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**Summary record of the 2490th meeting**

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Subparagraph (b), on the other hand, referred to persons having their habitual residence outside the successor State, subject to a general reservation concerning the exceptions listed in article 4. Subparagraph (b) was subdivided into two parts. Subparagraph (b) (i) related to persons who had been born in what had become the territory of the successor State or who had had their last permanent residence there before leaving it. Subparagraph (b) (ii) referred specifically to the case of a dissolved State which had been structured as a federation and where there were secondary nationalities that became criteria for the granting of nationality.

55. Article 21 applied the general provisions governing the right of option set forth in Part I to the specific case of the dissolution of a State. Paragraph 1 mentioned only successor States on the assumption that the predecessor State had disappeared. It would apply when, for example, a person who had his habitual residence in the territory of State A but possessed secondary nationality of State B was entitled, pursuant to article 20, to acquire the nationality of those two States. The only solution was to allow the person concerned to choose between the two nationalities, as had occurred in several recent cases of dissolution of federal States in eastern Europe. Paragraph 2 dealt with the case of persons who, since they were not covered by article 20 and were therefore in danger of finding themselves without any nationality, should be entitled to acquire the nationality of the successor State by exercising an option based on voluntary choice. The paragraph was designed first and foremost to prevent cases of statelessness, but also to enable each individual concerned to exercise the right to a nationality provided for in article 1. The aim was to bridge all gaps that might remain following the application of the preceding provisions.

56. Mr. PAMBOU-TCHIVOUNDA said that a harmonious approach should be adopted in dealing with the different categories of State succession, either by inserting a preliminary article before article 17, along the lines of article 19, indicating what was understood by the "transfer of part of a territory" or by deleting article 19 and article 22 (Scope of application). Moreover, referring to article 20, subparagraph (b) (ii), he said that he was convinced of the need to use the same reasoning, in the event of a transfer of territory in accordance with article 17, to examine the situation of persons born in the territory, but residing elsewhere. The debate on article 17 had shown that the problem existed and should be taken into consideration as in the case of the dissolution of a State.

57. Mr. HAFNER asked whether the definition in article 19 also covered the case of the dissolution of a State whose constituent parts did not form two or more successor States, but became an integral part of already existing States. He noted that, when the Commission had considered the draft 1978 and 1983 Vienna Conventions, there had been a discussion on whether dissolution should be distinguished from separation, but no distinction had been made. He asked the Special Rapporteur for clarification since the point had not been mentioned in the commentary to article 19.

58. Mr. MIKULKA (Special Rapporteur) said he would comment later on Mr. Pambou-Tchivounda's observations. In reply to Mr. Hafner's question, he said that the

Commission had refrained from making a distinction between dissolution and separation only in the 1978 Vienna Convention and had dealt with the two situations under the general concept of separation.<sup>11</sup> In drafting the 1983 Vienna Convention, however, the Commission had fully recognized that it was impossible to follow the same procedure as in the case of treaties and had made a distinction between dissolution and separation.<sup>12</sup> The main reason for the lack of a reference in the commentary to article 19 was that the Special Rapporteur had referred, in paragraph 11 of the introduction to the third report (A/CN.4/480 and Add.1), to the Commission's decision to adopt the types of succession referred to in the 1983 Vienna Convention.

59. Mr. ECONOMIDES asked the Special Rapporteur whether, given the distinction in article 18 between new successor States and successor States that were continuators of an existing international personality, article 19 was to be viewed as referring exclusively to two new successor States or whether one of the two could be the continuator of the legal personality of the dissolved State.

60. Mr. MIKULKA (Special Rapporteur) confirmed that article 19 must be interpreted as excluding the latter possibility, which was covered by article 22.

*The meeting rose at 1 p.m.*

<sup>11</sup> See *Yearbook* . . . 1972, vol. II, document A/8710/Rev.1, articles 27 and 28, pp. 292 and 295.

<sup>12</sup> See *Yearbook* . . . 1981, vol. II (Part Two), paragraphs (1) to (3) of the commentary to articles 16 and 17, pp. 44-45.

## 2490th MEETING

*Tuesday, 10 June 1997, at 10.05 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

**Nationality in relation to the succession of States (*continued*)** (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,<sup>1</sup> A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPPORTEUR  
(*continued*)

PART II (Principles applicable in specific situations of succession of States) (*continued*)

SECTION 3 (Dissolution of a State) (*continued*)

ARTICLE 19 (Scope of application)

ARTICLE 20 (Granting of the nationality of the successor States) and

ARTICLE 21 (Granting of the right of option by the successor States)

1. Mr. ECONOMIDES, referring to article 20 (Granting of the nationality of the successor States), subparagraph (b) (i), said it provided for two cases in which persons had the right to be granted the nationality of the successor State: persons who had their habitual residence in a third State, and persons who were born in the territory which was the subject of the succession or had their habitual residence there before leaving that territory. He was in favour of a much wider provision for granting that right to all persons who had a genuine link with the territory concerned. The term "genuine link" had not been defined in the draft, which in his view was a shortcoming.

