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A/CN.4/SR.1328

Summary record of the 1328th meeting

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

1328th MEETING

Thursday, 12 June 1975, at 10.15 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. Šahović, Mr. Sette Câmara, Mr. Tammes, 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. The CHAIRMAN invited the Special Rapporteur to reply to the comments made by members of the Commission on article 12.

2. Mr. BEDJAOUI (Special Rapporteur) said that the first point to note about article 12 was that it dealt with a very special kind of succession. Many of the difficulties encountered by members of the Commission, and many of their doubts about the soundness of the rules stated in article 12 and the subsequent articles (A/CN.4/282) and the advisability of laying down those rules, were due to the peculiarities of that type of succession. Some members took the view that the problems relating to currency and the other classes of State property dealt with in those articles did not arise in practice in a succession affecting a part of a territory. They were thinking of areas that were very small compared with the whole of the predecessor State's territory and, in particular, of frontier rectifications. Since their reasoning was based on such cases, it seemed to them that the questions covered by article 12 and the subsequent articles should not arise in practice. They also pointed out that when such questions arose they were settled by a treaty between the predecessor State and the successor State. Moreover, such treaties often dealt with matters other than those covered by article 12 and the subsequent articles. Consequently, they regarded the rules stated in those provisions as being far removed from reality. Mr. Ustor, for example, had questioned whether there was good reason to believe that the classes of State property referred to in the articles under consideration passed to the successor State in the absence of provisions to that effect in the succession agreement: [3] for the silence of such agreements might equally well be taken to mean that the property did not pass to the successor State.

3. There could be no doubt that a succession affecting part of a territory was often the consequence of a frontier rectification, that the States concerned often entered into an agreement to settle the fate of State property, and that in many cases those agreements did not mention the classes of property referred to in the articles under consideration, for the simple reason that they did not raise any problem of succession. Nevertheless, successions of that type could involve large provinces and a major part of the predecessor State's territory. In such cases, the questions dealt with in article 12 and the subsequent articles certainly arose. In short, whether the questions dealt with in those articles arose, and how important they were, depended on the size of the territory transferred. The existence of those questions should not be denied merely because they did not arise in all cases. The special nature of successions affecting part of a territory lay in the fact that the size of the territory to which the succession related was decisive, whereas for the three other types of succession it was immaterial, the essential factor being the creation or the disappearance of a State.

4. That being so, there were several ways of solving the problems raised by the transfer of part of a territory. Some members of the Commission thought it was incumbent on the predecessor State and the successor State to conclude an agreement. If that were so, the rules drafted by the Commission would have to be residuary rules. The silence of the agreement, however, could be interpreted as establishing a presumption that the State property was bound to pass to the successor State only in so far as the problem of such passing really arose—that was to say in cases other than ordinary frontier rectifications. It was precisely for that reason that article 12 and the subsequent articles referred to State property situated in the territory to which the succession related and "allocated" to that territory. Under article 12, if there were no gold or foreign exchange reserves, or if such reserves were not allocated to the territory in question, those assets clearly would not pass to the successor State. The silence of the agreement would not imply any presumption of passing: it would simply mean that the problem did not arise.

5. Other members of the Commission considered that the questions dealt with in article 12 and the subsequent articles were so technical and complex that the conclusion of agreements to settle them should even be encouraged by means of a special provision. In his opinion it would not be easy to achieve that result. In the *North Sea Continental Shelf cases* the International Court of Justice had stated that the delimitation of the continental shelf should be effected by agreement between the parties in accordance with equitable principles. [4] It was true that the Court had given its judgement in a very special context. The Commission could, of course, encourage the conclusion of agreements, but it was obvious that in some situations it could not be expected that agreements would be concluded. Frontier rectifications were often effected by agreements, but it was when a large part of the predecessor State's territory passed to the successor State that it was especially important to settle the question of the passing of State property. Yet in such cases an agreement was often lacking.

6. The possibility of a succession affecting a large part of a territory could not be excluded in modern international law, even though the annexation of territory by

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

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

[3] See 1326th meeting, para. 28.

[4] See *I.C.J. Reports 1969*, at p. 54.

force was now prohibited. By the application of a modern principle of international law, that of self-determination, a territory might be separated from one State and attached to another as a result of a referendum. It was also possible that part of the population of a State might secede and that the territory it occupied might be attached to another State. In view of the often dramatic political circumstances attending such changes of sovereignty, it would then be vain to hope for the conclusion of an agreement.

7. Several members of the Commission did not deny that a succession resulting from the transfer of part of a territory might raise the problems dealt with in article 12 and the subsequent articles, but had pointed out that other questions might also arise. Hence, they suggested either that an article should be drafted stating the general principle of the passing of State property in that particular type of succession, or that the list of classes of State property covered by article 12 and the subsequent articles should be extended. The reason why he had dealt with only a few classes of State property and had not mentioned either public property belonging to territorial authorities or public bodies or property of the territory itself, was that the Commission had drawn those distinctions at its twenty-fifth session, and had decided for the time being to consider only State property in the strict sense. [5] Consequently, the disposal of railways—to which Mr. Ustor had alluded—would have to be considered later, since under the law of many countries railways were not State property, but the property of public bodies or public companies. In reality, there were no other important kinds of State property than those mentioned in article 12 and the subsequent articles.

