Document:-
A/CN.4/L.237

Draft articles on succession of States in respect of matters other than treaties: new article proposed by the Special Rapporteur - reproduced in A/CN.4/SR.1351

Topic:
Most-favoured-nation clause

Extract from the Yearbook of the International Law Commission:-
1975, vol. I

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30. Referring to an observation by Mr. Ushakov, that the articles referred solely to treaties of a universal character, he said that the treaties could be general treaties, particularly regional treaties. Those treaties could also be defined, as he had defined them in paragraph 2 of his new article 19, by expressing in negative form the criteria laid down in article 20, paragraph 2, of the Vienna Convention. Then, if it did not follow either from the limited number of the negotiating States, or from the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty, the general rule in article 20, paragraph 1, of the Vienna Convention applied to a treaty to which an international organization was a party.

31. Mr. AGO said it was important to consider all the possible consequences of the change of régime which the Commission was preparing to accept. He had in mind the case where a treaty was adopted at a general conference in which States and international organizations were participating on terms of equality. It was not only through the operation of reservations that an international organization might cease to be a party to that treaty; it could happen that, after the adoption of the treaty, an international organization might consider that it was not entirely satisfactory and refrain from approving it. The treaty, when ratified by the States concerned, would become a treaty concluded between States. Must it then be considered to be governed by the Vienna Convention? In his opinion it must not, because the international organizations retained the right to become parties to the treaty. If they subsequently approved it, the treaty, which would in the meantime have been governed by the Vienna Convention, would once again fall within the scope of the future convention.

32. Sir Francis VALLAT said that he was anxious that there should be no doubt as to which of the two régimes would apply. He was thinking of the possibility that a State might in the future be a party both to the Vienna Convention on the Law of Treaties and to the convention that would result from the draft articles now under discussion. Care would have to be taken to show clearly which of the two conventions would apply in a particular situation. It was essential that the Commission should clarify its views on the fundamental point of the relationship between the rights and obligations under the Vienna Convention and those provided for in the draft. That problem had only stood out sharply when the Commission had taken up the articles on reservations.

33. As he saw it, the effect of paragraph 1 of draft article 19 would be to apply to any treaty not falling under paragraph 2 the régime applicable under article 20, paragraph 2, of the Vienna Convention, if one State participated in the treaty. According to the Special Rapporteur, if an international organization participated in a treaty together with States, then of necessity the treaty became a restricted multilateral treaty in the sense of article 20, paragraph 2, of the Vienna Convention; but it was doubtful whether that was necessarily so. There might be many conferences in the future in which an organization would participate in much the same way as a State. Was it contended that, simply because a conference was not a universal conference, even States were to be prevented from making reservations in accordance with the facilities granted to them by article 19 of the Vienna Convention? That seemed to be a very restrictive view.

34. Mr. USHAKOV said that only treaties between one or more States and one or more international organizations, excluding treaties between international organizations only, could fall within the scope of the Vienna Convention. As regards treaties between international organizations, he agreed with the Special Rapporteur that they could not be of a universal character. As for treaties in the other category, he wondered how their restricted character was to be decided. Was it the number of States or the number of international organizations which had participated in the negotiation of the treaty that had to be limited? Perhaps it would be better, in the articles on reservations, to separate treaties between international organizations, which created fewer problems, from treaties between States and international organizations, which could lead to the application of the rules of the Vienna Convention. For the latter category of treaties, a general rule might be formulated.

35. Mr. REUTER (Special Rapporteur), referring to the case envisaged by Mr. Ago, said that a general saving clause would appear to be necessary, but a decision on its wording should be left until later. In reply to Mr. Ushakov, he said that the Commission might consider examining separately the case of treaties between international organizations and that of treaties between States and international organizations. With regard to the terms to be used to describe the scope of treaties, he would suggest abandoning the adjectives "universal" and "general", which had no equivalents in the Vienna Convention on the Law of Treaties. As he had already said, it would be better to state in negative form the criteria set out in article 20, paragraph 2, of that instrument.

36. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer articles 22 and 23 to the Drafting Committee, which would thus have before it the whole section on reservations, articles 19 to 23.

It was so agreed.

The meeting rose at 4.30 p.m.

