/CN.4/338) had endorsed article 11, and Czechoslovakia (A/CN.4/338/Add.2) had welcomed the reference to the principle of sovereignty over wealth and natural resources. Czechoslovakia had also pointed out that the Commission had employed two different criteria in article 11, subparagraph 1 (*c*) and in article 13, subparagraph 1 (*c*), for determining the proportion in which certain movable property could pass to the successor State, and had indicated a preference for the wording of article 11.

[6] *Idem*, paras. 68–70.

[7] General Assembly resolution 3281 (XXIX).

65. Turning to the comments on which he had not as yet taken a position, he stressed that the obligation to restore to the newly independent State precious stones, works of art and historical artifacts could hardly be expressed more explicitly than it was in subparagraph 1 (*a*). The statement that such property "shall pass to the newly independent State" ought to forestall any difficulties.

66. The fate of immovable State property situated outside the territory to which the succession related, but to which the colony had made its contribution, should be considered by the Drafting Committee, which might be guided by the wording he had proposed in his thirteenth report (A/CN.4/345, para. 105). With regard to the idea underlying "contribution", it had to be pointed out that, in the view of the Commission, the term referred to the special contribution made by a former colony to the creation of property.

67. As the situations referred to in article 11, subparagraph 1 (*c*) and article 13, subparagraph 1 (*c*), were completely different, there was no reason to bring those provisions into line with each other. In the case covered by article 13, the part of the territory of a State that separated from it had had no separate identity making it possible to determine its contribution, whereas in the case of article 11, the former colony had enjoyed some degree of autonomy, at least in the budgetary and administrative fields.

68. In conclusion, he thought that article 11 might be referred to the Drafting Committee, which should be instructed to try to take account, as far as possible, of the drafting improvements that had been suggested.

69. Mr. USHAKOV drew attention to a discrepancy between the English and French versions of the last phrase of paragraph 4.

70. Mr. DÍAZ GONZÁLEZ said that he agreed completely with the views expressed by the Special Rapporteur in his report and his oral introduction. The Commission's earlier discussion of article 11 had clearly shown the importance of that provision with respect to natural resources and the right of peoples to dispose thereof. The article reflected the emergence in recent years of new law, or at least the progressive development of existing law, beneficial more particularly to newly independent States and developing countries.

71. As to the actual wording of the article, the words "and economic activities" should be added at the end of paragraph 4 because, as had repeatedly been stressed in the Sixth Committee and elsewhere, political independence was of no value without economic independence.

72. Mr. EVENSEN said that he had no quarrel with the substance of article 11, which provided an eminently equitable solution to the problems that could arise when a dependent or Non-Self-Governing Territory became an independent State.

73. In matters of form, it might be advisable to follow the example given in other articles and to make some reference—for example, by using the phrase "Unless otherwise agreed or decided"—to the possibility of the conclusion of agreements between the successor and predecessor States. He pointed out in that respect that paragraph 4 was designed to regulate such agreements.

74. Sir FRANCIS VALLAT said that, as in the case of the draft articles on succession of States in respect of treaties, the present draft, being designed for the modern world, must contain an article providing for separate and special treatment of newly independent States. Nevertheless, he continued to experience difficulty with the wording of paragraph 1 (*a*).

75. First, some alternative should be found for the word "belonged", which did not express exactly what he believed the Commission had in mind. In a legal context, the notion of "belonging" implied ownership. Hence, it was not, strictly speaking, an appropriate concept to employ in connection with the "property" with which he believed the subparagraph was principally concerned, namely objects that originated and remained in the dependent territory and were still there at the time of independence—in other words, objects that were in a general sense an integral part of the heritage of that territory. To express that idea in a legal draft would, admittedly, be very difficult.

76. The same subparagraph (*a*) also posed a more serious problem in that it took no account whatsoever of how the property in question had become the property of the predecessor State. As a lawyer, he found it very difficult to accept that all objects which had been the property of the predecessor State, however legitimate the method of their acquisition, should, automatically and without compensation, pass to the successor State.

77. Mr. CALLE Y CALLE said that the text of the article was acceptable. He also considered that the addition to paragraph 4 proposed by the Special Rapporteur in paragraph 109 of his report was justified, although the notion of sovereignty over economic activities implied that the State concerned enjoyed a right of *imperium*, or regulation, over those activities.

78. Mr. TABIBI said that he very much agreed with the principle underlying article 11, which could now be referred to the Drafting Committee.

79. Concerning one comment made by Sir Francis Vallat, his own view was that it should be made perfectly clear in subparagraph 1 (*a*) and in the commentary to the article that all objects originating in the territory to which a succession of States related should pass to the successor State. That was a most important point for newly independent States because

colonial Powers, as evidenced by the richness of their museums, had appropriated—in most instances by direct action or the acceptance of what had delicately been termed "gifts"—much of the heritage of the territories under their domination.

80. Mr. ALDRICH said that the Special Rapporteur was to be congratulated on having largely surmounted the immense difficulties with which he had been faced in drafting article 11.

81. One point to be noted was that from the legal standpoint paragraph 4 was not an integral part of the article, since it concerned not what happened to State property but the extent to which a predecessor State and a newly independent State could, by agreement between themselves, derogate from the rules laid down in the preceding paragraphs. Presumably, the paragraph had been included to fulfil the valuable purpose of ensuring some constraint on the making of agreements in situations when the parties were likely to have very uneven bargaining power. Should that assumption be incorrect, he would appreciate an explanation of the true reason for the presence of the paragraph.

82. With regard to the drafting, although the contexts were similar, the French word "*devoir*" had been rendered into English in paragraph 4 of article 11, paragraph 6 of article B, paragraph 4 of article E and paragraph 4 of article F by the mandatory "shall", and in paragraph 2 of article 20 by the word "should". He hoped that whichever translation was closer to the sense of the French original would be used throughout the draft.

