Document:-
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Summary record of the 1231st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

36. The text proposed for article 2 read:

Article 2

Cases of succession of States covered by the present articles

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

37. Mr. USHAKOV said that he approved of the substance of article 2, but must renew the objections he had made the previous year to the drafting of the corresponding article of the draft on succession in respect of treaties.

38. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported article 2, although he did not entirely agree with the reason given for its inclusion. The fact that the provision had appeared in the 1972 draft on succession in respect of treaties was not in itself a sufficient argument for its inclusion in the present draft. The two drafts dealt with comparatively different subjects and he was not convinced of the need for strict legal symmetry.

39. Mr. USTOR said that he fully agreed with the content of article 2, but thought it went without saying. To include in the present draft a provision to the effect that the articles dealt only with valid successions would create problems, because no such provision had been included in some other drafts.

40. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to approve article 2 provisionally, as proposed by the Drafting Committee.

It was so agreed.

TITLE OF PART I OF THE DRAFT, TITLE OF SECTION 1, AND ARTICLE 4

41. Mr. YASSEEN (Chairman of the Drafting Committee) said that the Committee proposed as the title of part I of the draft "Succession to State property", and as the title of section 1 "General provisions". So far, the Commission had discussed public property, to which the Special Rapporteur had devoted his last four reports. Public property comprised State property, the property of authorities or bodies other than States, and the property of the territory concerned. The discussion had shown, however, that the problem was extremely complex and that the difficulties must be taken one by one. The Drafting Committee and the Special Rapporteur accordingly suggested a new approach, as indicated by the title of part I. The Commission would first study State property and then the other kinds of public property.

42. Article 4 formed a corollary to the title of part I. It was very simple and intended solely to indicate that part I concerned the effects of succession of States in respect of State property.

43. The new version of article 4 read:

Article 4

Scope of the articles in the present Part

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

44. Mr. USTOR said he welcomed the Drafting Committee's proposal to restrict the scope of the draft articles in part I to the effects of succession of States in respect of State property.

45. Mr. SETTE CÂMARA said that at a later stage, it might prove convenient to replace article 4 by a simple title. If the provision was retained as a separate article, it would be necessary to have an article of the same kind in each of the following parts.

46. Mr. BEDJAOUI (Special Rapporteur) said that article 4 should be left as it was. It applied solely to the part of the draft which dealt with State property. When the Commission had finished considering that part, it would take up the parts which dealt with the other two classes of public property. An article corresponding to article 4 would have to be included in each of them.

47. The CHAIRMAN, speaking as a member of the Commission, said he hoped that, when the Commission had dealt with public property other than State property, it would consider merging all the provisions on public property if it found that the rules governing the public property of other entities were similar to those governing State property.

48. Speaking as Chairman, he suggested that the Commission provisionally approve article 4 and the titles of part I and section 1, as proposed by the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

1231st MEETING

Thursday, 21 June 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties

(A/CN.4/L.196; A/CN.4/L.197)

[Item 3 to the agenda]

(continued)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 5 [1]

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 5 (A/CN.4/L.196).

[1] For previous discussion see 1223rd meeting, para. 1.

2. Mr. YASSEEN (Chairman of the Drafting Committee) said that article 5 explained what was meant by "State property". It defined State property by reference to the internal law of the predecessor State; the Committee had considered that to be logical, since it was the internal law of the predecessor State which governed State property until the succession of States took place. In some cases the internal law of the successor State hardly existed on the date of the succession, the point in time to which article 5 referred, so that it would be illusory to define State property by reference to the internal law of the successor State. The position adopted in the article did not, of course, impair the right of the successor State to alter the definition or classification of State property in accordance with its own legal order. At the precise moment of the succession, however, it was only by reference to the law of the predecessor State that State property could be determined and classified.

3. The Drafting Committee was well aware that international practice and jurisprudence had often wavered between the internal law of the predecessor State and that of the successor State. The Committee therefore hoped that the commentary to article 5 would draw attention to the provisional nature of the text. It was, indeed, possible that, during its first reading of the draft, the Commission might decide to make the rule laid down in the article more flexible.