1351st MEETING

Wednesday, 16 July 1975, at 10.15 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Draft report of the Commission on the work of its twenty-seventh session (A/CN.4/L.231 and L.232)

Chapter I

ORGANIZATION OF THE SESSION

1. The CHAIRMAN invited the Commission to examine chapter I of its draft report (A/CN.4/L.231) paragraph by paragraph.

Paragraph 1

2. Mr. KEARNEY suggested that the final phrase of the third sentence should be amended to read "... as well as commentaries to the six of those articles provisionally adopted ..." and that the fourth, fifth and sixth sentences should be amended in the same way.

It was so agreed.

Paragraph 1, as amended, was approved.

Paragraph 2

Paragraph 2 was approved.

Paragraph 3

3. Mr. ŠAHOVIĆ proposed that, in paragraph 3, a sentence be added to the effect that, because of their official duties, certain members of the Commission had not been able to attend a number of meetings.

4. *Mr. USTOR* supported that proposal.

Mr. Šahović's proposal was adopted.

Paragraph 3, as *amended, was approved.*

Paragraph 4

Paragraph 4 was approved.

Paragraph 5

5. Mr. ELIAS suggested that, since Sir Francis Vallat had been absent for only a few meetings, the final sentence of the paragraph should be amended to read "Mr. Juan José Calle y Calle also served on the Committee for some time.".

It was so agreed.

Paragraph 5, as amended, was approved.

Paragraph 6

Paragraph 6 was approved.

Paragraph 7

6. Mr. SETTE CÂMARA asked whether the Commission would in fact take up item 7 of its agenda at the present session.

7. Mr. KEARNEY said that the Planning Committee[1] hoped to be able to circulate its report on item 7 to the Commission the following week.

Paragraph 7 was approved.

Paragraph 8

Paragraph 8 was approved.

Chapter I of the draft report, as a whole, as amended, was approved.

[1] See 1302nd meeting, para. 32.

Chapter II

STATE RESPONSIBILITY

8. The CHAIRMAN invited the Commission to examine the introduction to chapter II of its draft report (A/CN.4/L.232).

A. INTRODUCTION

1. *Historical review of the work of the Commission.*

9. Mr. KEARNEY said that some criticism had been expressed of the increasing length of the Commission's reports and he accordingly suggested that the historical review of the Commission's work be condensed wherever possible.

10. Mr. AGO (Special Rapporteur) said that the historical review of the work of the Commission had been included in the report, at the request of the Secretariat, mainly for the benefit of those members of the Sixth Committee of the General Assembly who might not have seen the previous reports and therefore might not be familiar with what had been done in the field of State responsibility. The present historical review, which was somewhat shorter than in previous years, was characterized by the fact that it was a nearly complete review, not only of what had already been done, but also of what was being prepared in part I of the draft. He therefore hoped that it would prove useful.

11. Mr. TSURUOKA said that he understood the concern expressed by Mr. Kearney, but felt that it was necessary to retain the historical review of the Commion's work because it would facilitate reading of the report, particularly for young officials of Ministries of Foreign Affairs in the various countries.

12. Mr. HAMBRO said he would be reluctant to approve a lot of new matter which he had not yet had time to study.

13. Mr. AGO (Special Rapporteur) said that paragraphs 1 to 22 did not contain any really new matter; it was all to be found in the reports of previous years. Paragraphs 23 to 43, however, and particularly paragraphs 30 to 36, concerning the general plan of the draft, required careful consideration.

Paragraphs 1-22 were approved.

2. *General remarks concerning the draft articles.*

Paragraphs 23 and 24

Paragraphs 23 and 24 were approved.

Paragraphs 25 and 26

14. Mr. ŠAHOVIĆ said that paragraph 25 stressed the difference between the question of the responsibility of States and the question of liability for risk, while paragraph 26 stated that those two topics possessed "certain common features". He therefore wondered whether the distinction made in paragraph 25 between those two topics was not too rigid.

15. Mr. AGO (Special Rapporteur) said that, in that respect as well, the report contained no substantive innovation as compared with the reports of previous years. It would not be very advisable to introduce

changes which might give the impression that the Commission had changed its mind.