83. Mr. JAGOTA said that the article constituted a major example of the progressive development of international law and the Commission's most important contribution to the draft as a whole. Furthermore, he considered the comments on the article by the Sixth Committee, Governments and the Special Rapporteur to be the best part of the Special Rapporteur's thirteenth report. In saying that, he was motivated both by objective considerations and by a sentiment akin to that expressed by Mr. Tabibi.

84. With regard to the drafting of the article, he would make to the Drafting Committee a number of suggestions concerning the difficulties regarding subparagraph 1 (*a*) referred to in paragraph 103 of the Special Rapporteur's report. To allay the concern expressed by Sir Francis Vallat over the use of "belonged", the best course might still be to retain that word, for it implied the necessity of some legitimate link between the property in question and the territory to which the succession of States related.

85. He agreed with the opinion expressed by the Special Rapporteur in paragraph 108 of the report that it would be unwise to attempt to bring the wording of article 13, paragraph 1 (*c*), into line with that of article 11, subparagraph 1 (*a*). The present subparagraph 1 (*d*) of article 11 should become subparagraph 1 (*a*), with the other subparagraphs being redesignated accordingly. As suggested in paragraph 105 of the Special Rapporteur's report, the new subparagraph 1 (*a*), should cover immovable property, whether that property was situated inside or outside the territory to which the succession of States related.

86. He considered the limitation on treaty-making power set forth in paragraph 4 to be a kind of *jus cogens*. Lastly, since the proposal was in keeping with the progressive development that had been apparent in recent years, he agreed that the paragraph could be supplemented by adding the words "and economic activities", although such an amendment did not seem entirely necessary.

87. Mr. BEDJAOUI (Special Rapporteur) said that when it had taken up the question of succession of newly independent States the Commission had wished to make a positive contribution to the progressive development of international law. That was why it had aimed at special treatment for those countries, to compensate them for the acts of violence and plunder to which they had frequently been subjected. It had acted not out of resentment but out of sympathy, in order to reflect more particularly that importance that the third world countries attached to their natural wealth.

88. During the discussion on article 11, a proposal had been made to use a verb other than "belong" in subparagraph 1 (*a*). He concurred with that proposal, provided that it made for greater possibilities of rendering justice to newly independent States. The concept of belonging was indeed inappropriate. A territory might well have possessed undiscovered archaeological wealth before falling under the control of a colonizing State. If that State subsequently undertook excavations, it was not possible to maintain in legal terms that the property thus discovered had previously belonged to the territory. However, as a matter of logic and justice, that property should revert to the territory. The Drafting Committee should therefore look for a more suitable formulation.

89. Elaborating on the comments by Mr. Tabibi and Mr. Jagota on the wealth that had been taken away from former colonial territories, he drew attention to a large consignment of valuable documents in Sanskrit which was located in London and was the subject of a long-standing dispute between the United Kingdom, on the one hand, and Pakistan and India on the other.

90. Mr. Evensen had expressed the hope that any agreements concluded between the predecessor State and the successor State would be mentioned at the beginning of article 11, paragraph 4, as was the case in other articles. The Commision had deliberately refrained from following that course. In its view, succession involving newly independent States should not in principle be settled by agreements between the predecessor State and successor State, for fear of one-sided agreements favourable to the former

administering Power. It was none the less true that the interests of both parties usually overlapped to such an extent that some problems could be resolved only by means of agreements. That was why they were referred to in second place. Furthermore, such agreements should not infringe the right of peoples to dispose of their wealth and natural resources. The reference made to that right in paragraph 4 of the article was based on the relevant resolutions of the General Assembly, and should be supplemented by a reference to economic activities, which were also alluded to in the Charter of Economic Rights and Duties of States.

91. As to whether it was better to speak of the right of every "people" or of every "State", both expressions were used interchangeably in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, whereas the term "State" alone appeared in the Charter of Economic Rights and Duties of States. It seemed better to retain the word "people" in paragraph 4, since it might well provide better protection of the rights of newly independent States.

92. As far as immovable property was concerned, a distinction could be made according to whether the property was situated in the territory of the former colony, in metropolitan territory or in another territory. Certain immovable property was created by the metropolitan State with the assistance, financial or other, of a colony. However, property of that kind was not necessarily situated in the territory of the colony or in that of the metropolitan State, and history afforded a number of examples of that kind. The Drafting Committee would therefore have to reconsider the problem.

93. Lastly, he recognized the need pointed out by Mr. Ushakov for better concordance between the English and French versions of the last phrase in paragraph 4.

94. The CHAIRMAN suggested that article 11 should be referred to the Drafting Committee.

It was so decided.[8]

ARTICLE 12 (Uniting of States)

95. The CHAIRMAN invited the Commission to consider article 12, which read:

Article 12. 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.

[8] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 71–75.

96. Mr. BEDJAOUI (Special Rapporteur) pointed out that article 12 had not elicited comments from States, with the exception of the German Democratic Republic (A/CN.4/338), which had found it to be acceptable.

97. If such was the opinion of the members of the Commission, and since he himself had no suggestions to improve it, the article might be retained in its present form.

98. The CHAIRMAN suggested that article 12 should be referred to the Drafting Committee.

It was so decided.[9]

The meeting rose at 1.05 p.m.

[9] *Idem*, para. 76.

1662nd MEETING

Friday, 29 May 1981, at 10.20 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 13 (Separation of part or parts of the territory of a State) *and* ARTICLE 14 (Dissolution of a State)

1. The CHAIRMAN invited the Commission to examine articles 13 and 14, which read:

Article 13. 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