2. He wondered whether article 21 (Granting of the right of option by the successor States) really concerned a right of option, since each State must allow in its legislation for the possibility of granting its nationality to persons affected by the succession. A right of option meant a choice between two nationalities: either between that of the predecessor State or that of the successor State, or between that of one successor State or that of another successor State. But when each State granted a right of option, in actual fact that was not a right of option, but the possibility to acquire the nationality of one or several of the States concerned.

3. Article 21, paragraph 1, stated that the right of option was granted to all persons concerned who would be entitled to acquire the nationality of two or more successor States. Which persons had such rights? That was not explained anywhere either. Moreover, whereas article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State) provided for the right of option for everyone without any restrictions, article 21 set conditions which were not very clear and would depend on the legislation of each State, and hence on internal, and not international, criteria. Nevertheless, in his view, the erroneous solution was the one contained in article 17, not the one in article 21.

4. Mr. MIKULKA (Special Rapporteur) said that everything Mr. Economides was asking for could be placed either under article 20 or article 21. All persons who were

not addressed in article 20, subparagraph (b) (i) were covered by article 21, paragraph 2. Article 20 could not be read simply as calling upon States to grant their nationality automatically to those categories of persons. The sole question was where to say that all categories were covered. He preferred putting it in article 21, whereas Mr. Economides was in favour of including it in article 20.

5. Mr. ECONOMIDES noted that, when the Special Rapporteur had introduced articles 19 (Scope of application), 20 and 21, he had said that article 21, paragraph 2, concerned cases of statelessness. It was not apparent whether other persons were also concerned, but if other persons fulfilled the positive requirements for acquiring nationality, why was it not possible to include them under article 20, subparagraph (b) (i), and possibly draw a distinction between them? Currently, both provisions gave rise to confusion. To his mind, one could speak of persons who had a genuine link with the territory.

6. As he saw it, in the framework of article 20, subparagraph (b) (i), nationality should not be granted automatically, but solely on an individual basis to persons requesting the nationality. That did not emerge clearly from the current formulation. The persons in question had their habitual residence outside the territory which was the subject of the succession and had the nationality of the predecessor State. Yet those persons could very well opt for the nationality of another successor State, since there were several such States. Thus, granting them a nationality automatically was like imposing a nationality upon them, perhaps against their will. Such persons must be allowed to acquire nationality on a voluntary basis. That was not clear in the text.

7. The CHAIRMAN said that it did, in fact, seem that article 20 concerned the automatic acquisition of nationality, and that it was only under article 21 that an option existed.

8. Mr. MIKULKA (Special Rapporteur) reminded the members of the Commission that the provisions under consideration examined cases in which the nationality of the predecessor State had disappeared along with the predecessor State itself. In cases in which the predecessor State and its nationality no longer existed, persons who did not have the nationality of a third State were necessarily stateless, something the two or more successor States must prevent by sharing that population among themselves.

9. As already pointed out, the articles under discussion fell under Part II (Principles applicable in specific situations of succession of States), which dealt with specific cases. The Commission had already prepared certain general rules which were applicable in all cases. Article 21 was, of course, applicable in the framework of the general rules set out in Part I (General principles concerning nationality in relation to the succession of States), which clearly stipulated that nationality could not be imposed on persons with habitual residence in a third State and who had the nationality of another State. In other words, if article 20, subparagraph (b) was read in that context, the sole interpretation possible was that the successor State had the right to extend its nationality to include the persons concerned who had their habitual residence in a third

<sup>1</sup> Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

State and had the nationality of another State, provided that it was not against their will. But that did not have anything to do with the way in which that was done. It could easily be accomplished by a procedure which provided for automatic granting of that nationality if it was accompanied by the right to opt out, that is to say the person concerned could immediately reject that nationality by means of a declaration. Article 20, subparagraph (b), while it might give the impression that it covered the automatic granting of nationality, was always conditional upon the possibility that the person concerned could reject that nationality, as provided under article 7 (The right of option).

10. Mr. ECONOMIDES said that, although the predecessor State ceased to exist, he noted that there could be two, three or even four successor States. The persons concerned lived abroad and, if the States concerned all imposed their nationalities, such persons might find themselves with a number of nationalities granted automatically. That ran counter to the spirit of the draft, because the nationality must be offered, and the person concerned must be able to choose. For that reason, he was in full agreement, in respect of article 20, subparagraph (b) (i), with automatically granting nationality for persons with habitual residence, but nothing should be imposed upon persons who were abroad and lost their nationality and could acquire a number of nationalities. Such persons must have a choice.

11. Mr. MIKULKA (Special Rapporteur) pointed out that article 20, subparagraph (b) read: "Without prejudice to the provisions of article 4 . . .". Mr. Economides would find from article 4 that the problem he raised was resolved there.

12. Mr. PAMBOU-TCHIVOUNDA said that he supported the proposal by Mr. Economides to broaden the list in article 20, subparagraph (b) (i) of persons entitled to acquire a nationality and include the genuine link criterion. He had already expressed the view that such an approach applied not only in regard to article 20, subparagraph (b) (i) but also to article 17.