16. Mr. SETTE CÂMARA, supported by Mr. CASTAÑEDA, proposed that, in view of the interest shown by the Sixth Committee of the General Assembly in the study by the Commission of the topic of international liability for injurious consequences arising out of certain acts not prohibited by international law, the Commission should indicate more positively in the first sentence of paragraph 26 its willingness to take up that subject in the future.

17. Mr. AGO (Special Rapporteur) said that that proposal involved some risk. He could agree to state that the Commission would consider the possibility of carrying out such a study, but it would then be necessary to appoint a working group to consider the matter and report to the Commission. In his own opinion the question of international responsibility for injurious consequences arising out of certain acts not prohibited by international law was a very wide topic which was still developing, and it was probably not quite ripe for codification. The Commission should be very careful not to commit itself definitely to codification of the topic without first deciding that codification was possible.

18. Mr. KEARNEY suggested that the point raised by Mr. Sette Câmara and Mr. Castañeda might be covered by deleting from the first sentence of paragraph 26 the words "in due time".

19. Mr. ELIAS said that the words "in due time" were necessary in view of the programme of work on the topic of State responsibility already established by the Commission.

Paragraphs 25 and 26 were approved.

Paragraphs 27-30

Paragraphs 27-30 were approved.

Paragraph 31

20. Mr. KEARNEY suggested that the word "pragmatic" be deleted from the final sentence of the paragraph.

It was so agreed.

Paragraph 31, as amended, was approved.

Paragraph 32

21. Mr. SETTE CÂMARA suggested that the word "prefacing" in the first sentence of the English version of the paragraph be replaced by the word "beginning".

22. Mr. AGO (Special Rapporteur) said that definitions were not rules and that they came before rules. He therefore found the word "prefacing" satisfactory, but it could just as well be replaced by the word "beginning".

It was so agreed.

Paragraph 32, as amended, was approved.

Paragraph 33

23. Mr. ŠAHOVIĆ said he wondered whether the words "Broadly speaking", at the beginning of the second sentence, were necessary.

24. Mr. AGO (Special Rapporteur) suggested that they be replaced by the equivalent words "In general".

Paragraph 33, as amended, was approved.

Paragraph 34

Paragraph 34 was approved.

Paragraph 35

Paragraph 35 was approved.

Paragraph 36

25. Mr. USHAKOV said that it should once again be stressed that the plan of a possible third part of the draft was entirely provisional and that the Commission had not yet taken any decision in the matter.

26. Mr. AGO (Special Rapporteur) said that Mr. Ushakov was perfectly right. He (the Special Rapporteur) was convinced that a third part was completely unnecessary; he could see no good reason to introduce into the draft a part dealing with the so-called "implementation" of responsibility, an expression which in fact covered something different from the responsibility itself. The final sentence of paragraph 36 stated clearly that "It is in any case too early to take a final decision in the matter".

27. Mr. ŠAHOVIĆ said he wondered whether that was why the Special Rapporteur had placed the word "implementation" in quotation marks.

28. Mr. AGO (Special Rapporteur) said that the implementation of responsibility was a vague concept used only by certain writers and that the Commission must consider the matter carefully before definitely deciding to use it. The question of the exhaustion of local remedies would be considered in part I of the draft, since in his view it was at the very source of responsibility.

Paragraph 36 was approved.

Paragraph 37

29. Mr. AGO (Special Rapporteur) said he wished to draw attention to foot-note 33. He had described in advance the plan of the various chapters in part I of the draft because he thought that it might be useful for the members of the Sixth Committee to have a general idea of the structure and contents of that part.

30. Mr. ŠAHOVIĆ said that the table was very useful because it would provide an excellent basis for discussion in the General Assembly and enable the Commission to know what States thought of it.

31. Mr. USHAKOV suggested that, in foot-note 33, the word "very" should be added before the word "approximate".

It was so agreed.

Paragraph 37, as amended, was approved.

Paragraphs 38-40

Paragraphs 38-40 were approved.

Paragraph 41

32. Sir Francis VALLAT said that he would be glad to have an explanation from the Special Rapporteur of the meaning of the words "or other" in the phrase "customary, convention or other", which appeared after the words "the source of the international legal obligation breached" in the third sentence of paragraph 41.

