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Summary record of the 1327th meeting

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

Extract from the Yearbook of the International Law Commission:-
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passed from the predecessor State to the successor State. His own view was different. Under contemporary customary international law, the predecessor State had no obligation to transfer the currency, treasury, State funds and other items in question. It was precisely because no such obligation existed under international law that the States concerned found it necessary to settle those questions expressly by treaty.

29. Mr. SETTE CÂMARA said he had no difficulty about the principle underlying article 12. An article of that kind would be necessary if the Commission decided to make specific provision for the transfer of the various kinds of State property, though it was doubtful whether currency could be described as State property.

30. He supported the Special Rapporteur's decision to drop from article 12 the former paragraph 1 which stated that the privilege of issue belonged to the successor State throughout the transferred territory.[11] The right to issue currency was an inherent sovereign right; it did not depend on any rule.

31. In the new text of paragraph 1, the reference to the transferred territory was a source of difficulty. The provision related to currency and gold reserves in the transferred territory; but in modern times most States kept considerable reserves abroad, including much of their gold. For example, all the members of the International Monetary Fund had to keep their IMF quotas with that organization; one quarter of those reserves consisted of gold and the remainder of certain currencies. It would be necessary to clarify paragraph 1 in that respect, for as the text now stood, no part of the reserves held abroad would pass from the predecessor State to the successor State. Another difficulty was created by the reference to currency and other reserves "allocated to" the transferred territory. In a modern State, it was not possible to determine the share of the currency, gold and foreign exchange reserves allocated to a particular territory.

32. Paragraph 2 of article 12 provided that the assets of the central institution of issue in the predecessor State would be apportioned "in proportion to the volume of currency circulating or held" in the transferred territory. In view of the high mobility of currency, it would be virtually impossible to ascertain what amount was in circulation on the date of succession. Hence Mr. Kearney's suggestion that an average for a period of six months should be taken seemed realistic, despite the practical difficulties involved. But he did not see any justification for adopting a ratio based on the volume of currency circulating or held in the transferred territory. That criterion was inappropriate because a financial centre would have an enormous amount of money in circulation, whereas an industrial area making a much greater contribution to the economy of the country would have far less. A number of other criteria had been suggested, such as the gross national products of the country and of the transferred territory. Other factors which could be taken into account were taxation revenue and population.

The meeting rose at 12.50 p.m.

[11] *Ibid.*, p. 34, article 12.

1327th MEETING

Wednesday, 11 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Kearney, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

Succession of States in respect of matters other than treaties

(A/CN.4/282)[1]

[Item 2 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Currency)[2] (*continued*)

1. Mr.TSURUOKA said that the rule stated in article 12 was not the only possible solution for the currency problem. It should therefore be presented as a residuary rule, with the addition of the proviso "unless otherwise agreed". In his opinion, the Special Rapporteur had over-stressed the claim and debt aspect of currency; for its nature had changed considerably in recent years. A distinction should be made between currencies that were traded on the world market and other currencies. In the case of a worldwide currency like the dollar, it was not necessary to make provision for compensation in gold or foreign exchange; but where a currency was not in worldwide use, the question of compensation might arise. For example, when the island of Okinawa had been returned to Japan, since the dollar was a worldwide currency universally accepted as means of payment, the agreement concluded between Japan and the United States of America had not contained any special provision concerning currency. As an internal measure, however, the Japanese Government had decided to make up the difference between the dollar rate of exchange prevailing at the date of the return of the island—305 yen—and the rate before the monetary crisis—360 yen. It had accordingly paid the difference of 55 yen to all dollar holders who wished to convert their dollars into yen. On the other hand, when the island of Amami Ô shima had been returned to Japan, the currency question had been settled differently, because the American occupation authorities had issued a currency which had been legal tender in that island only. The Japanese Government, by the agreement concluded on the matter with the United States, had waived all claim against the United States Government for monetary compensation.

2. Those examples showed that the currency problem could not be settled in the same way in all cases, even when the same countries were involved, and that each case required separate treatment. Thus the Commission should be extremely cautious about stating a rule

[1] *Yearbook ... 1974*, vol. II, Part One, pp. 91-115.

[2] For text see 1325th meeting, para. 6.

on currency, for the diversity of situations was such that it was difficult to establish a uniform rule. He was not opposed to stating a residuary rule, however, with the addition of the necessary proviso to paragraph 1 of article 12.