13. Mr. LUKASHUK said that he had no objection to the ideas contained in articles 20 and 21. However, articles 20, 21 and a number of others reflected in a certain sense features of the international law of the past. To some extent his views went in the same direction as those expressed by Mr. Economides. The international law of the past had dealt solely with the interests of States and their sovereign rights; the individual had been absent from it. Today, respect for human rights had become one of the fundamental principles of international law. A trend in international law had been observed in which the focus had shifted to the individual: *hominum causa jus gentium constitutum est*—in other words, all international law was created for the well-being of man.

14. International law was following the path taken by internal law. Constitutions of States currently recognized the pre-eminence of the individual. In particular, they denied the right of the State to deprive an individual of his nationality. The right to nationality was laid down in international law. Unfortunately, the individual was not sufficiently reflected in the draft, which invariably used a

formulation such as "States shall grant nationality", "States shall withdraw nationality", "States shall grant the right of option". Where was the right to a nationality or of option? Such an overwhelming emphasis on States was no longer justified. Even the Draft Convention on Nationality prepared by the Harvard Law School<sup>2</sup> had placed greater stress on the rights of the individual than did the current articles, because article 18 (Granting of the nationality of the successor State) had provided that, when the entire territory of a State was acquired by another State, those persons who had been nationals of the first State became nationals of the successor State, unless those persons declined the nationality of the successor State.

15. The rights of the individual were not in conflict with the rights of States. Ensuring the rights of the individual had become a prerequisite for a democratic legal order, and in the final analysis, that was in the interest of all States.

16. His proposal would not require a radical change in the draft but would be of fundamental importance: it would be enough, for example in article 17, to speak of "acquisition" and "loss" of nationality instead of "granting" and "withdrawal", in articles 18 and 20 of "acquisition" instead of "granting", and so forth. There was reason in article 21 to strengthen the right of option, a point already raised by Mr. Economides. Although the alternative proposed by the Special Rapporteur was more likely to be acceptable to States, the Commission's task was not to support views which were inconsistent with the current state of development of international or internal law, but to point the way to the future. As for the statement by the Special Rapporteur that soft law instruments could only codify existing law, one should remember that soft law instruments, including those adopted in the framework of the United Nations, had played an enormous role in the progressive development of international law, including in the area of human rights. The Sixth Committee and meetings of legal counsels in the United Nations system had stressed the importance of soft law in the progressive development of international law in connection with the activities of the Commission.

17. The CHAIRMAN, speaking as a member of the Commission, said that he disagreed with Mr. Lukashuk's point of departure. No one contested that the individual should be at the centre of international law, but international law must not necessarily allow individuals to do entirely as they pleased. Avoiding statelessness was the fundamental idea behind the draft. Mr. Lukashuk had on a number of occasions suggested that individuals should have the right to choose to be stateless, but he himself challenged the right to statelessness: individuals must not be allowed to decide to acquire no nationality whatsoever. The provisions in section 3 reflected the idea that sometimes things must be done for people's well-being, be it against their wishes. He did not believe that contemporary law consisted in saying that the individual had all rights against the State. It was not because human beings and human rights were the central concerns in many spheres that individuals should be given the opportunity to make senseless decisions. The current trend in the law was not to give people every possible right. In social security leg-

<sup>2</sup> See 2475th meeting, footnote 9.

isolation, for example, people were not deemed to have the right not to contribute to retirement schemes.

18. Thus, he was not in favour of the philosophy behind Mr. Lukashuk's proposal, but had no strong feelings about the formulation to be used—"States shall grant nationality" or "Individuals shall acquire nationality".

19. Mr. GALICKI said that, with all due respect both to Mr. Lukashuk and to human rights concerns, he was of the same view as the Chairman. Despite the increasing role of the individual in international law in general, the principles to be included in the draft articles should focus on States. If the Commission had not totally rejected the idea that the future draft would take the form of a convention, it should concentrate on principles that created obligations for States. Introduction of the notion of acquisition, rather than granting, of nationality, as a phrase that reflected the standpoint of the individual, would attenuate the obligation to ensure the right to nationality. The better course would be for rights to be translated into obligations for States, as such obligations were more visible, better defined and, accordingly, could better serve the ideal of protection of human rights.

20. Mr. THIAM said that, as he understood it, Mr. Lukashuk was opposed to the notion of absolute rights for States in the area of nationality. The time-honoured, and possibly outdated, vocabulary used, "States shall grant", "States shall withdraw" and the like, should be employed with circumspection, for in reality it was increasingly recognized that individuals also had rights. On that point, he agreed with Mr. Lukashuk.