33. Mr. AGO (Special Rapporteur) said that the words "or other" were intended to cover cases of obligations

which had their source neither in customary international law nor in the provisions of a treaty. He could give two examples: obligations arising from a decision of the International Court of Justice and obligations imposed by an organ established by a treaty.

34. Sir Francis VALLAT said he was glad to have that explanation but he feared that the point would not be clear to the average reader of the Commission's report. He suggested that a foot-note be added containing the Special Rapporteur's explanation.

35. Mr. AGO (Special Rapporteur) said that he had no objection to including a foot-note, but the paragraph in question was merely intended to indicate the work on which the Commission proposed to embark in 1976.

36. Mr. HAMBRO said that perhaps the most practical solution was simply to delete the phrase "customary, convention or other". In view of the purpose of paragraph 41, it was not necessary to enter into a classification of the sources of international legal obligations.

37. The CHAIRMAN suggested that the Special Rapporteur be invited to amend paragraph 41 either by adding an appropriate foot-note or by deleting the phrase in question.

It was so agreed.

38. Mr. KEARNEY drew attention to the sentence towards the end of paragraph 41 which read: "A matter which will be examined in this context is the validity of the rule that local remedies must be exhausted before, for example, the breach of certain obligations relating to the treatment of aliens can be established". That sentence was placed after a sentence which drew a distinction between an obligation of conduct and an obligation of result.

39. At the same time, he noted that in paragraph 37 the words "exhaustion of internal remedies" (placed between brackets) had been appended to the title of article 20 which read "Breach of an obligation of result". The title of article 19 was: "Breach of an obligation of conduct". That presentation, taken in conjunction with the remarks in paragraph 41, appeared to imply that the problem of exhaustion of local remedies was related to the whole question whether the breach related to an obligation of conduct or to an obligation of result. In actual fact, the question of the exhaustion of local remedies went far beyond the problem of obligations of conduct or of result. The exhaustion of local remedies could be affected by factors which were completely external to the type of obligation involved.

40. Mr. AGO (Special Rapporteur) said that obligations under international law were for the most part obligations of result; that being so, it was immaterial how the result intended by international law was achieved, provided that it was finally assured. The question of the exhaustion of local remedies arose in connexion with obligations of result, and he expected that the whole question would be discussed by the Commission at its next session; the reference to the matter in paragraph 41 was only a passing one.

41. He had considered it necessary to include a parenthetical reference to the exhaustion of local remedies in the list of headings which appeared as titles of articles in chapter III (Breach of an international obligation) in paragraph 37 of the draft report because it would have seemed strange to delegations in the General Assembly if no mention had been made in that list of the well-known rule of the exhaustion of local remedies. The list of headings was, of course, only a very provisional one and the Commission was not committed in any way to it.

42. In order to allay the concern expressed by Mr. Kearney, the opening words of the sentence quoted by him might be amended on the following lines: "A matter which the Special Rapporteur proposes to study in this context is the validity of the rule that local remedies must be exhausted . . .". The responsibility would thus rest with the Special Rapporteur and not with the Commission.

43. Mr. CASTAÑEDA suggested that the difficulty be overcome by retaining the heading "Exhaustion of internal remedies", not as an appendix to the title of article 20 but as the title of an entirely separate article. The rule of the exhaustion of local remedies was sufficiently important to be the subject of an article on its own. His suggestion would have the advantage of not tying the rule of the exhaustion of internal remedies to any particular type of breach. The reference to that important rule would thus be retained, but without prejudging the issue.

44. Mr. AGO (Special Rapporteur) said that he was opposed to the suggestion that there should be a special article on the exhaustion of internal remedies in the particular context. In his own opinion, the rule in question was completely tied to the breach of an obligation of result. It was only in relation to that type of obligation that the rule had a substantive meaning. In connexion with other types of obligation, it could only have a procedural meaning.

45. Another possibility would be simply to delete the words "exhaustion of internal remedies" which appeared in parentheses immediately after the title of article 20, although he would be reluctant to do so.

46. Mr. USHAKOV said that all the headings appearing in chapter III were of a very approximate character, as already stressed in foot-note 33.

