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Summary record of the 1398th meeting

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

Extract from the Yearbook of the International Law Commission:-
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49. With regard to the drafting of articles 14 and 15, the Drafting Committee should, in particular, try to unify the terminology of paragraphs 1 and 2 of article 14. The expressions "shall exercise a right of ownership", and "property ... shall pass" and the notion of a "right of ownership" all required careful consideration. It seemed that it would be difficult to adopt the concept of a *droit éminent* (eminent domain) to which Mr. Martínez Moreno had referred,[49] because it was not well known except in Spanish, Italian and French law. Lastly, with regard to Mr. Ramangasoavina's remarks concerning the extract from an article in the *New York Times* quoted in his eighth report,[50] he had not intended to attach the same importance to that information, which he had only put in a foot-note, as to the Ordinance of the Comorian Government mentioned in paragraph 19 of the commentary to article 14. He had even taken the precaution of using the conditional mood, in particular in paragraph 20, to report the statements contained in that document, although it was official.

50. The CHAIRMAN, speaking as a member of the Commission, said that he wished to comment on the question of the definition of the expression "newly independent State", which he believed had been first raised during the discussion by Mr. Martínez Moreno, and might be taken up by the Drafting Committee as the Special Rapporteur had indicated. The Commission had given a definition of that expression in article 2, paragraph 1 (*f*), of the draft on succession of States in respect of treaties:

> "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible.[51]

51. The suggestion made at the beginning of the meeting by Mr. Martínez Moreno appeared to be linked with the definition of the expression "newly independent State" which would be adopted for purposes of the present draft.

52. Mr. MARTÍNEZ MORENO explained that the object of his suggestion was to obviate any difficulties that might arise in regard to Trust Territories. He had suggested that, where necessary, the reference to the "predecessor State" should be accompanied by a reference to the "administering authority", which was the term used in Article 81 of the Charter in regard to Trust Territories. He did not think it was necessary to define the term "administering authority" because its meaning was already explained in Article 81 of the Charter. Unlike Mr. Njenga, however, he thought the expression "newly independent State" should be defined.

53. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Martínez Moreno's suggestion brought out the importance of including a broad category of territories in the definition of the expression "newly independent State". Article 81 of the Charter was in the chapter dealing with the International Trusteeship System. The Commission should not confine itself to borrowing a term from the Charter, but should work out a formula broad enough to cover all non-independent territories.

54. The Charter itself drew a distinction between the former League of Nations mandates which had passed under the United Nations Trusteeship System, the territories placed under trusteeship since the establishment of the United Nations, and "Non-Self-Governing Territories". As far as the latter were concerned, the Powers responsible for their administration were required to submit information to the United Nations and to lead the peoples of the territories concerned to independence. All those territories, regardless of their status—colonies, protectorates or Trust Territories—were not fully sovereign and independent and should be covered by the definition.

55. The Special Rapporteur had referred to the concept of eminent domain, which was a concept of internal law. In international law, the concept of *dominium*, or territorial sovereignty, was coupled with that of *imperium*, which was the power of a State to exercise supreme authority over its citizens; taken together, those two attributes constituted sovereignty with all its prerogatives.

56. Speaking as Chairman, he thanked the Special Rapporteur for his eloquent and detailed replies to all the numerous questions raised by the members of the Commission regarding articles 14 and 15.

57. If there were no objections, he would take it that the Commission agreed to refer articles 14 and 15 to the Drafting Committee for consideration in the light of the comments and suggestions made.

It was so agreed.[52]

The meeting rose at 1 p.m.

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[49] See 1395th meeting, para. 26.

[50] *Ibid.*, para. 22.

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

[52] For the discussion on the articles proposed by the Drafting Committee, see 1405th meeting, paras. 20-42.

1398th MEETING

Friday, 25 June 1976, at 10 a.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 16 (Uniting of States)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 16, contained in his eighth report (A/CN.4/292) and worded as follows:

Article 16. Uniting of States

1. On the uniting of two or more States in one State, movable and immovable property situated in the territory of the State thus formed shall remain the property of each constituent State unless:

(*a*) the constituent States have otherwise agreed; or

(*b*) the uniting of States has given rise to a unitary State; or

(*c*) in the case of a union, the property in question has a direct and necessary link with the powers devolving upon the union and it thus appears from the constituent acts or instruments of the union or is otherwise established that retention by each constituent State of the right of ownership of such property would be incompatible with the creation of the union.

