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UNITED NATIONS COMMISSION ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Third Session

SUMMARY RECORD OF THE THIRTIETH MEETING

Held at Headquarters, New York,
on Monday, 22 May 1961, at 11 a.m.

CONTENTS

PRESENT:

Chairman:	Mr. GAMBOA	(Philippines)
Rapporteur:	Mr. KHAMIS	United Arab Republic
Members:	Mr. PAZHWAK	Afghanistan
	Mr. SCHWEITZER	Chile
	Mr. FLORES AVENDANO	Guatemala
	Mr. POLDERMAN) Mr. van GORKOM)	Netherlands
	Mr. BRILLANTES	Philippines
	Mr. PETREN	Sweden
	Mr. ORNATSKY	Union of Soviet Socialist Republics
	Mr. RAYMOND	United States of America
Observer from a Member State:		
	Mr. MAURTUA	Peru
Representative of the International Atomic Energy Agency:		
	Mr. FREEMAN	
Secretariat:	Mr. SCHACHTER	Director of the General Legal Division
	Miss CHEN	Secretary of the Commission

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ORGANIZATION OF WORK

The CHAIRMAN recalled that in his opening statement he had said that the Commission should conclude its work on 19 May. The Commission had, however, been unable to adhere to that time-limit owing to the complexity of the question under discussion. Since it would be very difficult for the Secretariat to service the meetings of the Commission after 23 May, owing to the number of other meetings scheduled, he urged members to conclude their discussion of the draft resolutions and amendments and to proceed to the vote as quickly as possible. The Commission would meet on 24 May to adopt its report to the Economic and Social Council.

Mr. PAZHWAK (Afghanistan) proposed that the time-limit for the submission of amendments should be 3 p.m., so that the Commission could vote on the draft resolutions and amendments in the afternoon.

Mr. SCHWEITZER (Chile) supported the proposal, on the understanding that it did exclude the possibility of reaching a unanimous agreement before there was any voting.

It was so decided.

REPORT TO THE THIRTY-SECOND SESSION OF THE ECONOMIC AND SOCIAL COUNCIL (A/AC.97/L.2/Rev.1, L.3/Rev.2, L.4, L.5/Rev.1, L.7, L.8, L.9) (continued)

Mr. KHAMIS (United Arab Republic) considered that the amendment submitted by Afghanistan and Sweden (A/AC.97/L.5/Rev.1) to the Chilean draft resolution (A/AC.97/L.3/Rev.2) was superfluous. In the first place, international adjudication or arbitration applied only to disputes of a legal nature and not to conflict of interest; international courts applying the principles of international law were competent only when the parties based their cases on those principles. In the matter in question it was only the calculation of the amount of compensation which gave rise to disputes and the latter were not of a legal nature. For that reason, all international courts dealing with cases of nationalization or expropriation had refrained from fixing the amount of compensation and simply referred to "appropriate compensation". The same applied to arbitration, as was shown by article 38 of the Hague Convention for the pacific settlement of international disputes of 1907 and the General Act of 1928

(Mr. Khamis, United Arab Republic)

for the pacific settlement of international disputes, to which the United Nations General Assembly, in resolution 268 (III), had restored its original efficacy.

Moreover, even assuming that international adjudication or arbitration could relate to any type of dispute, the two-Power amendment (A/AC.97/L.5/Rev.1) ignored other means of friendly settlement - negotiation, the use of good offices or mediation - which should precede recourse to arbitration. The Arbitration Convention of 1909 between the United States of America and Ecuador, for instance, provided for recourse to arbitration only in the case of differences of a legal nature which it might not have been possible to settle by diplomacy. Similarly, in the instructions of 17 January 1913 given to the United States chargé d'affaires in London regarding the dispute between the United States and the United Kingdom over the payment of transit dues in the Panama Canal, the United States Secretary of State had said that the clauses of an arbitration treaty should be invoked only in the event of failure at the diplomatic level. The same principle had been repeated in the General Convention of Inter-American Conciliation signed at Washington on 5 January 1929 and in Article 13 of the League of Nations Covenant.