4. The Drafting Committee also hoped that two remarks would be made in the commentary regarding the expression "property, rights and interests" used in article 5. The first was that that expression, found in several treaties, referred only to legal rights and interests. The second was that the expression was not known to some legal systems. In view of the latter situation, the Commission might wish to explore, on first reading, the possibility of using a different expression having regard, in particular, to the whole set of provisions it adopted on property.

5. The text proposed for article 5 read:

Article 5
State property

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

6. Mr. QUENTIN-BAXTER said he was very pleased with the general shape of article 5 as it had emerged from the Drafting Committee. He had been one of those who believed that a relatively simple concept of State property would make a good starting point for the draft articles.

7. It was important to bear in mind, however, that the words "according to the internal law of the predecessor State" should be taken to mean the law in force in the territory which was the subject of succession.

8. New Guinea, one of the last important territories still governed by an administering authority, provided a useful example in that regard. From the outset of the Australian administration of that territory, there had been a law of New Guinea. Although that law was the ultimate responsibility of the Parliament of Australia, it was made by the administration of New Guinea and, more recently, with increasing participation by representatives of the people of the territory. That law was made to suit local conditions and the philosophy of the people; the law of New Guinea had never at any time been described as the law of Australia.

9. In every case in which the administering authority responsible for a territory faithfully carried out its duty of leading that territory towards independence, the law which applied at the municipal level was entirely distinct, and often very different, from that of the metropolitan country. That raised a problem of principle which must be taken into account.

10. That position was also based on practical considerations. State property in New Guinea had for a long time been in the ownership of the Government of New Guinea. When the territory became independent, any problem that might arise in connexion with such property would have to be solved, not in accordance with the law of Australia, but in accordance with the law of New Guinea at the moment of independence. A similar solution would have to be adopted by the courts of a third State if called upon to deal with property situated outside the territory.

11. It was also important to stress that the territory which was the subject of succession changed hands as an entity and not as a lawless territory. The introduction of a reference to the law in force in the territory at the time of succession would have the further advantage of not impairing the sovereignty of the successor State. It would be clear that the new lawgiver was free to take whatever action it wished in the territory, with due regard to the successor State's obligations under international law.

12. Another principle to be kept in mind was that the property, rights and interests which changed hands had two elements: their physical features and the law which they carried.

13. Subject to those remarks, he welcomed article 5. He expressed his gratitude to the Drafting Committee and to the Special Rapporteur, whose work was beginning to bear fruit.

14. Mr. USTOR said that he was prepared to accept article 5 in view of its provisional character, subject to some comments which he hoped would be taken into account when the time came to adopt a final draft.

15. His first remark concerned the inconsistency of using the term "property" with two different meanings. In the expression "State property", as used both in the title and in the text of the article, the term "property" covered all forms or property of the State. In the expression "property, rights and interests" it covered only part of State property. In the context it was clear that the word "property" was being used with two different meanings, and consideration should be given, in due course, to removing that inconsistency.

16. The expression "property, rights and interests" was in itself somewhat obscure. It should perhaps be assumed that the term "interests" referred to something other than rights directly pertaining to the State, or property

directly owned by it. The term could thus be taken to refer to the interest which the State had in, for example, a State enterprise or even a trust or foundation. The retention of the term "interests" was therefore likely to create difficulties and to blur the distinction between Stete property and other public property. It would thus run counter to the intention of the Drafting Committee, which was to exclude from the scope of the articles in part I items of public property which did not constitute State property.

17. Mr. YASSEEN said that the question raised by Mr. Quentin-Baxter—that of locating, within the internal legal order, the rules that were applicable—also arose in other contexts. A case in point was the law applicable under the rules of applicability in private international law, when the legal order to which certain legal situations were attached was a complex one. The general practice was to look at the whole of the legal order in order to determine which of its various component systems was applicable.

18. In his opinion, therefore, the expression "internal law of the predecessor State" was sufficient. It was for the legal order of that State to determine which rules were applicable. It would be inadvisable, in a set of draft articles on succession of States, to try to solve such a general problem as that of determining which rules were applicable within an internal legal order.