2. Movable and immovable property situated outside the territory of the State formed by the uniting of two or more States and belonging to the constituent States shall, unless otherwise agreed or decided, become the property of the successor State.

2. Mr. BEDJAOUI (Special Rapporteur) said that draft article 16 was relatively straightforward, since it concerned a kind of State succession, namely uniting of States, that involved the pooling and not the apportionment of property. It was therefore, not a divorce but a marriage, and no conflict was likely to arise.

3. The definition of uniting of States contained in article 30 of the draft articles on succession of States in respect of treaties adopted in 1974[1] was valid for the present draft articles as well: there was a uniting of States when two or more States united and so formed one successor State. Such a uniting of States could take widely differing forms. In the case of complete integration, where two or more States united to form a unitary State, all State property passed to the successor State. There was no reason in that instance to distinguish between movable property and immovable property or between property situated within the territory and property situated outside the territory of the new State. Between that form of uniting of States and a confederation of States there was a whole range of other forms. The constitutional organization of the successor State would be the determining factor for the purposes of the article under consideration, whereas it had not affected the case of succession of States in respect of treaties. In matters of that kind, third States were faced with a single authority, namely that of the successor State, regardless of its internal constitutional organization. Generally speaking, the constituent States of the new State lost, if not their international personality, at least their international powers. In succession to State property, several courses were possible, depending on the degree of integration existing in the new State. The property might all become common property or, conversely, it might continue to be owned by the constituent States. The question involved the subject of succession to the internal legal order, since acts of internal law affected the treatment of State property. For all that, the question under consideration was still one of succession to State property.

4. Where States merged to form a federal State, there was normally an agreement on the subject which could be used to determine the treatment of State property, but where they merged to form a unitary State, it was necessary to refer to internal law, as expressed in the constitution or a basic law. There was accordingly a close link between the subjects of succession in respect of State property and succession in respect of legislation.

5. Since a uniting of States led to the creation of a new community, and consequently movable property was not likely to be excluded from the succession, there was no reason to draw a distinction in article 16 between movable and immovable property. Thus uniting of States was covered by a single article in which the first paragraph dealt with State property situated in the territory of the new State and the second with State property situated outside that territory. It had been decided that articles 14 and 15 should encompass all situations arising from decolonization; his observations regarding unions formed from dependent territories[2] should therefore be considered as applying to articles 14 and 15 and would be transferred to the commentaries to those two articles. There were, however, borderline cases in which dependent territories had decided to unite after attaining a broad measure of autonomy.

6. Article 16 was based on the functional criterion for the allocation of property. Paragraph 1 referred first to the most common case, namely the creation of a federal union or of a confederation. It went on to mention, in the form of exceptions, the case in which the constituent States agreed to derogate from the general rule, the case in which a unitary State was established, and the case in which the degree of integration determined succession to property. In the latter case, the notion of the viability of the successor State had to be considered. The general rule was that movable and immovable property situated in the territory of the new State remained the property of each constituent State. Many examples of the different situations mentioned were given in his report.[3]

7. Paragraph 2 of article 16 concerned property situated outside the territory of the new State. In principle, when two States decided to unite, it was because they did not wish to remain separate. Their uniting would not be genuine if they fully retained both their internal autonomy and their independence in international terms. If they formed a unitary State, all property passed to that State. But even if they formed a union of States, experience

[1] *Yearbook... 1974*, vol. II (Part One), p. 252, document A/9610/Rev.1, chap. II, sect. D.

[2] See A/CN.4/292, chap. III, paras. 24 *et seq.* of the commentary to article 16.

[3] *Ibid.*, paras. 13 *et seq.* of the commentary.

showed that the union was generally vested with responsibility for the international relations of the constituent States and took over property situated abroad since it was in the best position to manage and protect it. Because of the exceptions to that rule, paragraph 2 contained the proviso "unless otherwise agreed or decided".

8. Mr. AGO said that he was somewhat puzzled by article 16 as proposed by the Special Rapporteur. Admittedly a residuary rule should cover all possibilities, but in the present instance a residuary rule did not seem necessary. A uniting of States involved the formation of a new State made up of all of the predecessor States. The new State might be a unitary State in which the constituent States disappeared entirely, not only in terms of international law but also in terms of internal constitutional law. That had been the case when Italy had united: the former States had not re-emerged in the new kingdom, even in the shape of provinces. Clearly, in a case of that kind, the constituent State could not retain the ownership of their property. The Special Rapporteur himself had provided that the general rule should not apply in that case. He (Mr. Ago) felt that the draft articles should not even contemplate such a case.