Furthermore, the two-Power amendment (A/AC.97/L.5/Rev.1) excluded the jurisdiction of the domestic courts in questions of compensation. Domestic courts, however, were the first competent bodies to which such disputes should be referred. Most arbitration agreements, whether multilateral or bilateral - including the General Convention of Inter-American Conciliation and the Arbitration Convention between Ecuador and the United States - excluded recourse to arbitration for any dispute which came within the jurisdiction of one of the contracting Parties.

Moreover, operative paragraph 4 of the Chilean draft resolution (A/AC.97/L.3/Rev.2) stated that nationalization, expropriation or requisitioning should be based on grounds or reasons of public utility, security or the national interest, and most arbitration agreements, including the General Convention of Inter-American Conciliation, excluded disputes involving the vital interests, the independence or the honour of a country from arbitration.

Lastly, the amendment proposed by Afghanistan and Sweden was superfluous even from the practical standpoint. The words "it would be appropriate" and the phrase "provided the parties to the dispute agree to such a procedure" robbed the text of all value, for if the State concerned considered it inappropriate or did not agree to submit the dispute in question to international adjudication or arbitration, it would be impossible to use that procedure. Moreover, the

provision was optional in character and the parties could at any time by common agreement submit their disputes to international adjudication or arbitration, without the need for any such amendment to the Chilean draft resolution. The Afghan representative had made the original Swedish amendment superfluous by adding the clause "provided the parties to the dispute agree to such a procedure".

Turning to the amendments proposed by the delegations of Afghanistan and the United Arab Republic (A/AC.97/L.7), he explained why the sponsors were proposing the insertion of the words "when and where appropriate" after the word "compensation" in operative paragraph 4. Although the Hague Convention of 1907 stipulated that any requisition must be accompanied by a document certifying that the property had been handed over and that the sum due must be paid as soon as possible, no period was laid down for the payment of compensation, the country concerned being left free to do so at its convenience. Moreover, the State concerned needed some time to carry out the valuation of nationalized, expropriated or requisitioned property, to collect the money needed to pay compensation to shareholders, to determine the value of the capital and property of the nationalized enterprise and to audit the accounts; that was even more difficult if the enterprise had funds and property abroad. Furthermore, the idea that the State concerned should be left free to determine for itself the period in which compensation would be paid had been accepted by the members of the Commission.

Another of the amendments (A/AC.97/L.7) would insert the word "and justly" after the word "freely" in operative paragraph 3. It sometimes happened that an ill-informed State might, without at first being aware of it, act against the interests of its people by consenting to share profits in certain agreed proportions. It was accepted in law that an agreement, even one entered into freely, was not binding on a party which had given its consent by mistake because it was not fully aware of the facts or because of misrepresentation by the other contracting party. To prevent the perpetuation of such injustices it was necessary to safeguard the future interests of the parties. Since a State always had the right to nationalize on grounds of public utility, it would be better if such nationalization were carried out under a just agreement.

(Mr. Khamis, United Arab Republic)

With regard to the draft resolution submitted by the Soviet Union (A/AC.97/L.2/Rev.1), like the Chilean draft resolution it contained some constructive provisions. It had therefore seemed opportune to incorporate two paragraphs from the Soviet draft resolution in the Chilean draft resolution. After thanking the representative of the Soviet Union for having incorporated in his revised text several of the amendments proposed by the delegation of the United Arab Republic, he read out a draft resolution[1/] designed to put the work of the Commission on a permanent basis.

Mr. PAZHWAK (Afghanistan) said that he had had no intention of making the Swedish amendment inoperative by submitting a sub-amendment to it. Moreover, the latter had been accepted by the Swedish delegation.