21. Mr. CRAWFORD said he agreed with the Special Rapporteur's decision to use two categories, dissolution and separation, in line with the 1983 Vienna Convention, not the 1978 Vienna Convention. However, once those categories had been introduced, it might not immediately be clear into which of them certain situations fell. Disputes between States, not merely about recognition, but about identity, might take a considerable amount of time to resolve. Hence one of the virtues of presumptions was that they could provide a bridge for the individuals concerned at a time when such inter-State issues of classification had not been resolved. In general, the articles were sufficiently flexible in that regard.

22. He was nonetheless concerned about the relationship between articles 7 and 21. Article 21 provided that States "shall" grant the right of option to all persons covered by article 20. Article 7, also on the right of option, said States "should" provide for the right of option. The obligation relating to the specific case outlined in article 21 thus appeared to be stronger than the one provided for in general in article 7. Yet article 20 made an important distinction: subparagraph (a) referred to persons habitually resident in the territory of the successor State, while subparagraph (b) dealt with persons who had some other connection with that territory. It was not clear that the same level of obligation ought to exist with respect to both categories of persons. In his view, the situation covered by article 20, subparagraph (a) was the core of the nationality situation, and it was not plain that the State was under an obligation to grant the right of option to persons habitually resident in its territory, irre-

spective of whether they would be stateless. In the "softer" situations covered by article 20, subparagraph (b), however, the obligation to grant the right of option was different, especially since secondary nationality, rather than being a term of art, might merely be defined in the law of a particular predecessor State. The Drafting Committee should look into the distinction between subparagraphs (a) and (b) and consider whether the obligation to grant the right of option in article 21 should have equal force with respect to those two subparagraphs, in the light of the wording of article 7.

23. Mr. MIKULKA (Special Rapporteur), summing up the discussion on section 3, said that the difficulties pointed out by Mr. Crawford in respect of the distinction between dissolution and separation in State succession could be illustrated by the disintegration of Yugoslavia. In the first few months, Slovenia and Croatia had been generally considered to have been born of the separation of part of Yugoslav territory. But as the disintegration of the State continued, the Arbitration Commission had concluded that the process of the dissolution of Yugoslavia as such had ended.<sup>3</sup> That pointed to a certain relativity in separation and dissolution.

24. Faced with that dichotomy, which nothing in international law resolved, the only thing the Commission could do was to try to formulate rules for both cases in such a way that no conflict would ensue if a situation was categorized first in one way, and then in another. That was what he had tried to accomplish in the draft articles. When the Commission came to consider section 4, it would become clear that, despite the somewhat academic typology that drew a distinction between dissolution and separation, there was very little risk of conflicts arising from the actual application of the provisions of section 3 or section 4.

25. Two diametrically opposed viewpoints had been expressed on article 20. Mr. Lukashuk said it limited the right of the individual and compelled him or her to hold one nationality, while Mr. Economides said the application of the article could result in an individual's having more than one, indeed too many, nationalities. Another issue was whether a State on whose territory an individual had habitual residence was in any way obliged to allow such an individual to divest himself of his or her nationality.

26. His initial comments on Part II should be borne in mind in that regard. Part II was not designed to set out well established rules of international law, but to assist States engaged in negotiations. Ultimately, the States concerned would determine themselves the exact modalities whereby the population affected by the dissolution of a State would be shared among them. The rules set out in the articles would be available as guidelines: they were not being put forward as positive international law. The phrases "shall grant", and the like, should thus be read, not as setting out legal obligations, but as suggesting pos-

<sup>3</sup> Conference for Peace in Yugoslavia, Arbitration Commission: Opinion No. 8 of 4 July 1992, *International Legal Materials* (Washington, D.C.), vol. XXXI, No. 6 (November 1992), pp. 1521-1523, at p. 1523.

sible solutions for States in wording that might ultimately be incorporated in international treaties.

27. In response to Mr. Economides' question on multiple nationality in the context of article 20, one might cite a straightforward example. A federation of two States underwent, not a simple dissolution into two parts, A and B, corresponding precisely to two entities that had previously made up the federation, but a complex dissolution resulting in three States: A split into two, and B formed the third successor State. The first two States could naturally operate on the basis of the principles set out in article 20, subparagraphs (a) and (b) (i), while the third State could use the rules in article 20, subparagraphs (a) and (b) (ii). Hence, there would be a considerable amount of overlap, for when a State granted its nationality to all individuals that had held it as a secondary nationality, that would naturally include nationals of the first two successor States. The only way of coping with the ensuing situation of multiple nationality was through the right of option, and that was the reason for the formulation used in article 21. Paragraph 1 of that article envisaged multiple nationality, and paragraph 2, the specific problem of statelessness, though that was not the sole concern addressed in that paragraph.

28. Mr. HE noted that the notion of secondary nationality as set out in the draft articles was to be applied to a federal State composed of distinct entities, but it was alien to many other federal States in which the nationality of the federal State was dominant. The use of the expression "secondary nationality" raised the possibility of the application of different degrees of nationality. The expression was not used in the European Convention on Nationality, the Venice Declaration,<sup>4</sup> or in internal law. If the Commission wished to retain it, it should define the expression in a separate article, in order to clarify the distinction between nationality granted by a federal State, or primary nationality, and secondary nationality granted by the constituent entities of such a State.