9. If two or more States united to form a federal State in which they still existed, but only as persons under constitutional law, it was the new State which would determine, under a federal enactment, the treatment of the property of the constituent States. That treatment would depend therefore on a rule of federal constitutional law, and not on a rule of international law. Consequently, there were no grounds for compensating for the possible lack of a rule of internal constitutional law by a rule of international law.

10. A final case was that of States which formed a union based on an international instrument and which continued to have international relations with each other. It was quite likely that such an instrument would settle the question of the property of the constituent States. However, should any doubts remain in that regard, he would agree that they should be dispelled by means of a rule of international law. The rule proposed by the Special Rapporteur would then be acceptable, but it should apply only in that particular case.

11. Mr. KEARNEY said that, in matters of international law such as the question of the uniting of States, he was bound to be influenced, like the previous speaker, by what had happened when his own country had been formed. In numerous respects, the United States was different from other unions. It functioned in many ways as a unitary State but in other ways it constituted a union of States. It could not easily be placed in any particular category because of the division of governmental powers as between the Federal authorities and the authorities of the individual States. For example, even now the individual States had authority to conclude international agreements, but those agreements had to be approved or authorized by the United States Congress. From his reading on the subject, he had arrived at the conclusion that, because of such distinctions and variations, it was very difficult in almost any case of a uniting of States to differentiate clearly between one type of organization arising from that process and another type which produced different results. Moreover, the rules on the division of governmental powers as between a union and its component parts could vary according to the category of subject-matter concerned. For example, in Canada —which was also a union of States—the Provinces had much greater rights of ownership over rivers flowing within or between them than the States of the United States of America had over rivers flowing through their territories or along their boundaries. It should be borne in mind that some of the rivers in question flowed through both Canada and the United States of America.

12. In view of the different situations that could thus arise, there was justification for Mr. Ago's concern regarding the formulation of rules to govern the internal relationships between the constituent States of a union in respect to property. As he (Mr. Kearney) saw the matter, it was unnecessary to lay down residuary rules for the internal disposition of property following a uniting of States. Even if the constituent States forming the union adopted rules which were not sufficiently thorough or adequate, or which left some gaps, there would always be internal machinery to remedy the situation. It would be for the judicial system, parliament or the Executive, as the case might be, to deal with problems of that kind. That being so, it would be wise to refrain from framing any residuary rules and to leave such questions to be solved by the States concerned.

13. A residuary rule was, however, necessary for property situated outside the territory of the State formed by the uniting of two or more States and belonging to the predecessor or constituent States. If the draft articles contained no such rule, the third State in which the property was situated might not know how to deal with it. The provisions of paragraph 2 of article 16 were thus necessary for international purposes.

14. In conclusion, he favoured the retention of paragraph 2, subject to any amendments which might be considered desirable, but considered that the Commission should keep out of the area which paragraph 1 attempted to cover.

15. Mr. ŠAHOVIĆ supported the views expressed by Mr. Ago. There was no reason to deal with succession to the property of predecessor States which united to form a unitary State or a federal State. At most, consideration could be given to the case of the formation of a confederation. A study of the new Yugoslav Constitution confirmed that, in federal States, the treatment of the property of federated States was determined by internal law. It followed that the title of article 16 should be changed. Furthermore, the concept of a union should be clarified.

16. Like Mr. Kearney, he considered that paragraph 2 of that article was of some value and should perhaps be retained.

17. Mr. SETTE CÂMARA congratulated the Special Rapporteur on the very interesting material which he had assembled in support of his proposed article 16. He understood why the Special Rapporteur thought that an article of that kind should be included in the draft. Since the draft articles were intended to cover all types of succession, as classified by the Commission in its draft

articles on succession of States in respect of treaties, it was natural that the present draft should deal with the type of succession resulting from a uniting of States.

18. With regard to the structure of article 16, however, he shared the misgivings already expressed by several members. The article appeared to take as its starting-point the presumption that a uniting of States would always give birth to a union of States. The examples given by the Special Rapporteur in his report showed that such had often been the case in recent years. He himself, however, felt that it was not advisable to turn that presumption into a rule and attach exceptions to it. He considered it far preferable to lay down a general rule of *renvoi* to the internal law of the successor State in regard to questions concerning the treatment of property.