19. Mr. RAMANGASOAVINA said that when the Commission had examined the original version of article 5, he had expressed approval of the wording then proposed. Nevertheless, he found the proposed new wording preferable; it was consistent with the position taken by the Drafting Committee in the previous articles. In article 3, for example, the Committee had emphasized that succession of States was essentially a question of responsibility for the international relations of the territory to which the succession related. In the proposed article 5, the emphasis was on State property; that was in keeping with the general spirit of the draft.

20. The new wording of article 5 would enable the Commission to go ahead, whereas the previous, much contested version might have prevented it from doing so. He therefore supported the text proposed, though he thought it might be made more precise later on.

21. Mr. USHAKOV said he provisionally accepted the text proposed by the Drafting Committee, as he had provisionally accepted the text originally submitted by the Special Rapporteur.

22. He thought that the words "property, rights and interests" should be amended to read "property, with the rights and interests relating thereto", as the Special Rapporteur had proposed to the Drafting Committee. The present formula might be clear to common-law jurists, but it was not clear to other lawyers.

23. In addition, article 5 contained a contradiction. While seeking to define the general notion of State property, in fact it only defined the State property of the predecessor State, since it defined State property by reference to the internal law of that State. The first part of the definition referred to State property in general, whereas the last part referred only to the property of the predecessor State. It would be preferable to draft a definition of State property in general.

24. With regard to Mr. Quentin-Baxter's remarks on dependent territories which already had their own law, another point to note was that, when a new State became independent, there was no replacement of one sovereignty by another. In that situation it was not the internal law of the predecessor State which was applicable. More consideration should therefore be given to the case of newly independent States. However, he found the proposed text acceptable at the present stage.

25. Mr. KEARNEY said that, although the formulation adopted by the Drafting Committee for article 5 was not perfect, it would enable the Commission to go ahead with its work.

26. It should be borne in mind that the draft articles would constitute a set of residual rules. The formula in article 5 had to cover not only customary situations, but also unusual situations. He therefore favoured the retention of the expression "property, rights and interests", which provided as broad a coverage as possible in describing the different types of property.

27. To illustrate by an example the meaning of the term "interests" in the present context, he would remind members that there was a law in many countries to the effect that property of a deceased person which was not claimed by any heir within a specified time reverted to the State. The territory which was the subject of a succession of States could well contain property that was in suspense because its owner had died and the time-limit for claims by heirs had not yet expired. Such property would not be "owned" by the State on the date of the succession, yet the successor State might well become its owner if no heir appeared. It undoubtedly had what could correctly be termed an "interest" in the property.

28. The very valid point which had been raised by Mr. Quentin-Baxter would certainly have to be considered at the appropriate time, but he himself did not favour any change in the formula "according to the internal law of the predecessor State". It would not be possible to solve all the problems involved by adding to those words the formula: "as applied in the territory subject to succession". In particular, such an addition would be of no assistance in dealing with the very pertinent problem of property which was not actually in the territory and which might well be in the capital city of the predecessor State.

29. Another problem which would not be solved by such a change of language was that which might arise in the event of secession of a component state from a federal union. The seceding state would already have had its own property under its own laws while a member of the federal union, but there would also be in its territory federal property which was governed by federal law. In view of the extreme difficulty of covering all such problems, it would be preferable to retain the formula used in article 5.

30. Sir Francis VALLAT said that the point raised by Mr. Ushakov, regarding the reference in the concluding words of article 5 to property "owned by [the predecessor] State", touched on the essence of the draft articles. Those

articles dealt with the fate, in the event of a succession of States, of the property owned by the predecessor State at the date of succession. With regard to the property of an authority or of a non-State body, the presumption would be that the title would continue under internal law. In that context article 5 was fully justified. It dealt with the international problem of what happened to State property owned by the predecessor State. Any departure from that approach could only lead to confusion.

31. The reference to the internal law of the predecessor State was correct, because it was the law of that State which determined what constituted its property. It was necessary to leave aside, as a totally different question, the problems of the application of private international law and of the law applicable to the property.

32. Mr. MARTÍNEZ MORENO said that the expression "property, rights and interests" which, as pointed out by the Special Rapporteur, had been used in the Treaty of Versailles and in many other treaties, was not unknown to Latin American practice. It was used in a number of treaties between Latin American countries.