Mr. PETREN (Sweden) recalled that operative paragraph 4 of the Chilean draft resolution (A/AC.97/L.3/Rev.2) referred to international law. It was therefore quite natural to want any disputes arising in that field to be submitted for settlement through international arbitration or adjudication. Prior agreement on that question could be decisive in inspiring confidence in foreign investors by establishing that the country in which the investments were made would respect its international obligations.

Mr. RAYMOND (United States of America) said that he felt it necessary to refute various assertions, made at a previous meeting, which challenged certain principles of international law. It was not surprising that a society which rejected and in fact destroyed the institution of private property should refuse to accept principles of international law which were based on the recognition and protection of such property. Although it was not for the Commission to reform the laws in force or to make laws itself, it was called upon to agree on a draft resolution which would be in accordance with the generally accepted interpretation of law as it emerged from official statements and from the decisions of international organs.

The first concept to be maintained concerned the supremacy of international law over domestic legislation. That principle, which restricted the sovereignty of countries members of the international community, had been recognized for a long time. Thus, in the case of the free zones of Upper Savoy, the Permanent

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1/ Distributed subsequently as document A/AC.97/L.8.

(Mr. Raymond, United States)

Court of International Justice had laid down that "France cannot rely on her own legislation to limit the scope of her international obligations...". Similarly, in its advisory opinion concerning the treatment of Polish nationals in the Danzig territory, the Court had stated that a State "cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force". That principle had to be taken into account when the Commission went into the question of how the public authorities could dispossess owners of their property interests. Admittedly every State undoubtedly had the sovereign right, unless a treaty in force provided otherwise, to appropriate, on grounds of public utility, property coming within its jurisdiction, whether it belonged to its own nationals or to foreigners. Such dispossession, however, must be in conformity with the law. Under an established principle of international law, a State which thus seized property was bound to pay compensation, whether the dispossession was partial or total, as for instance in the nationalization of an industry or on the occasion of an agrarian reform. That principle of international law had been corroborated by international judgements. Examples were to be found in chapter III, paragraphs 49-87, of the revised study (A/AC.97/5/Rev.1) which was before the Commission. Thus the Permanent Court of International Justice, in its judgement in the case concerning the factory at Chorzow, had stated: "The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation - to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by article 7 of the said Convention." The Court had added: "It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated; ...". The highest international authority had thus recognized that, under international law, any expropriation must be accompanied by a just and equitable compensation. If those principles were not respected, international commercial and financial relations

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(Mr. Raymond, United States)

would suffer and, as a consequence, States Members of the Organization would have greater difficulty in developing their resources and in raising the level of living of their people.

Furthermore it had been adduced, by claiming that a private individual or a company could not be a subject of law under international law, that a State could break an agreement which it had freely concluded with a private person or with a company and take with impunity a part of their profits or their property, even though it had recognized their ownership of that property. That was a gross distortion of international law. While it was true that at the diplomatic level, before the International Court of Justice or some other international tribunal, a company had to have its cause pleaded and its rights protected by the State to which it belonged, the other State was not thereby entitled to break an agreement concluded with that company or to take its property without compensation. To behave in such a way would be to act like the German Government of 1914, which had broken its solemn undertaking to respect Belgian neutrality by arguing that the agreement concluded was only a scrap of paper. With such an attitude it would certainly be quite impossible today to obtain the foreign capital and technical assistance needed for the economic advancement of the under-developed countries. Mutual confidence between the nations needing such aid and the countries able to supply it was essential. Without such an atmosphere of confidence the movement of capital and international trade would quickly come to a halt. Moreover, the Economic and Social Council had taken a similar stand in resolution 512 (XVII) by recommending continuing efforts by countries seeking to attract private foreign capital to "re-examine... domestic policies, legislation and administrative practices with a view to improving the investment climate". The Commission, for its part, should take care not to express in a draft resolution the opinion that a State, large or small, old or newly independent, would have the right to take the property of others with impunity and without paying compensation.