3. As to paragraph 2 of article 12, it was very difficult to decide what criteria should be adopted for the apportionment of the assets of the central institution of issue. The ratios between gold and foreign exchange reserves and the currency in circulation had changed so much in recent times that the assets of the central issuing institution could hardly be regarded as backing for the currency. It would be better to privide that the assets of the central issuing institution of the predecessor State were not affected by the succession of States.

4. It was also necessary to define what was meant by "transfer of part of a territory". For that purpose the Commission should revert to the formula it had adopted in 1974 in the draft articles on succession of States in respect of treaties. [3]

5. He noted, incidentally, that article 13 contained a reference to the public debt, which was not mentioned in article 12. The two articles should be brought into line.

6. It was difficult to lay down, in article 12, a uniform rule applicable in all circumstances, for allowance had to be made for the diversity of situations and possible solutions. Hence it should be clearly stated that in most cases currency questions were settled by an international agreement. Even if a residuary rule was laid down, its practical value would be slight, for recent examples showed that the transfer of part of a territory, within the meaning of article 12, gave the successor State such advantages that it seldom claimed monetary compensation from the predecessor State. Great caution should therefore be exercised in laying down any rule on the subject.

7. Mr. QUENTIN-BAXTER, referring to the important question of the relationship between the draft articles under discussion and the doctrine of sovereignty over natural resources, which had been raised by Mr. Pinto, [4] said that at some future stage in its work the Commission should consider the principle of sovereignty over natural resources. There were good reasons, however, why it had not so far included a statement of that principle in the draft. The first of those reasons was undoubtedly the generality of the principle, which the Commission had taken into account in deciding not to enunciate it in article 10, in the limited context of the authority to grant concessions. The Special Rapporteur had agreed to drop from that article the former paragraph 3 (A/CN.4/282), which had reserved "the right of eminent domain of the State over public property and natural resources in its territory"; that provision had been a clear reference to the question of sovereignty, which went much deeper than that of ownership. Similarly, in the case of article 12, the same considerations had led the Special Rapporteur to drop the reference to the right to issue currency which had appeared in the version of that article in his sixth report. [5]

8. Another sound reason for not stating the principle of sovereignty over natural resources was that such a statement would involve the danger of mixing two levels of rules: those relating to sovereignty and those relating to ownership. In his view, a clear distinction had to be maintained between the plane of sovereignty and the plane of ownership. The purpose of the draft articles was to trace the consequences of the change of sovereignty over the territory to which the succession of States related; those consequences were examined at the level of domestic law. In a sense, the topic under discussion was at the intersection of international law and domestic law. The rules of international law that were being framed related to property, which had to be identified by the form given to it in municipal law. He considered that the Commission had been entirely correct in deciding to confine the provisions of the draft to State property defined as such by the law of the predecessor State, which was the law in force at the time of the succession.

9. In his opinion the Commission should not, at that stage, discuss the question of resources which had not been reduced to ownership under the domestic law of the predecessor State. Systems of internal law differed greatly, particularly with regard to the extent of private property rights. In the common law countries, rights of ownership in land, whether vested in a private person or in a public body, were always subject to the sovereign's right of eminent domain. In his own country, New Zealand, the right of eminent domain had existed from the outset. Land was held under Crown grants by individuals or by the State itself, but behind the grant there was the right of the sovereign to interfere with the ownership of the land for reasons connected with the public interest. Moreover, vast areas of mountain and other land remained in sovereignty and had never been reduced to ownership. The draft articles now under discussion were concerned with the passing, at the level of ownership, of certain property from the predecessor State to the successor State. The question of the sovereign's residual right behind ownership was outside the scope of the draft.

10. It was significant that the Commission had instinctively refrained from entering into the distinction between the public domain and the private domain of the State. That distinction was peculiarly a matter of domestic law; indeed, it was totally alien to, or even in conflict with, the basic tenets of constitutional theory in some countries. If the Commission were to go beyond the question of ownership under domestic law, it was likely to get involved once more in that distinction and the difficulties to which it gave rise. He appreciated the concern of those who suggested that the distinction between movable and immovable property should be introduced into the draft; but views on that distinction were coloured, if not governed, by the varying conceptions of domestic law, and for that reason he did not favour its introduction. The Commission should move

[3] *Yearbook ... 1974*, vol. II, Part One, document A/9610/Rev.1, chapter II, section D, article 14.

[4] See 1325th meeting, paras. 3 and 4.

[5] *Yearbook ... 1973*, vol. II, p. 34.

towards a mixed solution; the physical presence of property in the territory to which the succession related should not be the only criterion to be taken into consideration. The Special Rapporteur himself had suggested some other means of attachment to, or connexion with, the territory.