33. In the Latin American legal system it was perfectly possible to distinguish between "rights" and "property". The term "rights" was used, in contrast with "property", to describe incorporal property such as debt-claims. As to the term "interests", the example given by Mr. Kearney was an excellent one. The term had also been used on a number of occasions in Latin America in declarations relating to the law of the sea, which had referred to the interests of the coastal State in the protection and utilization of the resources of the sea adjacent to its coast.

34. In conclusion, he thought that the Drafting Committee's formulation of article 5, despite its imperfections, constituted a satisfactory provisional basis for the Commission's work.

35. Mr. SETTE CÂMARA said that the new wording of article 5 was a great improvement on the earlier text. The controversial features had been eliminated, and that would greatly assist the Commission in its work. The Drafting Committee had abandoned the negative definition originally proposed for public property and had dropped the controversial reference to property "necessary for the exercise of sovereignty by the successor State".

36. The introduction of the concept of "State property" was a step forward. "State property" could properly be regarded as a concept of international law, whereas "public property" was essentially a concept of constitutional and municipal law.

37. With regard to the expression "property, rights and interests", he was inclined to agree with the views put forward by the Chairman of the Drafting Committee and was prepared to accept that formula on a provisional basis, on the understanding that it would be construed as broadly as possible.

38. He agreed that it would be very difficult to avoid making some reference to an internal law defining State property at the moment of succession; that law could be no other than the law of the predecessor State.

39. The fate of public property other than State property—such as the property of public bodies or State enterprises—would be decided by the internal law of the successor State. That law might well completely change the status of the property in question.

40. It would be useful to retain in article 5 a somewhat vague formula capable of covering all situations, including the one to which Mr. Quentin-Baxter had referred.

41. Mr. AGO said that, in order not to hinder the adoption of the proposed text, he would accept the expression "property, rights and interests", but he greatly hoped that a more satisfactory formula would be found. The main defect of the present wording was that it placed widely different notions on the same footing. The term "property" meant rights in corporeal property; the term "rights" applied also to rights in incorporeal property, including debt-claims; the term "interests" also denoted rights. The terms "interests" was taken from systems of law, both Anglo-Saxon and continental, in which there were legally protected interests which could not be classed as true subjective rights. A particular example was lawful interests. In other words, each of the three terms denoted rights or interests recognized and protected by the law. Mr. Martínez Moreno had given an example of an interest which was not covered by the wording of article 5: a State might have an interest in protecting certain resources, but that interest might not yet be protected by law. The successor State might inherit the interest in question, but it would not be comprised in the legal phenomenon of State succession.

42. The CHAIRMAN speaking as a member of the Commission, said he fully agreed with the new method adopted by the Drafting Committee for the formulation of article 5.

43. Both the other possible methods of drafting the article had already been tried without success. The first was to give an enumeration of the property in question. The second was to define that property in negative terms, as the Special Rapporteur had done in his sixth report (A/CN.4/267), as all property not under private ownership.

44. Both those methods had led into a blind alley. The only acceptable course which remained was that adopted by the Drafting Committee of defining State property by referring back to the internal law of the predecessor State. The Drafting Committee had adopted that approach with success in its new version of article 5.

45. The formula "property, rights and interests" was the best that could be found, bearing in mind the variety of legal systems. The three terms used in that formula had one common element: they all referred to items having an economic value items of what might be called a "patrimonial character".

46. The example given by Mr. Kearney to illustrate the meaning of "interests" was a very appropriate one. The term "interest" denoted a potential right, or the expectancy of a right; no actual right existed yet but, under certain circumstances, a rights could come into existence, emerging from the "interest".

47. He approved of article 5 as formulated by the Drafting Committee and suggested that in due course

an attempt should be made to introduce the idea that the "property, rights and interests" mentioned in the text all had an economic value.

48. Mr. USHAKOV explained that he was not opposed to the words "according to the internal law of the predecessor State". He merely thought that, if the reference to the predecessor State were deleted, the definition of State property would become general. To that end, the words "predecessor State" should be replaced by the words "State in question". Once a general definition of State property had been given, the subsequent articles could specify what State property was referred to. For instance article 8, sub-paragraph (i), expressly mentioned "public or private property of the predecessor State". It should be noted, in that connexion, that in the case of a partial transfer of territory not all the property of the predecessor State passed to the successor State.