### Cooperation with other bodies

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

29. The CHAIRMAN invited Mr. Zelada Castedo, Observer for the Inter-American Juridical Committee, to address the Commission.

30. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said he welcomed the opportunity to pursue with the Commission the exchange established some years ago and to explore possibilities for more intensive cooperation in future. After all, the two bodies had similar functions. The Inter-American Juridical Committee was committed to promoting the development and codification of international law in the Americas, providing advisory opinions at the request of OAS and conducting studies on topics of special interest

relating to public and private international law in the Americas.

31. At its two most recent sessions, held at Rio de Janeiro, Brazil, in August 1996 and February-March 1997, the Committee had focused on several subjects. The task that had called for the greatest amount of time and effort had been the preparation, at the request of the OAS General Assembly, of an advisory opinion on the status under international law of the Cuban Liberty and Democratic Solidarity (Libertad) Act (Helms-Burton Act), signed into law by the United States of America. The Committee had also pursued its earlier efforts in the development and codification of international law, concentrating on the elaboration of rules to improve the application of the Inter-American Convention against Corruption. Among the special studies carried out at the request of OAS, special mention must be made of a study on the right to information, with particular reference to access to and protection of personal information and data. Work had also been done on the development and application of the most-favoured-nation clause among States in the hemisphere. The Committee had organized a course on international law for specialists from the Americas, particularly government advisers and professors of international law. And lastly, it had held what had, at the current time, become a meeting to exchange views, experience and information with legal advisers and heads of legal departments within ministries of foreign affairs.

32. The Committee's advisory opinions were mainly of a recommendatory nature and were not binding on member States or on OAS bodies. It was in that context that the Committee had been requested in 1996 to examine in the light of international law, the Helms-Burton Act. The Committee had stated that it did not intend to pronounce on a State's internal legislation but that it would give its view, in the abstract as it were, on legislation whose content was approximately the same as that of the Act. The Committee had decided that there were two sets of provisions in the Act that merited special attention, those on the protection of nationals and the duty of States to protect their own nationals, and those on the exercise of the jurisdiction of States beyond the limits imposed by international law, practice and custom. The Committee's conclusion was that, had the legislation been applicable in practice, it would not have been in conformity with international law on account of part of its content. He would not enter into the detail of the considerations that had led to that finding.

33. So far as the development and codification of public international law were concerned, the Committee's February-March 1997 session had been devoted to exploring new formulas for legal development in inter-American cooperation to combat corruption in public office. In March 1996, the OAS General Assembly had convened the Specialized Conference of the Organization of American States against Corruption, in Caracas, which had adopted the Inter-American Convention against Corruption to regulate cooperation between American States in combating corruption in public office. That important instrument had earlier been discussed at three intergovernmental meetings on the basis of a draft prepared by the Committee and was currently being implemented by several OAS member States. Under the Convention, member

<sup>4</sup> See 2475th meeting, footnote 22.

States in the Americas were also urged to develop draft internal legislation to characterize and punish two specific offences: unlawful enrichment in the exercise of public office, and transnational bribery. Other agreements adopted by the OAS General Assembly also recommended that possible forms of cooperation should be explored to cope with those offences. In 1997, discussions had been initiated on the possibility of elaborating international rules to complement the Convention and to draft model rules with a view to encouraging member States to draft internal legislation. Model legislation, which offered scope for greater cooperation between the Commission and the Committee, was another technique being promoted by the Committee to bring about legislative harmonization. Perhaps the development of international law by codification could be replaced in some cases by the technique of devising model national legislation.

34. As to specific areas for further cooperation, the Committee was particularly interested in exchanging more information on the Commission's crucial experience in conceptualization with regard to the development in the 1970s of the draft articles on the most-favoured-nation clause.<sup>5</sup> The matter was receiving special attention since the development of a new legal order under the WTO system had created special obligations for all States in the Americas, which were committed to initiating negotiations in the short term for the possible establishment of a wide-ranging free trade regime. OAS had urged the Committee to reflect on the practice of American States in regard to the use of the most-favoured-nation clause bilaterally, whether conditionally or unconditionally, in free-trade agreements or other legal regimes of that kind. The Committee had also been asked to explore most-favoured-nation commitments at the internal level, and also such commitments imposed by the clause's new dimensions within the WTO regime at the external level. It would also be useful to have an exchange between the Committee and the Commission on the new technique of legislative harmonization, with particular reference to the drafting of model laws. Finally, he would welcome institutional arrangements for the exchange of experience between the two bodies with regard to the annual Course on International Law run by the Committee. Some members of the Commission had already taken part in those courses and it would be a great honour if more would do so.

35. The CHAIRMAN, thanking the Observer for the Inter-American Juridical Committee for a clear and constructive statement, said that the proposals he had made could perhaps be discussed in the Planning Group. Personally, he would remind members that, in the report of the Commission to the General Assembly on the work of its forty-eighth session, the Commission had taken the view that visits by representatives of legal bodies were useful but tended to be rather formal, complimentary exchanges. It had advocated, *inter alia*, a less formal discussion on selected issues of interest to both the legal

body concerned and the Commission.<sup>6</sup> He invited members to proceed on that basis.