He thought that the revised Chilean text, which was the product of various suggestions and of a complex drafting process, contained certain obscurities and gaps which should be corrected, as the United States delegation sought to do in its amendments (A/AC.97/L.9). The first preambular paragraph of the original

(Mr. Raymond, United States)

draft to be submitted to the General Assembly had been replaced by two paragraphs, and as it had not been possible to preserve the exact wording of General Assembly resolution 1314 (XIII), which referred only to a "basic constituent of the right to self-determination" reference had had to be made to "permanent sovereignty over natural wealth and resources". When those words had been omitted in the previous line the words "the Commission" had become too vague; the draft resolution to be submitted to the General Assembly must constitute a fully intelligible whole. He therefore proposed amending the part of the sentence following the comma to read: "which established the Commission on Permanent Sovereignty over Natural Wealth and Resources and instructed it to conduct a full survey". On account of the division of the original first paragraph, accuracy also demanded that in the second preambular paragraph after the words "should be respected", the words "in conformity with the rights and duties of States under international law" should be added. With regard to operative paragraph 2, he thought that the word "use" in the first line should be replaced by the word "disposition", which more closely reflected the Spanish wording. In the second line of that paragraph, the word "shall" should be changed to "should". The beginning of operative paragraph 3 had been amended to take account of the comments made by the representative of the Soviet Union. However, since that paragraph stated that capital should be governed by international law, international law should also be mentioned in operative paragraph 2, which likewise contained provisions regarding foreign investments. The words "and in accordance with international law" should therefore be added at the end of paragraph 2.

At the beginning of operative paragraph 3, it was stated that capital imported and the earnings on that capital should be governed by the authorizations granted, by national legislation and by international law. The fourth element - existing agreements - was referred to in the second sentence. The discussion had centred mainly on the question of profits, as a number of members were anxious to ensure that the profits accruing to foreign investors who developed the resources of a State, with its permission, would always be fair and equitable. It should be borne in mind, however, that not merely the agreements freely entered into concerning the sharing of profits needed to be respected but also all the terms of agreements freely made should be observed. For example, an African State wishing

(Mr. Raymond, United States)

to develop its hydroelectric and mining resources, might give an electricity company and a mining company the task of exploiting them. The former might build a dam and a State-operated power plant, which in turn would furnish the mining company with the energy it needed. Those operations could only be successful and profitable if each party respected existing agreements. That point should therefore be made clear in operative paragraph 3, and he proposed that, at the beginning of the second sentence of that paragraph, the words "Agreements freely made in each case should be faithfully observed and" should be inserted, and that in the following line the words "freely agreed upon" should be amended to read "as may be so agreed". Likewise, the words "between the investors and the recipient State" should be replaced by "between the parties concerned", as the State might not own the resources, and in the following line, the word "that" should be replaced by the words "the recipient". He also stated that he was informed the Secretariat was changing the words "public utility" in operative paragraph 4 to read "public purpose" as being a more accurate translation of the original Spanish. He therefore proposed that the words "or the national interest" should be deleted and the word "or" inserted after "public purpose".

He said that he was willing to accept the amendments numbered 1 and 4 in part A of the joint amendments submitted by Afghanistan and the United Arab Republic (A/AC.97/L.7). However, the notion of "just" introduced in sub-paragraph (ii) was not clear, and he preferred the original text, subject to the changes he had suggested. The amendments proposed in sub-paragraph (iii) raised a question of substance. He did not think that there could be any cases in which it might not be appropriate to pay compensation, nor was he in favour of replacing the word "appropriate" by the word "adequate". Compensation must not only be adequate; it must be prompt and effective. However, the wording proposed by the representatives of Afghanistan and the United Arab Republic contained only one of those essential elements. The word "appropriate" now in the text had no technical or limited meaning but was merely descriptive. He therefore could not agree to the amendments in sub-paragraph (iii) (a) and (b). He had no objection to the first amendment in part B, provided that the Secretariat agreed that the Commission could address a direct request to the International Law Commission.