49. Mr. BARTOŠ reminded the Commission that the expression "property, rights and interests" had not only been used in the Treaty of Versailles and in the treaties supplementing it, but had given rise to discussion in 1946 before being included in the treaties of Paris.[2] At the time, some people had opposed the use of the expression because, they had thought it unnecessary to mentioned interests. They had taken the view that legal interests were assimilable to rights, whereas non-legal interests were not subject to State succession. The Paris Conference had nevertheless adopted the expression, believing it useful to mention interests which had not yet become legal in character because they took the form of rights in process of formation, future rights, or interests which it was lawful to protect. In that connexion the draftsmen of the treaties of Paris had referred in particular to the lawful interest of a State in not being deprived, by diversion, of the waters of a river crossing the territory which was the subject of the succession. They had also referred to problems relating to the subsoil and, in particular, to oil.

50. The expression "property, rights and interests" had become part of the terminology of international treaties on succession of States. If it was not used in the draft articles under discussion, difficulties of interpretation might arise. The omission of the word "interests" might suggest that interests were excluded from succession. In his view, therefore, the traditional formula "property, rights and interests" was necessary.

51. Mr. MARTÍNEZ MORENO explained that the example he had given of the interest of a coastal State in the protection and utilization of the resources of the sea adjacent to its coasts had been intended to illustrate that the term "interest" should be taken to mean a legal interest; that was the point he had wished to make, and he was thus in agreement with the view expressed by Mr. Ago.

52. In that connexion it was worth noting that, at a recent meeting at San Salvador of a group of Latin American countries known as the Montevideo group, which upheld the claim to a territorial sea or sovereignty zone of 200 miles, it had been urged that it was not the interests, but the rights of the coastal State that should be invoked.

53. Mr. RAMANGASOAVINA said there was a point connected with article 5 which needed clarification. In the event of a succession of States, the territory of the predecessor State and that of the successor States were not necessarily the same—for instance, in cases of secession or partition. The words "property, rights and interests" might suggest that everything which had belonged to the predecessor State passed to the successor State, whereas in some cases the succession comprised only part of the property.

54. The CHAIRMAN invited the Special Rapporteur to comment and make recommendations.

55. Mr. BEDJAOUI (Special Rapporteur) first thanked the Drafting Committee for the assistance it had given him in formulating article 5. The definition proposed in the article was purely provisional; it had the merit of avoiding a number of pitfalls, of enabling the Commission to go on with its work, and of indicating clearly to the Sixth Committee and the General Assembly the general direction the work was taking, which would have been impossible without a definition of public property. Of course, the definition in article 5 was just as provisional as the definition of succession of States in article 3, and the Commission would probably have to recast them both later.

56. The Commission would note that in defining State property in that way it had reverted to the method of determining public property which he had suggested in article 1 in his third report,[3] that was to say by reference to the municipal law which governed the territory affected by the change of sovereignty. The Commission would have to determine later, in a second part of the draft articles and probably in the same manner, what public property belonged to territorial authorities and then, in a third part, what constituted the property of public enterprises. At an even later stage it might perhaps revert to a definition of the kind proposed in the third report, namely, that public property was property belonging to the State, a territorial authority thereof or a public body.

57. In his third report he had referred to the municipal law "which governed the territory affected by the change of sovereignty". That brought him to the very pertinent comment by Mr. Quentin-Baxter who, taking New Guinea as an example, had pointed out that cases could arise in which colonial legislation should normally be applied in defining what constituted State property. That difficulty had not escaped his attention when he had prepared his third report. In the former colonies, however, State property was reduced to its simplest form and, above all, the property of the metropolitain State was not necessarily governed by the territorial internal law of the colony but, in a sense, came under the law of the metropolitan State itself. Barracks and military installations, for example, and generally speaking all service property

[2] See, for example, Part VII of the Treaty of Peace with Italy, United Nations, *Treaty Series*, vol. 49, p. 160.

[3] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 133, document A/CN.4/226.

called "crown property" and the services themselves, were not subject to the law of the territory. Thus difficulties were, indeed, to be encountered in determining State property by reference to colonial law.