36. Mr. BAENA SOARES said that, while he fully agreed on the need for a less formal approach, he also wished to extend his thanks to the Observer for the Inter-American Juridical Committee. He agreed that the Planning Group should consider the various points raised with a view to closer cooperation between the Committee and the Commission.

37. He would like, in particular, to have more information about the annual Course on International Law organized by the Committee and possible participation by members of the Commission, and also about the documents published by the Committee on the preparation of model rules for the guidance of the OAS member States.

38. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the Course on International Law organized by the Committee, which had been introduced several years ago, was on specific subjects, as the persons attending the Course were young specialists in international law who stood in need of further knowledge in specific areas. Thus, the main theme of the 1996 Course had been settlement of disputes in contemporary law, with special reference to the development of means for dispute settlement in economic international law and in the law of economic integration. The main theme of the Course to be held in August 1997 would be the classic topic of the interrelationship between the internal legal order and public international law. In 1998, the Course would possibly be on another specific subject. The Committee was endeavouring to introduce into the Course a nuance to reflect the important changes that had taken place in international law over the past 20 years, particularly in the field of human rights and international economic law. His reference to the possibility of members of the Commission participating in the discussions held during the Course had been motivated by a desire to find a practical form of cooperation between the Committee and the Commission.

39. The Committee was just beginning its work on the preparation of model laws. As a first step, it would probably be preparing model legislation on the two subjects he had mentioned—the characterization and punishment of the crimes of unlawful enrichment and of transnational bribery. The Committee had completed the preliminary phase of its studies in that connection and had carried out a comparative examination of the legislation of the countries of the Americas from which it had determined, on a preliminary basis, that, while there were some internal legislative developments in the Americas in regard to unlawful enrichment, there were fewer legal developments in regard to transnational bribery, save in the case of the United States of America.

40. Mr. LUKASHUK said that he was grateful to the Observer for the Inter-American Juridical Committee for the very useful information he had provided. The Sixth Committee of the General Assembly had stressed that the Commission must cooperate with regional bodies and scientific institutions and he had the impression that, in the

<sup>5</sup> See *Yearbook . . . 1978*, vol. II (Part Two), chap. II, sect. A (Introduction), which dealt with the background to the topic, pp. 8-15; and sect. D, which contained the final draft articles on most-favoured-nation clauses, pp. 16-72.

<sup>6</sup> See *Yearbook . . . 1996*, vol. II (Part Two), para. 239.



future, such cooperation would become one of its main activities. He fully agreed that the Commission and the Committee should begin with an exchange of views and, in that connection, it would be useful if the Commission could receive documentation and information from the Committee. In particular, it was evident that it was essential to include in the Commission's long-term programme specific subjects such as the extra-territorial effects of national law, about which nothing had yet been done though it had long been an issue.

41. Another subject mentioned was the fight against corruption. Hardly a country remained unaffected by that scourge, which had not only internal but also external repercussions and undermined international law and cooperation. The fight against corruption also related to the Commission's earlier work on international criminal law and, specifically, the draft Code of Crimes against the Peace and Security of Mankind and the draft statute for an international criminal court. The Commission must pursue the matter, for corruption was on the increase.

42. It was also clear from the statement by the Observer for the Inter-American Juridical Committee that the principles of international economic law deserved the most careful attention. Indeed, it had already been referred to by legal counsels of States Members of the United Nations and in the Sixth Committee of the General Assembly.

43. An important field for cooperation with the Committee was dissemination of information on international law. As the General Assembly and other bodies had pointed out on a number of occasions, knowledge about international law was very poor. The cooperation of the Committee in research and especially in the dissemination of such knowledge held out great promise.

44. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said he was surprised to learn that the documentation in question had not been circulated to the Commission as a matter of course. He would request the Committee's secretariat to transmit more information to the secretariat of the Commission in future.

45. Mr. Sreenivasa RAO thanked the Observer for the Inter-American Juridical Committee for his excellent overview of the work being done in the Committee. He was struck by the similarities between the scope and functions of that Committee and those of the Asian-African Legal Consultative Committee, a body that took up subjects at the request of member States or on its own initiative, and whose conclusions were of a recommendatory character. The conclusions reached by the Inter-American Juridical Committee on the Helms-Burton Act and the material it had considered in that connection would be of extreme importance to the work of the Asian-African Legal Consultative Committee.

46. Cooperation between the Commission and regional bodies, and between the regional bodies themselves, was an extremely important matter. He therefore sought clarification as to whether the Committee had any institutionalized links with other regional bodies of the sort it engaged with the Commission.

47. Visits by representatives of the Commission to regional bodies afforded an opportunity to exchange information. However, it was also important for the reports of the special rapporteurs of the Commission, the summary records of its meetings and the reports to the General Assembly on the work of its sessions to be made available to those bodies as a matter of course, so that they could obtain fuller information on the Commission's activities and provide an additional means of promoting a mutually sustaining relationship.