11. He had been impressed by Mr. Kearney's remarks on the danger of attempting to deal in a single article with several rather specialized subjects. [6] The Commission was expected to draw up rules that would be applicable at the level of domestic law. The issue was not just what attitude would be adopted by States that enacted legislation in order to give effect to their obligations under international law. There was the very much more mechanical process of actually applying the rules in question in commercial and fiscal relations. Mr. Kearney had also pointed out that, in conventions on private international law, a long series of articles had often been found necessary to deal with questions that were dismissed in a single article in the present draft. [7] But the Commission had neither the means nor the time to enter into those questions in great detail.

12. The Commission generally worked on the assumption that the rules it drafted would be in the nature of residuary rules, and there was certainly much merit in that approach. The situations that arose in regard to State succession were so complex and so individual that in almost every case the States concerned would be well advised to enter into special agreements. Sir Francis Vallat had suggested that suitable language should be included in the draft articles to encourage the making of such agreements. [8] At the same time it was agreed by all that any set of rules drawn up by the Commission must influence States by identifying principles according to which they should act and which they should incorporate in the instruments they adopted. A rather similar task had been performed by the International Court of Justice when it had dealt with the problems of the North Sea continental shelf. [9] The Court had not restricted in any way the freedom of sovereign States to make any arrangements they considered satisfactory; it had, however, insisted that the parties must agree and that, unless there were good reasons for departing from the normal criteria, they should follow certain principles. Such being the scope of the Commission's task, it should endeavour to formulate precise and detailed articles that would operate automatically when the States concerned did not elaborate their own régime. The Commission should say expressly that States had to formulate a régime of their own and that its task was essentially to point the way and to provide guidelines for them.

13. Where matters like currency were concerned, the Commission could hardly dismiss them with broad generalities. Mr. Kearney had demonstrated the need to expand the present text of article 12, for as it stood it did not state a balanced principle on the subject of currency.

14. With regard to the point raised by Mr. Ustor, [10] he thought that the Commission's decision to ask the Special Rapporteur to adopt as a working arrangement the four types of succession of States already adopted for the draft articles on succession of States in respect of treaties had been based on sound reasons of doctrine and practical convenience. From the standpoint of doctrine, the Commission should pay due regard to fundamental principles, such as United Nations doctrine and law on decolonization and the principle of sovereignty over natural resources, as it had in its work on succession of States in respect of treaties.

15. There were also reasons of practical convenience for dividing cases of succession into four types. The case of a union of States differed from the other cases of succession of States in that no predecessor State remained and there was therefore no problem of apportionment of property. In a succession of the moving-treaty-frontier type, on the other hand, two sovereign States were involved and they were able to make the necessary arrangements before succession. The case of the newly independent State was likewise a separate one. In that case, there was a decision on the apportionment of property as between the predecessor State and the State which came into being as a result of the succession. The apportionment was usually determined by a decision embodied in an instrument other than an agreement between the States. It was precisely in order to cover that point that the formula "unless otherwise agreed or decided" had been suggested. The reference to agreement in that convenient formula covered situations of the moving-treaty-frontier type; the reference to decision covered the case of the newly independant State.

16. Both at the first reading and at the second reading of the draft articles on succession of States in respect of treaties the Commission had recognized that there could be cases of separation under conditions of disorder and unfriendly relations, in which the principles to be applied must be very much the same as those which governed a newly independent State. Throughout its work, the Commission had stressed the need to keep in close touch with the realities of international life, and it had accordingly striven to ascertain existing rules of customary international law by reference to the actual practice of States. He had therefore found somewhat disturbing the suggestion made during the discussion that for cases of the moving-treaty-frontier type there was no need to draft elaborate rules. The same applied to the idea that the rules being drafted should not be assumed to be applicable in matters with which the interested States chose not to deal. If that approach were adopted, the significance of the draft articles and their commentaries would be considerably impaired.

17. The four-column table of provisions relating to each type of succession of States [11] facilitated comparison of the rules, which showed that neither State practice nor logic dictated very different rules for the different types of succession. The Special Rapporteur had wisely left

[6] See previous meeting, paras. 20 and 21.

[7] See 1322nd meeting, para. 14.

[8] See 1319th meeting, para. 16.

[9] *I.C.J. Reports 1969*, p. 3.

[10] See 1325th meeting, para. 17.