58. Another difficulty might arise where the property of the former sovereign, who had preceded colonization, had not been regarded as public property by the colonizing State and had been abandoned to private ownership. In such a case, what law should be referred to for the purpose of defining public property in the event of succession ?

59. He had therefore thought it would be wiser to make a comprehensive and, as it were, generic reference to the internal law of the predecessor State, rather than to allude to the particular branch of that law constituted by the legislation of the colony; for the latter too represented the internal law of the predecessor State, being the legal order which the metropolitan Power itself had established in the colony. In view of their complexity, perhaps the commentary should mention those problems and specify that the law of the predecessor State should, where possible, be understood to mean the local law, but that the local law was to be distinguished from the *lex loci* in order to avoid the problem of referring to the law of a third State in which the property in question might be situated. For the time being, it would be better to keep to the formula proposed by the Drafting Committee, which made it possible for the Commission to go ahead.

60. With regard to the comments of Mr. Ustor and Mr. Ushakov, he hid not think it would be possible to avoid referring to the predecessor State; it was a legal necessity. Mr. Ushakov had explained that what he objected to was not the reference to internal law, but the reference to the internal law of the predecessor State. But if the text did not specify which internal law was meant, there would be serious uncertainty and a choice would have to be made between the laws of the two States concerned. Unfortunately, it was not possible to define property which necessarily belonged to the State. There was no property which was State property by its very nature, since the nature of State property was determined by the philosophy of each State. It was therefore impossible to mention the State without being more specific: a choice had to be made between the two States concerned. The best course would therefore be to accept the proposed definition, which in any case was only provisional.

61. With regard to the expression "property, rights and interests", which had been criticised by several members of the Commission, in particular Mr. Ustor, lawyers had been vainly seeking an alternative to it for nearly half a century. But as Mr. Bartoš had pointed out, it was a hallowed formula whose meaning and scope were well known despite its inherent uncertainties and imperfections. Perhaps the theoretical difficulties it raised could be indicated in the commentary, which might state that the Commission, having failed to find a more general definition for all public property that was compatible with the different legal systems, had considered the formula acceptable. As Mr. Castañeda had indicated, the word "interests" must be used to provide for the option which might be open to a natural or legal person—in the case in point, the State. That interest was, of course, a legal interest, as Mr. Ago had observed. In any case, the rights to which the expression "property, rights and interests" referred were all the rights which could be described as "patrimonial" or, as Mr. Castañeda had said, rights of an economic character.

62. Mr. Ustor had said that the definition of State property given in article 5 was bound to bring the Commission up against the problem of State enterprises. But a clear distinction must be made between State enterprises and State property, which were two entirely different things. The property of a State enterprise did not necessarily belong to the State, since a State enterprise had its own patrimony; and article 5 dealt with State property, not with the property of a State enterprise. Nevertheless, direct participation of the State, and State property distinct from that of the enterprise, could exist in a State enterprise. The question was whether, in such a case, that property should pass to the successor State. He had answered that question affirmatively in other articles; in article 34, for example, he had spoken of property of the State in public establishments and he intended to revert to the matter later.

63. Mr. Ramangasoavina thought that article 5, as proposed by the Drafting Committee, might give the impression that all the property of the predecessor State, including property in territory which still belonged to it after the succession, would pass to the successor State. But article 5 only defined State property; it did not deal with its allocation, which was the subject of article 9. It was the determination of the geographical area in which one State replaced another that made it possible to specify what State property passed to the successor State. He had originally intended to refer direct to the territory affected by the change of sovereignty, as shown by the definitions given in his fourth, fifth and sixth reports.[4] Mr. Reuter had dissuaded him from doing so by raising the question of property situated outside the territory.[5] He had therefore adopted a more general formula in order to avoid referring to territory; but it was quite clear, as the succeeding articles showed, that not all State property would pass to the successor State.

64. Mr. USHAKOV said that there was a difference between the internal law of a particular State and the internal law of the State in general. It was to the internal law "of the State in question" that reference should be made.

65. The CHAIRMAN noted that a number of pertinent and important observations had been made on article 5, but no fundamental objections or real reservations. In view of its wholly provisional character, therefore, he suggested that the article should be approved.

It was so agreed.