(Mr. Raymond, United States)

With regard to the second amendment in part B, he recalled that, under its present terms of reference, the Commission on Permanent Sovereignty over Natural Resources was required to conduct a full survey of the legal status of permanent sovereignty over natural wealth and, where necessary, to make recommendations. The decision on whether the work should be continued under new terms of reference would have to be made by a higher body. The Commission's report might mention that such a proposal had been made and had received the support of several members of the Commission.

He was fully inclined to support the amendment proposed by Afghanistan and Sweden, since the pacific settlement of international disputes should be encouraged. In conclusion, he said that he would vote for the Chilean draft resolution, subject to the reservations he had just made, and that he would vote against the Soviet draft resolution for the reasons he had expressed at the twenty-fifth meeting.

Mr. BRILLANTES (Philippines) said that in view of the important question before the Commission, he wished to recall some general considerations that would clarify his delegation's stand on the Chilean draft resolution (A/AC.97/L.3/Rev.2). All the countries represented on the Commission had the inalienable right to benefit from the application of the principle of the dignity and worth of the human person. They were all equally sovereign, and that sovereignty should not be affected by such considerations as territorial divisions, population, wealth, intellectual ability or scientific knowledge. The resolution to be adopted by the Commission would not be compulsory in the same way as a national law; its value would largely depend on the solidarity and good faith not only of the countries represented on the Commission but of all States Members of the United Nations. In order to fulfil the task assigned to it by the General Assembly, the Commission should not give precedence to one system of law over another but should ensure that international co-operation in the economic development of under-developed countries was compatible with the principle of national sovereignty.

He supported the United States amendment (A/AC.97/L.9) whereby the words "which instructed the Commission" at the beginning of the first preambular paragraph of the draft resolution to be submitted to the General Assembly would be replaced by the words "which established the Commission on Permanent Sovereignty over Natural Wealth and Resources and instructed it". He agreed that, in the first

(Mr. Brillantes, Philippines)

line of operative paragraph 2, the word "use" should be replaced by the word "disposition", and he proposed that the word "those" should in that same line be replaced by the word "such", and in the second line, by the word "these".

He thought that, in order to avoid any ambiguity, the word "it" in operative paragraph 3 should be replaced by the words "the terms thereof", which would correspond to the French text. He assumed that the word "authorization" in that paragraph and in the preceding one referred not only to the "terms and conditions" governing the exploration, development and use of natural resources, but also to the agreements referred to in the fourth preambular paragraph of the draft resolution which was to be submitted to the General Assembly. If that was so, there was no need to amend the first sentence in operative paragraph 3 any further, but if that was not so, it would be advisable to add the words "or by the agreement, as the case may be".

He saw no objection to the addition of the words "and justly" after the word "freely". With regard to the words "between the investors and the recipient State", it had been pointed out that the State and individuals could not be placed on the same footing as the latter were not subjects of international law. However, the word "investor" had a general meaning and could refer to public as well as private investment. Similarly, the recipient of an investment could be a State or a private enterprise. Hence there was a lack of balance in the present wording. He proposed two alternatives: either to delete the words "between the investors and the recipient State", a change which would not alter the meaning at all, or to replace the words "of that State's" by the words "of the recipient State's". In either case the words at the end of the paragraph, "that State's sovereignty over its natural wealth and resources", ought to be replaced by the words "the sovereignty of peoples and nations over their natural wealth and resources".