19. With respect to the exceptions set forth in paragraph 1, it was true that recent cases of the uniting of States had usually led to the formation of a union. The past history of Europe and other continents, however, showed that a uniting of States had often resulted in the formation of a unitary State. The exception mentioned in subparagraph (*c*) of paragraph 1 constituted a typical case of *renvoi* to internal constitutional law. It would be for the internal constitutional law of the successor State to determine which powers devolved to the union and which must belong to the constituent States. Some constitutions reserved the residual powers to the union. Others did exactly the opposite: the union had no powers other than those specifically conferred upon it by the constitution and the constituent States had the residual powers. Property could have its links with the powers of both the constituent States and the union. He therefore supported the idea of laying down a general rule which would leave States free to decide what kind of union they had in mind and what its results would be with regard to the treatment of property.

20. With regard to paragraph 2, he agreed that no distinction should be made between movable and immovable property. The main reason for distinguishing between those two types of property in other articles had been the ease with which a movable could be transferred from one territory to another and the consequent risk of dispossession when a succession of States occurred. That did not apply where all the predecessor States merged into a single successor State.

21. Having said that, he suggested that the provisions of paragraph 2 should be modelled on those of subparagraph (*c*) of article 13 and paragraph 1 (*b*) of article 15, both of which laid down the principle that, in determining the apportionment of property, regard should be had to the contribution of the territory to the creation of that property. That principle was all the more necessary where the territories concerned had formerly been independent States. In every such case the constituent States would have paid for the property in question. It was therefore difficult to understand why the principle of apportionment should not be extended to article 16.

22. Mr. PINTO said that article 16 differed from the other articles of the draft. The reason was that the cases of uniting of States for which it provided did not involve the existence of competing domestic legal systems, unlike practically all the cases dealt with in the other articles. He accordingly felt that article 16 had no place in the series of articles under consideration, except in respect of paragraph 2; that could be useful in dealing with the question of property situated in a third State, which did in fact involve an outside or foreign legal system.

23. He also wished to raise a question of drafting. The change in the legal status of the State property concerned was described in a variety of ways in articles 14 to 17. The formula most frequently used consisted in stating that the property "passed" to the successor State, but in article 15 the newly independent State was described as succeeding to the property. In article 17, it was stated that property "shall... be attributed to" the State in question. In subparagraph (*c*) of article 13, it was stated that the property of the predecessor State situated outside the territory would be "apportioned equitably" between the predecessor State and the successor State. In subparagraph (*b*) of article 15, the same idea was expressed differently: it was stated that the newly independent State "shall succeed thereto" in the proportion determined by its contribution. He urged that the Drafting Committee should try to standardize the terminology.

24. The CHAIRMAN said that the Drafting Committee would deal with the points raised by Mr. Pinto and would endeavour to unify the terminology used in the various language versions of the draft articles.

25. Sir Francis VALLAT said that he was inclined to agree with other speakers that paragraph 1 of article 16 was not really appropriate to the articles under consideration, but that some provision on the lines of paragraph 2 should be included. However, that course would somewhat upset the balance of the general structure of the draft. The Commission was seeking to make appropriate provision for cases of succession of States within the meaning of the provisional definition given in subparagraph (*a*) of article 3.[4] According to that definition, the term "succession of States" meant the replacement of one State by another in the responsibility for the international relations of territory. Where two or more States united to form a single State, a successor State was created and the case was indubitably one of succession of States. It would therefore be appropriate to include in the draft articles a provision indicating what happened to State property in that case.

26. The principle applicable in the case of uniting of States might be that the treatment of State property was referable to the internal law of the successor State. That would be correct. Yet other States would wish to know what treatment was accorded to State property on succession, and so the principle in question should perhaps be spelt out in the commentary. If necessary, it could be embodied in the article at a later stage.

27. The use of the term "union" inevitably caused confusion. The Commission had already experienced that in another context. The logic of the draft articles demanded that a new State was either formed or not. If the uniting

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

of States was such that certain constituent units retained only some of their powers, the result would essentially be a State with a federal structure. If, on the other hand, the constituent units retained their identity as States, what emerged was a union or, in ordinary parlance, a confederation. The latter case—that of a confederation—would fall completely outside the existing definition of a successor State and the Commission should not be concerned with it. That point must be taken into account in the drafting of the text of article 16, the commentary thereto and the Commission's report.

28. Mr. USHAKOV observed that, in his view, the hypothetical case of the Canton of Geneva deciding to join France had to be considered within the framework of a uniting or a separation of States. A case of that kind would not come under the provisions of articles 12 and 13 since those provisions only concerned successions to small portions of territory.