66. The CHAIRMAN said that the Commission had completed its examination of the texts proposed by the Drafting Committee in document A/CN.4/L.196. Since articles 6 and 7 were under still consideration by the Com-

[4] *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 157, document A/CN.4/247 and Add.1; *ibid., 1972*, vol. II, document A/CN.4/259; and *ibid., 1973*, vol. II, document A/CN.4/267.

[5] See 1223rd meeting, para. 30.

mittee, he invited the Special Rapporteur to introduce his new version of article 9 (A/CN.4/L.197), which was intended to replace the former articles 8 and 9.

ARTICLE 9

67. Mr. BEDJAOUI (Special Rapporteur) said that since the Commission had provisionally restricted the definition of State property, article 8 had lost much of its point, and its last two sub-paragraphs served no purpose for the time being. He had therefore submitted a new article 9 in place of the former articles 8 and 9.

68. The new article read:

Article 9

The substitution of the successor State for the predecessor State shall have the effect of substituting the former for the latter, freely and without compensation, in the ownership of all State property, save as may have been agreed otherwise.

For his part, he considered that article 9 also replaced articles 15, paragraph 2; 19, paragraph 2; 23; 27; 31, paragraph 2; 34 and 38; that was to say, the scattered provisions relating to State property held by public enterprises or territorial authorities, or situated outside the territory.

69. The Commission's discussion on article 5 was an excellent point of departure, because article 9 must be examined in the light of article 5. The provision in article 9 was clearly one of international law. There was now a rule of international law which allowed the substitution of the successor State for the predecessor State in the ownership of all State property unless, of course, the two States had agreed otherwise. That was a practically uncontested rule.

70. There was, indeed, a unanimity among writers which made it possible to regard the rule laid down in article 9 as a commonly accepted rule of international law. It was true that not all the authors referred specifically to State property, but that was because of the terminology used in the system of law to which they belonged. Some spoke, for example of property in the "public domain", as opposed to property in the "private domain" of the State, borrowing those concepts from the internal law of a particular legal system. In general, however, writers—whose example had been followed by international jurisprudence—were in agreement on the rule laid down in article 9.

71. That rule was based on the principle of the viability of the State, which should be taken as a guide in all cases of succession of States—or in nearly all, for it might be thought that in some cases there was no automatic transfer of State property; he would revert to that point. Property such as roads, barracks, harbour infrastructures and State public buildings—government headquarters and ministries—could not remain in the possession of the predecessor State. They were property which the predecessor State had deemed it useful, if not necessary, to own for social purposes which it had set itself in the general interest. But what had seemed necessary or useful to the predecessor State might also prove necessary or useful to the successor State.

72. The transfer took place on the elementary principle that the replacement of one State by another was incompatible with the concurrent exercise of two State authorities over the same territory. It was difficult to accept that the predecessor State could continue to hold certain State property which sometimes involved the highest forms of the exercise of sovereignty. That was why he had first defined such property as appertaining to sovereignty or necessary for its exercise, the main purpose being to overcome the difficulties arising from the differences between legal systems: for example, the French legal system referred to the private and public domains of the State, whereas those concepts did not exist in other legal systems. But he had discarded that formula, which might lead the Commission to a dead end.

73. In his view, the definition of State property adopted in article 5 made the Commission's task easier in regard to article 9. But although there were certain State practices which had become general and made it possible to infer the existence of a rule on the subject, it had also happened that some practices had not followed the same course. Some predecessor States had given up property in their possession only against indemnity or compensation. Compensation had been spoken of mainly in connexion with property constituting the private domain of the State. But that approach was neither general nor fully accepted in practice. Without wishing to ignore the existence of such practices, he had therefore concluded that exceptional situations could be covered by special formulas such as that of article 9. An agreement, for example, could provide for the handing over of State property against compensation or could allow the predecessor State to retain certain State property with the consent of the successor State.

74. In making a reservation to the principle that State property was transferred in all cases of State succession, he had been thinking, in particular, of the case of uniting of States, in which there was not a total transfer of all State property. It was clear that the transfer of some items of property, such as currency, could take place only at the level of union, and all the texts which referred to that type of succession of States also referred to such transfer at union level. But those were special cases which could be settled by agreement, and it was generally by agreement that a union of States was formed. The reservation could therefore be dropped, since article 9 provided for an exception to the rule by specifying that matters could be agreed otherwise.