47. The CHAIRMAN suggested that the Special Rapporteur be asked to adjust the table in paragraph 37 and paragraph 41 to meet the point raised by Mr. Kearney.

It was so agreed.

Paragraph 41, as amended, was approved.

Paragraph 42

Paragraph 42 was approved.

Paragraph 43

48. Mr. PINTO said he noted the use in the title of section (5) and in the first sentence of paragraph 43 of the phrase "attenuating or aggravating circumstances". Consideration might be given to replacing the word "attenuating" by the word "extenuating", which was the more usual adjective.

49. Sir Francis VALLAT said that the two words had virtually the same meaning but, on reflection, he would prefer to see the word "attenuating" retained.

Paragraph 43 was approved.

The introduction to chapter II, as amended, was approved.

Succession of States in respect of matters other than treaties
(A/CN.4/282; A/CN.4/L.237)
[Item 2 of the agenda]
(resumed from the 1330th meeting)

NEW ARTICLE PROPOSED BY THE SPECIAL RAPPORTEUR (A/CN.4/L.237) [2]

50. The CHAIRMAN drew attention to the new article proposed by the Special Rapporteur, which read:

1. If part of a State's territory becomes part of the territory of another State, the passing of State property of the predecessor State to the successor State shall be settled by agreement between the predecessor and successor States.

2. In the absence of such agreement:

(*a*) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in the territory to which the succession of States relates shall pass to the successor State;

(*c*) movable State property other than that mentioned in sub-paragraph (*b*) shall pass to the successor State in an equitable proportion.

He invited members to comment on the article with a view to its being referred to the Drafting Committee as early as possible.

51. Mr. ELIAS said that, in view of the importance of the proposed new article, it was essential that it should be introduced by the Special Rapporteur, so that the Commission could hold an informed discussion.

52. Mr. USHAKOV said that, with regard to the topic of succession of States in respect of matters other than treaties, the Commission should first adopt the relevant chapter of its report. When it had done so, it could proceed to deal with the proposed new article.

53. Mr. KEARNEY said that the text of the proposed new article seemed inconsistent with the general approach adopted in preceding articles which had been referred to the Drafting Committee. In the new article a distinction was made between immovable and movable State property. A new classification was introduced with regard to succession of States to the two types of property, as well as a new type of qualification regarding two kinds of movable State property. That approach departed completely from the position taken by the Commission in earlier articles, which dealt with the effects of a succession of States on all State property.

54. In view of the fundamental nature of those issues, it was necessary that they should be discussed in the presence of the Special Rapporteur. Only in that manner could the Commission reach a reasoned view on the proposal now before it.

55. Sir Francis VALLAT said that it was not possible for the Commission to do justice to the very important proposed new article in less than two full meetings, with the assistance of the Special Rapporteur. In view of the pressure of time, he felt that the only course open to the Commission was to do as it had done at the previous session with certain proposed articles that it had not been able to discuss, namely, to mention the proposal contained in document A/CN.4/L.237 in a foot-note, explaining that the Commission had not had time to deal with it.

56. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that it would not be right for such an important proposal to be referred to the Drafting Committee without a full discussion in the Commission itself. There was also a problem of administrative convenience: the Drafting Committee had at present to give first priority to the draft articles on treaties concluded between States and international organizations or between two or more international organizations.

57. Mr. HAMBRO said that, in view of the serious objections raised by Mr. Elias, Mr. Kearney, Sir Francis Vallat and the Chairman of the Drafting Committee, it was evident that the proposed new article could not be referred to the Drafting Committee. He agreed that the only course open to the Commission was to mention it in a foot-note.

58. Mr. USHAKOV said that it was essential that the Commission should adopt, in the presence of the Special Rapporteur, the chapter of its report dealing with the topic of the succession of States in respect of matters other than treaties. Should the time available at the present session so permit, the Commission could examine the proposal contained in document A/CN.4/L.237; in that case, the Commission should focus its attention on the general idea embodied in the proposal rather than on the wording.

The meeting rose at 12.45 p.m.

1352nd MEETING

Thursday, 17 July 1975, at 10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Castañeda, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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[2] See discussion on article 12 at the 1325th meeting, para. 6, and following meetings.