[11] See 1323rd meeting, paras. 1-5, and 1325th meeting, paras. 15-22.

open the possibility of merging the four articles on any one class of State property. For his part, he very much welcomed that approach and urged that careful note be taken of all similarities and differences, with a view to merging articles wherever possible. In the process of drafting appropriate rules, an attempt to go into great detail was not without risk. A set of elaborate rules formulated *a priori* might prove unsuited to the needs of the predecessor State and successor States concerned; the two States would then be inclined to agree to disregard the rules. Nor did he believe that the Commission had the means or the time to produce a set of residuary rules applicable as a sort of safety net in the variety of situations which occurred in international life. But if the Commission's intention was to produce a set of guiding principles to help States reach equitable solutions, the arguments put forward by Mr. Ustor appeared less persuasive.

18. There were minor cases of succession of States in which most of the problems dealt with in articles 12 to 15 would probably not arise. An example was the transfer of a small piece of river bed never reduced to ownership, in consequence of a change in a river's course which had altered an inter-State boundary. The problems in question arose in the larger cases of succession, such as that of the absorption of Newfoundland by Canada—an example which, incidentally, showed how difficult it was to classify particular cases in the somewhat arbitrary system of four types of succession.

19. In cases in which a territory with a life and population of its own was transferred from one sovereignty to another, the question of sovereignty over natural resources would arise. He considered that in the United Nations era the major concern should be with people, not merely with States. The problems involved concerned the relationship between the geographical configuration of the territory and the local population.

20. Whatever modifications were made to meet the needs of the various types of succession of States, it had to be recognized that there were certain underlying principles which were not contradicted by State practice. That consideration tended to support the approach adopted by the Special Rapporteur. The Commission should proceed with great caution, because any concrete rules it might devise were bound to contain an important element of progressive development of international law. He therefore suggested that, in its work, the Commission should think in terms of moving-treaty-frontier cases and leave the other possible cases in abeyance. The Commission should explore the means of giving practical help in cases of succession without undertaking a task so detailed and extensive as to be unsuited to its working methods and beyond the limits of its time schedule.

21. Mr. RAMANGASOAVINA said that currency was very important State property because it was the manifestation of a regalian right of the State—an outward sign of its sovereignty. In his commentary to article 12 (A/CN.4/282, chapter IV) and in his oral presentation, the Special Rapporteur had explained the nature of currency, and that it must enable services and institutions to continue to operate in the territory to which the succession related. When one sovereignty replaced another in a particular territory, what happened to the currency and the gold and foreign exchange reserves was of capital importance, and the State assumed an obligation to back the monetary tokens it had placed in circulation. In most cases of a change of sovereignty over a territory, monetary matters were the subject of an agreement between the predecessor State and the successor State, but it was nevertheless necessary to draft residuary rules.

22. One case, which was related both to transfer of part of a territory and to secession, could be added to the types of succession adopted by the Special Rapporteur. That was the case in which a country, after acceding to independence, agreed by treaty to continue to form part of a certain monetary area and thus to maintain ties with the predecessor State. A problem of succession in respect of currency arose only when it decided to leave the monetary area in question and to have its own currency, backed, for example, by special drawing rights. That would be a kind of monetary secession or transfer of monetary sovereignty which did not, strictly speaking, affect a newly independent State. When the State in question acquired its monetary independence, the currency in circulation, even if given its own name, was still associated with the area to which it had formerly belonged and continued to be backed by a stock of gold or foreign exchange. The successor State must therefore hold its own reserves constituting a counterpart for the currency in circulation and foreign exchange claims.

23. A country's currency not only determined its credit rating abroad, but was also a reflexion of its economy and national wealth. A State which exploited its natural resources and sold them abroad obtained, as a counterpart, foreign exchange which it usually converted into the national currency, but which was backed by reserves. The accumulation of wealth, particularly in young African countries like Madagascar, sometimes took the form of the acquisition of physical property. Some inhabitants preferred to deposit their savings in banks, while others preferred to buy property, such as draught animals. In the event of a change of sovereignty, the property of the inhabitants should continue to benefit from monetary backing in the form of the reserves held by the State.

24. The principle stated in article 12, that the full ownership of currency placed in circulation and gold and foreign exchange reserves stored in the territory passed from the predecessor State to the successor State, met a need: the viability of the successor State. The same was true of the assets of the central institution of issue, for the placing of currency in circulation was justified only if it was backed by a counterpart held by the State. It was not unnecessary to state those principles in an article, even though the great majority of States took the precaution of settling questions of succession relating to currency by agreement. The negotiations preceding such agreements were usually conducted on amicable terms, but the bargaining strength of those concerned was not always satisfactorily balanced. Thus it was important that when a country wished to enjoy its full sovereignty it should be sure that its currency was not only paper, but was backed by the gold and foreign exchange reserves of the predecessor State.