29. Mr. RAMANGASOAVINA said that, in the cases dealt with in article 16, the disposition and apportionment of the property were in principle matters for the internal jurisdiction of the new State. When two or more States united, they normally did so freely; the treatment of the property was then settled either in an agreement concluded at the time of uniting or in a constitution promulgated subsequently. The Special Rapporteur's comparison with a marriage was very apt, since the spouses had the choice between the régime of community of property and that of separation of property.

30. As he saw it, where two or more States decided to unite and become a new State, it was natural for all their property, whether situated in the territory of the State thus formed or outside it, to become the property of the new State. He accordingly had doubts regarding the usefulness not only of paragraph 1 but also of paragraph 2.

31. Mr. AGO said that Sir Francis Vallat's remark was absolutely correct: when several States united to become a single State, problems of succession arose. Those problems could arise in various fields, for instance in that of international responsibility. It might thus become necessary to determine whether the new State was bound by the international obligations arising from an internationally wrongful act committed by one of the constituent States. The series of articles under consideration, however, concerned State property alone. If that property was situated within the new State, no question arose internationally and there was no need to formulate a rule of international law on the matter, even a residuary one. It was only then the property was situated abroad that the situation could become complicated, although it was doubtful whether any genuine international problem was involved. The treatment of immovable property possessed abroad by the States which had united to form the Kingdom of Italy had been settled by the latter's internal law and not by specific international agreements. Obviously, if a third State refused to recognize the new State, the situation might become extremely complicated, but the Commission did not have to enter into questions of that kind.

32. As far as a genuine international union of States was concerned, it might not give rise to a succession of States, as Sir Francis Vallat had pointed out.

33. Mr. MARTÍNEZ MORENO said that the Special Rapporteur had included article 16 in the draft in conformity with the decision that the draft articles should deal with every type of State succession. In addition, the Special Rapporteur had designed article 16 to cover all the various forms which the uniting of States could take, whether the successor State was a confederation, a federation, a real or personal union or a unitary State.

34. The debate had shown almost unanimous agreement in the Commission not to deal with matters which were connected more with constitutional law than with international law. He believed however that it would be advisable, as suggested by Sir Francis Vallat, to spell out the fundamental principle applicable to the case of uniting of States, namely that the agreement of the constituent States was the main rule that concerned the passing of State property. That basic principle could be stated in the first paragraph of article 16. As to the present paragraph 2, dealing with State property situated outside the territory of the successor State formed by the uniting of States, it should be retained. The result would be an article 16 which would satisfactorily cover all the necessary cases, in accordance with the intentions of the Special Rapporteur.

35. Mr. QUENTIN-BAXTER said that he largely agreed with Mr. Pinto with regard to article 16: it did not present the issue which was central to the remainder of the draft articles, namely the obligation to choose between competing sovereignties.

36. For the reasons already advanced by other speakers, he felt that paragraph 1 of article 16 was not strictly within the scope of the draft. As to paragraph 2, if it was necessary at all, it would have to be worded in the simple form in which it had been proposed. The paragraph should merely provide that, in the event of the uniting of two or more States, the only possible successor State—namely the State thus formed—would succeed to the State property.

37. Having said that, he wished to comment on the question of *renvoi* to the internal law of the successor State. It was a well known fact that national courts, in order to identify the parties before them—especially when a party was a legal person—had to refer to the law under which the legal person had been constituted. It seemed strange, however, that the principle of *renvoi* should be touched on in the context of article 16 but not in others. Under the moving treaty-frontiers rule, it was not impossible for a territory which had an identity of its own to move as a unit into another area; reference to the law of the successor State was then necessary in order to discover how that law described the subordinate unit. Accordingly, the *renvoi* principle could be applied to cases other than that of the uniting of States. It was a principle which followed upon the application of such tests as those of contribution and the "direct and necessary link". Once the choice of sovereignty had been made, there could be an additional need for the doctrine of *renvoi*.

38. He shared the general feeling that the contents of paragraph 1 had no place in the draft, yet he felt that they could not be wholly disregarded in view of the case of

separation of parts of a State, dealt with in article 17. There had been cases where the parts of a unified State which had later dissolved had retained their identities so completely during the period of unification that the rules of succession had had to be applied to the parts of the State. Consequently, when applying the tests of contribution and of the direct and necessary link, it would be necessary to keep in mind the case in which a separating part of a State had at all times been clearly identified with a particular body of property.