48. The CHAIRMAN said that Mr. Sreenivasa Rao's useful suggestions could be given fuller consideration in the Planning Group.

49. Mr. KATEKA said he had been particularly interested to hear the remarks by the Observer for the Inter-American Juridical Committee concerning the Inter-American Convention against Corruption, as corruption was "Public Enemy Number One" in many countries, especially developing countries. The Committee's preliminary studies would be of great interest to the Commission. Specifically, he asked whether the Convention had yet entered into force. He also endorsed Mr. Lukashuk's request that the issue of corruption, especially the transnational aspects, should be taken up in the Commission's long-term programme of work.

50. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that, according to the latest information at his disposal, the Inter-American Convention against Corruption was already in force for those States that had deposited an instrument of ratification. He was not sure how many States had complied with that formality.

51. Mr. SEPÚLVEDA said he looked forward to further close cooperation between the Committee and the Commission. The Observer for the Inter-American Juridical Committee had referred to the Committee's advisory opinion on the legal validity of the Helms-Burton Act. In his view, that legal opinion had a direct bearing on the work of the Commission, and in particular of its Working Group on Unilateral Acts of States. He therefore wished to ask the Observer for the Inter-American Juridical Committee to arrange, with the Chairman's approval, for that legal opinion to be circulated to members of the Commission.

52. The CHAIRMAN said he doubted that the opinion, with which he was well acquainted, would be especially useful to the Commission in the context of its work on unilateral acts of States. However, he saw no objection to its being distributed in the Committee's working languages.

53. Mr. FERRARI BRAVO said he wished to take the opportunity to thank the Observer for the Inter-American Juridical Committee for the valuable support the Committee had provided for a congress on uniform law,<sup>7</sup> which he had attended in his capacity as President of the International Institute for the Unification of Private Law (UNIDROIT). Very useful links had been forged between

<sup>7</sup>A New Approach to International Commercial Relations: the UNIDROIT Principles of International Commercial Contracts, held at Valencia (Venezuela), from 6 to 9 November 1996.



the Committee and UNIDROIT on the occasion of that congress.

54. In the framework of the annual Course on International Law and of other joint activities, the preparation of model laws, referred to by the Observer for the Inter-American Juridical Committee, could prove very useful. Members of the Commission might contribute to establishing such a practice, which, in his view, was a much more promising activity than the preparation of conventions that often remained a dead letter, as States had neither the time nor the inclination to ratify them.

55. The CHAIRMAN said that UNIDROIT, too, was yet another body with which the Commission could forge official links, rather than purely personal links with Mr. Ferrari Bravo.

56. Mr. DUGARD said that the European Union too was currently considering promoting a convention covering the question of corruption, and had shown particular interest in developments in that regard in Latin America. He would be interested to know whether it was still too early for any practice to have developed in that area. It would, in due course, be very helpful if information concerning the practical application of the very important Inter-American Convention against Corruption could be more widely distributed.

57. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that no case of practical application of the Inter-American Convention against Corruption had yet come to the Committee's attention. Responsibility for monitoring application of inter-American conventions lay with the Secretariat for Legal Affairs of the OAS secretariat.

58. The Convention had three fundamental elements. First, it provided a better characterization of the meaning of an act of corruption. Secondly, it refined certain procedures and provisions of bilateral treaties concerning extradition of persons involved in corruption. Lastly, it contained special provisions to enhance cooperation between the legal and administrative authorities of signatory States in cases of corruption.

59. Mr. CANDIOTI asked what the current status was of the study on personal data protection to which the Observer for the Inter-American Juridical Committee had referred. Regarding the dissemination of international law, he would like to know whether the proceedings of the courses organized by the Inter-American Juridical Committee were readily accessible, as it would be interesting to follow the evolution of legal thinking on the various topics covered by the courses.

60. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the Committee's study on personal data protection was still in the preliminary phase. The Committee was refining the concept and making a comparative analysis of legislation in the countries of the region. In due course the analysis would enable it, either to prepare an inter-American convention to promote cooperation in that matter, or else to draft model laws. At the current time, however, work was still at the diagnostic stage.

61. With regard to the dissemination of information, it had traditionally been the practice to publish the proceedings of the Courses on International Law. Unfortunately, budgetary constraints had recently halted the programme of dissemination of the courses and other materials produced by the Committee. The Committee had a wealth of ideas, but few resources with which to propagate them.

62. Mr. HAFNER said there was a widespread feeling that international law was undergoing a process of fragmentation on a global level. He asked whether, as the representative of a regional body, the Observer for the Inter-American Juridical Committee shared that perception. He also asked whether he perceived any particularities of a regional nature in, so to speak, inter-American international law.

63. The CHAIRMAN said that Mr. Hafner might usefully put the same kind of question to the other representatives of regional groups due to address the Commission in the days ahead.

64. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the question was a very interesting one, on which there was no general agreement among experts on public international law in the Americas. During the 1930s and 1940s an effort had been made, at the urging of some Latin American countries, intensively to develop a body of regional international law in the Americas. That had led some scholars to maintain that the American continent had some singularity that enabled it to develop a system of international law with its own special features. In justification of that view they had cited important innovations in areas such as the law of treaties, problems of nationality, and the rights and obligations of States, as a result of cooperation between States of the American region. However, in the past 15 or 20 years a different tendency had been discernible, with those States instead seeking to promote the universalization of various institutions of public international law. The trend could be seen in the manifest interest shown by States of the region in participating very actively in the development of the new system of international economic law on a global scale. Twenty years ago, fewer than half of the Latin American States had been members of the General Agreement on Tariffs and Trade system, yet almost all States of the region were currently members of the new international trade system. It was obvious that there was a move towards developing norms that had no regional particularity: the Inter-American Convention against Corruption, for example, was not peculiar to the region's culture, but was potentially of universal application. That shift was attributable to the new economic and political climate in the region. He personally detected no trend towards fragmentation or excessive regionalization of the fundamental institutions of contemporary international law.

65. The CHAIRMAN said that the Commission looked forward eagerly to receiving the documentation mentioned, including the Inter-American Convention against Corruption. He expressed the hope that next year the Committee would provide the Commission with documentation sufficiently well in advance to enable members to be better prepared for the discussion. On behalf of all members, he thanked the Observer for the Inter-American

Juridical Committee for participating in what had proved a very productive exchange of views.

*The meeting rose at 12.10 p.m.*

## 2491st MEETING

*Wednesday, 11 June 1997, at 10 a.m.*

*Chairman:* Mr. Alain PELLET

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

### Cooperation with other bodies (*continued*)

[Agenda item 9]

#### STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN invited Mrs. Requena, Observer for the European Committee on Legal Cooperation, to address the Commission.

2. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that she was also speaking as representative of the Committee of Legal Advisers on Public International Law (CAHDI). The Council of Europe, particularly the intergovernmental committees attached to its Directorate of Legal Affairs, had always endeavoured to cooperate closely with the Commission, which had observer status with the European Committee on Legal Cooperation (CDCJ).

3. The Council of Europe, an intergovernmental organization established by statute,<sup>1</sup> currently had 40 member States. Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, and Georgia had applied for membership. Canada, Japan and the United States of America had observer status with the organization and four countries—Armenia, Azerbaijan, Bosnia and Herzegovina, and Geor-

gia—had special guest status with the Parliamentary Assembly. The special guest status of Belarus had been suspended and was under discussion in the Parliamentary Assembly.

4. The Directorate of Legal Affairs of the Council of Europe was entrusted with a number of functions, in particular providing legal advice to the Secretary-General and other bodies of the Council of Europe, assisting the Secretary-General in his duties as depositary of the 165 European treaties, implementing the Intergovernmental Programme of Activities in the legal field adopted each year by the Committee of Ministers, providing the secretariat for the Venice Commission, and implementing legal cooperation programmes with the new democracies of the countries of Central and Eastern Europe, particularly under the Demo-Droit and Themis programmes. The Programme of Intergovernmental Activities was carried out by four operational divisions.

5. The functions of CDCJ, which came under the direct authority of the Committee of Ministers of the Council of Europe, fell into three main categories: developing European legal cooperation among member States with a view to modernizing private and public law, including administrative and procedural law; examining the functioning and implementation of Council of Europe conventions, agreements and recommendations falling within its competence with a view to adapting them and improving their practical application; and adopting opinions for the Committee of Ministers on legal matters falling within its competence. The meetings of CDCJ were attended by representatives of the 40 member States and observers for non-member States of the Council of Europe or for international intergovernmental or non-governmental organizations.

6. The Committee had adopted a large number of draft international legal instruments, some binding and others not. Its seven subordinate committees included the “Data Protection” project group, which had drafted the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and several recommendations, including one on the protection of medical data which had recently been adopted by the Committee of Ministers. The Committee of Experts on Family Law had drafted the European Convention on the Exercise of Children’s Rights, which had been opened for signature on 25 January 1996 and whose purpose was, in accordance with article 4 of the Convention on the Rights of the Child, to promote children’s rights taking into account the best interests of the child.

7. The Committee of experts on nationality had drafted the European Convention on Nationality,<sup>2</sup> which would be opened for signature by States on 7 November 1997. The Convention covered all major aspects of nationality and also sought to guarantee fair and equitable procedures in respect of the processing of requests for nationality and the filing of appeals. In view of the numerous developments in Europe since the drafting of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, the strict application of the principle of avoidance of multiple

<sup>1</sup> Statute of the Council of Europe (London, 5 May 1949) United Nations, *Treaty Series*, vol. 87, p. 103; see also Council of Europe, *European Treaty Series*, No. 1 (London, 1949) (amendments and texts of statutory character adopted later have been numbered 6, 7, 8 and 11).

<sup>2</sup> See 2477th meeting, footnote 7.