25. Mr. BILGE said he thought the discussion on the typology of succession had not been in vain, as it had enabled the Commission to clarify a number of points. The question of currency was a very delicate one involving notions which were very technical, but which the Special Rapporteur had successfully mastered.

26. Generally speaking, the members of the Commission now seemed to be agreed on the need for residuary rules to cover each type of succession. That represented considerable progress, for in considering any particular type of succession it was especially important to allow for the possible existence of an agreement between the predecessor State and the successor State.

27. Since he was in favour of specific rules for each type of succession, he could only approve of the wording of article 12. The article covered a quite particular type of succession which involved neither the disappearance of a State nor the creation of a State; hence it should lay down rules of limited scope. It was essential to refine the rules relating to each type of succession as much as possible. Other provisions, such as article 13, might be amended in that way, and still others, like article 15, could even be deleted.

28. In addition, the commentary to article 12 should explain that the provision did not cover transfers of small parcels of territory, such as frontier rectifications, since they did not involve true successions of States. For instance, the exchange of certain small islands and small areas of land which had taken place in 1974 between the Soviet Union and Turkey, would not come within the scope of the article.

29. He approved of the Special Rapporteur's choice of certain classes of State property which had been the subject of succession agreements. The Commission could, of course, merely deal in general terms with movable and immovable property, but it would be better to concentrate attention on the difficulties experienced by States in negotiating and concluding of agreements. That pragmatic method called for great caution, however, because certain classes of State property, such as currency, raised very technical questions. The functions of currency were found to multiply as new social and political needs arose. Consequently, the Commission should not enter into the details and, in particular, should consider the criteria suggested by Mr. Kearney only with the utmost circumspection.

30. The essential provision of article 12 seemed to be that in paragraph 2, which stated the principle of the passing from the predecessor State to the successor State of the assets of the central institution of issue. Paragraph 1 was only a rather vague introduction concerning the passing of currency to the successor State. With regard to that paragraph, he was not sure whether it was the currency in circulation which passed to the successor State, or the rights in that currency, including the privilege of issue. That privilege, which the Special Rapporteur had not mentioned in the new version of article 12, was an attribute of sovereignty, and there was no reason why it should not pass by succession. Naturally, the privilege of issue should be distinguished from the full freedom to legislate possessed by the successor State after the succession. If article 12 was to cover only the currency in circulation, difficulties might arise during the consideration of article 13 relating to treasury and State funds

31. The Special Rapporteur had been right to add the word "allocated" in both paragraphs of article 12,[12] because it was always important, in the type of succession concerned, to establish a close link between State property and the territory. That point should be stressed in the commentary.

32. The principle stated in paragraph 2 of article 12, that the assets of the central institution of issue in the predecessor State should be apportioned in proportion to the volume of currency circulating or held in the territory to which the succession related, was in keeping with considerations of justice. Nevertheless, the volume of currency was only one of a number of criteria and it might lead to injustice in certain cases. It might perhaps be better to rely on the concept of equitable apportionment, which would make it possible to take into consideration, according to circumstances, either the volume attained by the currency during a certain time or other criteria.

33. Mr. ŠAHOVIĆ, noting that all the questions which article 12 might raise appeared to have been mentioned, said he would only stress the fact that the Commission was tending to consider the provisions relating to each type of succession as residuary rules. That tendency was understandable, since the agreements which could be concluded between the States concerned were of a mandatory nature. Nevertheless a problem of codification technique arose. In codifying international law, the Commission had always tried to state general rules, after having studied State practice, judical decisions and doctrine. In order to reconcile those traditional methods of codification with the technique now envisaged, the Commission should, in the rest of its work, take care to state as many general rules as possible. The subject of succession of States in respect of State property was so complex, however, that it might be better, for the time being, to concentrate on the rules applicable to each type of succession, while at the same time trying to formulate general rules valid for as many situations as possible. The Commission could always draft rules on particular aspects of the subject.

34. With regard more particularly to currency, the Commission could compare the solution proposed by the Special Rapporteur for the case of transfer of part of a territory with the solutions he proposed for the other types of succession. That comparison might even show whether currency should really be treated as a truly separate class of State property.

35. Mr. EL-ERIAN said that the Special Rapporteur had very commendably agreed to study one of the most complex and least explored areas of international law, to which the Commission could make a valuable contribution. He approved of article 12 as drafted by the Special Rapporteur.

The meeting rose at 12.50 p.m.

[12] For previous text see *Yearbook ... 1973*, vol. II, p. 34.