39. Mr. TSURUOKA said that it would be best to simplify the article under consideration as much as possible. It derived from the idea that a new State was born and that all the property passed to that new States regardless of the latter's form. The apportionment of that property should be a matter for the internal law of the new State.

40. Mr. KEARNEY said that the problem of *renvoi* to internal law was frequently encountered in conventions on conflicts of law. Such conventions commonly incorporated what was called a federal-state clause, which sought to determine the particular law that would apply—the law of the State or the law of a subdivision of the State. In dealing with federal unions of one kind or another, it was not possible to refer simply to internal law; it was essential to specify which law was to be applicable. The Commission might therefore do well to avoid touching on the question of *renvoi* to internal law.

41. Mr. Ago had questioned the need for the rule enunciated in paragraph 2, but there were good grounds for adopting a rule of that kind. For example, if two or more States united, a third State might ask itself whether property formerly owned by one of the constituent States should continue to be exempt from taxation or immune from execution. In other words, the status of the property might change, with adverse effects upon the property itself and upon the international relationships of the States concerned. It would be useful to have a residuary rule which made it clear that the status of the property would be determined by the internal law of the successor State—that was the reason for the phrase "unless otherwise agreed or decided"—but that, in the absence of such a determination, the property would continue to be viewed as State property. A rule of that kind would eliminate friction, and with rules of international law that was always desirable.

42. The CHAIRMAN, speaking as a member of the Commission, observed that the discussion had focused not so much on the text itself but on the question whether, in the case of uniting of two or more States, international law determined in some way the ownership of property of different kinds. It was clear that, within the new unified State, movable and immovable property would ultimately be apportioned under internal constitutional law or a federal kind of law. That possibility was not precluded by the terms of article 16, which contained the proviso "unless... the constituent States have otherwise agreed", i.e. unless they agreed by other means, constitutional and legal.

43. However, the uniting of two or more States could create certain problems affecting not only the constituent States but also third States—for example, in the case of credits or loans extended to the constituent States before they united. In his view, there should be a certain uniformity between the draft under discussion and the draft articles on succession of States in respect of treaties, and accordingly the draft under consideration should cover uniting of States, especially since the Special Rapporteur had also proposed an article on the possible separation of States which had previously been united. Recent times offered examples of attempts by States to unite, or of short-lived unions, and it would be advisable to lay down certain rules for cases of that kind. Moreover, future unions of States were likely to be more gradual, with the constituent States retaining their own legal personality for an initial period and becoming more integrated or united at a later stage. Some drafting changes could be made in the text, but the important point was that the draft should include an article on the uniting of States, as clearly defined in article 30 of the draft articles on succession of States in respect of treaties.

44. Mr. BEDJAOUI (Special Rapporteur) said that all the observations made with regard to article 16 were absolutely correct. It was true that some of the cases contemplated in that article fell outside the scope of succession of States; particularly in the case of complete unification—i.e. the setting-up of a unitary State—the treatment of the property was settled by internal law. The draft articles could obviously not deal with problems of internal constitutional or administrative law. Moreover, where it was internal law that settled the treatment of the property, that law could not of course operate until the unitary State had been created. The situation contemplated therefore arose after the date of succession, which was normally the determining date. The case of unitary States was accordingly outside the scope of succession of States. If an attempt was made to deal with that case, there would be a problem of *renvoi* that would lead to many difficulties, as pointed out by Mr. Quentin-Baxter. He should reflect further on the matter to see if it would be preferable to leave aside the case of unitary States, as Mr. Ago and Mr. Kearney in particular had suggested.

45. Perhaps the draft articles should also disregard the second case contemplated in article 16, namely that of the federal State. It was an intermediate case in which the constituent States retained some personality of their own within the federation in terms of internal public law because, constitutionally, they were States and could settle the question of the devolution of their property as they wished.

46. Thus, since the case of international unions of States—or confederations of States—was the only case which raised questions of international law and of succession of States, the Commission would limit the scope of article 16 to that case alone, in other words, to the case where two or more States agreed to set up among themselves a community which preserved their personalities not only internally but also internationally. His task as Special Rapporteur would thereby be greatly facilitated, because unions of that kind were nearly always created by an international agreement among the States concerned which contained provisions governing the devolution of property. The Commission would thus confine

the article to the statement of a very simple residuary rule.

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

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

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

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

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

It was so decided.[5]

The meeting rose at 12.35 p.m.

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

1399th MEETING

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

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Succession to State property in cases of separation of parts of a State)

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

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

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

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

2. its movable property shall:

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

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

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

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

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