75. In conclusion, he considered that the rule laid down in article 9 existed in practice and imposed on the predecessor State a legal obligation to transfer the ownership of State property, with all the legal consequences that might entail. He had left wide scope for agreement in order to take into account the diversity of situations, and had endeavoured to look beyond the theoretical problems and draft a text which was as practical as possible and which the Commission could support.

Other business

[Item 10 of the agenda]

76. The CHAIRMAN drew the Commission's attention to a letter dated 30 April 1973, addressed to the Secretary-

General of the United Nations, containing the comments of the Prime Minister and Minister for Foreign Affairs of Tonga on the draft articles on succession of States in respect of treaties (ILC (XXV)/Misc.2).

The meeting rose at 1 p.m.

1232nd MEETING

Friday, 22 June 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/267 ; A/CN.4/L.197)

[Item 3 of the agenda]

(resumed from the previous meeting)

ARTICLE 9 *(continued)*

1. Mr. TAMMES said that in the new text of article 9 (A/CN.4/L.197), all reference to the different categories of public property had disappeared; it was now only State property—all State property—in the territory affected which would pass to the successor State without compensation. It had been agreed that at a later stage the Commission might consider other categories of public property, as enumerated in article 8, but that for the time being it would deal only with State property. That was undoubtedly a helpful solution; but he wondered whether the new article 9, just because of its simplification, did not go rather too far.

2. In studying the history of the present article he had again gone through the Special Rapporteur's earlier reports, which gave a well-organized account of the multifarious situations which history presented to the legal mind, but he had not found much evidence, either in judicial decisions or in the writings of qualified publicists, of an absolute rule that all State property in the territory in question passed to the successor State without compensation. In his fourth report the Special Rapporteur had indeed recognized that "while the transfer without compensation of property appertaining to the public domain is not in dispute, some legal authorities maintain that public property constituting the private domain can be transferred only against payment".[1] That point of view also seemed to be confirmed by the Special Rapporteur in the commentary to article 9 in his sixth report (A/CN.4/267).

3. In that connexion an interesting example was the decision of 31 January 1953 taken by the United Nations Tribunal in Libya in the case of *Italy v. United Kingdom and Libya*.[2] That decision, which involved the interpretation of General Assembly resolution 388 (V), had quoted the following excerpts from Fauchille's *Traité de droit international public:*

> "When a dismembered State cedes a portion of its territory, property which constitutes *public* property, namely property which by its nature is used for a public service, existing on the annexed territory, passes with its inherent characteristics and legal status to the annexing State; being devoted to the public services of the ceded province, it should belong to the sovereign power which is henceforward responsible for it...
>
> "As regards *private* State property, i.e., property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provisions it does not become part of the property of the annexing State. In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory."

4. That decision, dealing with one category of public property, namely, alienable public property or *patrimonium disponibile*, which, as he understood it, came close to private property of the State, seemed to leave room for different kinds of treatment, and that had been the subject of the litigation.

5. In his opinion, whatever the terms used and the definitions made in internal law, such as public domain, private domain and *patrimonium disponibile*, there was at the present time no agreement in judicial decisions or other authorities on the existence of a rule so catagorical as that laid down in the new article 9. The Commission was in effect working out a rule for the progressive development of international law, and that should be clearly stated.

6. He himself was partly in favour of such a rule, in particular where it referred to the free substitution of the successor State for the predecessor State, which he understood to be an automatic substitution not requiring any agreement. There would be an undeniable burden on the successor State if private property, independently of that State's sovereign will, passed within its jurisdiction with the characteristics of foreign property.

7. As to the absence of compensation, he was not quite sure that the new rule would be the just rule in all cases of succession. It might be so in typical cases of decolonization, but perhaps it might not be so in the more numerous cases of secession which might occur in the future, and which were precisely the cases in which there was often no prior agreement.

[1] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 177, document A/CN.4/247 and Add.1, part II, para. (2) of the commentary to article 6.

[2] *Ibid., 1970*, vol. II, p. 173, document A/CN.4/232, para 16.