Operative paragraph 4 dealt with the measures which could be taken by a State to express or implement the collective will of a people in the exercise of its sovereignty over the national wealth and resources, namely, nationalization, expropriation and requisitioning. The result of such measures was in some cases a loss of property, and that inevitably posed the question of compensation. The authority and competence of the State to exercise those rights had not been

(Mr. Brillantes, Philippines)

disputed or questioned. In fact, everyone was unanimous in recognizing such rights and their inalienable nature. The problems and difficulties before the Commission concerned the possible consequences of the exercise of that right, the most important and controversial aspect of which was compensation. The principle of compensation applied, in the strict sense, only to private property seized by the State, and it embodied the legal maxim that no one should enrich himself unjustly at the expense of others.

Judging from what had been said by the representatives who had spoken before him, he was inclined to think that the question of compensation was the crux of the debate. A large majority of the Commission appeared willing to admit that all States had a duty to pay compensation in cases of nationalization, expropriation or requisitioning, but even those members which agreed on the principle were divided as to how much and when. Some wanted the strict minimum; others, in the name of international co-operation, would like the duty to be recognized as explicitly as possible and to be subject to a minimum of prerequisites. The right to compensation was recognized by his delegation, and the Constitution of the Philippines laid down that private property should not be taken for public use without just compensation.

He did not think that the Commission's terms of reference obliged it to enter into the details of compensation. To avoid any clash between ideologies or between different political and social systems, it would be simpler for the Commission to confine itself to a general statement repeating the general principles recognized in international law. For that purpose, it might be sufficient to delete the word "appropriate" in the second sentence of operative paragraph 4. Similarly, he urged the representatives of Afghanistan and the United Arab Republic to withdraw their amendment (iii) to part A of the Chilean draft resolution (A/AC.97/L.7).

He proposed that a separate vote should be taken on the second sentence of operative paragraph 4 so as to enable the members of the Commission to express their views on the question of compensation.

During the informal meetings of the Commission, he had submitted a draft which stressed the importance of international co-operation for the economic development

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(Mr. Brillantes, Philippines)

of under-developed countries. He was gratified that the representative of Chile had included his proposal in operative paragraph 6 of the revised draft. In order to make the wording more forceful, he proposed that the words "whether it takes" should be replaced by "whether in" and that the words "so oriented as" should be replaced by "so encouraged as".

Turning to the amendments submitted by Afghanistan and the United Arab Republic (A/AC.97/L.7) to part B of the Chilean draft resolution, he too believed that paragraph (a) would be more appropriate in part A, since it was not for the Commission but for the General Assembly to request the International Law Commission to speed up its work. With regard to paragraph (b) of part B, it had been replaced by draft resolution A/AC.97/L.8. In that connexion he agreed with the representatives of Chile, the Netherlands and Sweden that it would be bad taste for the Commission to request the Economic and Social Council and the General Assembly to make the Commission a permanent United Nations body. That had certainly not been the Chairman's intention when he had referred to the matter in his preliminary statement. He himself proposed that the operative part of the draft resolution submitted by the United Arab Republic (A/AC.97/L.8) should be replaced by the following wording:

> "Recommends that the United Nations studies on the status of the permanent sovereignty of peoples and nations over their national wealth and resources be conducted on a continuing basis".

He said that he intended to speak at a later stage concerning the draft resolution submitted by the Soviet Union.

Mr. PAZHWAK (Afghanistan) said that he wished to make it clear that he had withdrawn amendment (b) (A/AC.97/L.7) to part B and that the representative of the United Arab Republic had resubmitted it in the form of another draft resolution. He agreed with the representative of the Philippines that it would be bad taste to recommend renewing the Commission's mandate; his original proposal had been made for the purpose of placing the work of the United Nations on a permanent basis. He considered that formula to be preferable, since it was for the General Assembly to decide on the method of implementation once the principle had been accepted. He

(Mr. Pazhwak, Afghanistan)

could not agree with the United States representative that the Commission was barred from making such a recommendation because of its restricted terms of reference.

Mr. KHAMIS (United Arab Republic) accepted the wording proposed by the representative of the Philippines.

The meeting rose at 12.50 p.m.