8. Referring to Mr. Pinto's comments, [6] he said that a succession resulting from the transfer of part of a territory differed from a succession resulting from secession in that it did not involve the formation of a new State. Mr. Pinto had also asked in what way currency, referred to in article 12, differed from State funds, which were dealt with in the next article. In that connexion it should be borne in mind that currency was more in the nature of a debt, as Mr. Kearney had pointed out. The passing of currency to the successor State had been mentioned in the draft only in order to justify the passing of gold and foreign exchange reserves. Draft article 13 treated State funds as an asset, not as a liability or debt. Perhaps article 12 should be recast as Mr. Kearney had suggested, [7] so that a first paragraph would deal with gold and foreign exchange, a second with the assets of the institution of issue and a third with currency properly so called.

9. He had never concealed the difficulties and anxieties he had experienced in dealing with the very technical questions covered by article 12 and the subsequent articles. His fears had been strengthened by the suggestions of Mr. Kearney and Mr. Sette Câmara, [8] which would make article 12 even more complicated. In addition, Mr. Tsuruoka had told how the same problem, that of currency, had been dealt with differently between the same countries in the case of the island of Okinawa and that of Amami O shima. [9] The occupation of Japan by the United States of America was not, of course, an example of a succession of States, but the case presented a useful analogy.

10. The time had come for the Commission to make a choice: either it should refer article 12 to the Drafting Committee, asking it to draft an article as non-technical as possible on currency, or it should prepare a general draft article covering all cases of succession resulting from the transfer of part of a territory. The second course would be consistent with the proposals made by Mr. Šahović [10] and by Mr. Ushakov, who had even submitted a single draft article to him, which read:

Article 12

1. When part of a State's territory becomes part of the territory of another State, the passing of the 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 the agreement referred to in paragraph 1:

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

11. If the Commission continued along the lines he had indicated and took account of suggestions like those made by Mr. Kearney, it would have to draft some very technical articles. If it decided to draft, for each type of succession, no more than one or two general articles like that proposed by Mr. Ushakov, without going into the details of different classes of property, its work would be simplified, it would save time and its draft articles would be kept to more modest proportions. He had deliberately not chosen the easy way, and to avoid exposing himself to criticism had followed the course traced out by doctrine, which had so far been concerned with only a few classes of State property. The choice before the Commission was of capital importance for the future of the whole draft and would be decisive for the continuation of his own work. It was for the Commission, not the Drafting Committee, to make that choice.

12. In conclusion, he stressed the value of Mr. Quentin-Baxter's comments on the problem of sovereignty over natural resources, on the distinction between sovereignty and ownership rights and on the question of the right of eminent domain of the State. [11] The considerations he had put forward, which were in accord with Mr. Pinto's

[5] *Yearbook . . . 1973*, vol. II, p. 202, para. 87.

[6] See 1326th meeting, paras. 1-4.

[7] *Ibid.*, paras. 21-26.

[8] *Ibid.*, paras. 31 and 32.

[9] See previous meeting, para. 1.

[10] *Ibid.*, paras. 33 and 34.

[11] *Ibid.*, paras. 7-20.

remarks, would be most useful for drafting the commentary.

13. Mr. USTOR said that the Commission had to take a stand on the question so lucidly put to it by the Special Rapporteur, which affected the whole draft. As he saw it, there were at least two valid arguments in favour of adopting a general approach to succession to State property. The first was that the classes of State property dealt with in articles 12 to 15 had been selected more or less at random and in fact amounted to only three kinds of State property; there were many other kinds, and it would be difficult to explain why the Commission had not dealt with them. Currency, State funds and State archives were no doubt important forms of State property, but they were not the only ones. He had mentioned earlier the example of railways which might, of course, be privately owned, but which were more often State property. He had in mind particularly the question of rolling stock, which had created great problems in Europe after the Second World War. Armaments, naval vessels and merchant ships were further examples.

14. The second reason for adopting a general approach was the highly technical character of the questions dealt with in articles 12 to 15, which could only be settled with the help of experts. That applied to currency, State funds, archives, rolling stock, weapons and ships. The Commission's work would be more productive and the results more likely to prove acceptable to the General Assembly if it abandoned the ambitious plan of trying to solve a series of difficult technical problems, which called for specialized knowledge he thought he did not possess.

15. Mr. TSURUOKA agreed with Mr. Ustor. He suggested, however, that before entirely abandoning the idea of dealing separately with the different classes of State property, the Commission should ask the Secretariat to draft a report on the question, after taking expert advice. That course was particularly advisable in regard to currency questions, because of the extremely precarious international monetary situation.

16. Mr. BEDJAOUI (Special Rapporteur) welcomed Mr. Tsuruoka's suggestion, but pointed out that the General Assembly had recommended the Commission to proceed with the preparation, on a priority basis, of draft articles on succession of States in respect of matters other than treaties and had placed that topic immediately after the high priority topic of State responsibility. [12] It would be regrettable if the Commission were to defer for a year a decision which, if taken at once, would enable it to submit to the General Assembly, at its thirtieth session, either a general article on succession in the case of transfer of part of a territory or several special articles on that type of succession. So long as he did not know the results of the study to be made by the Secretariat, which was overloaded with work at the present, he would not know how to proceed. In any event, a Secretariat study could be expected to reach the conclusion that the questions under consideration were even more complex than they seemed.

17. Mr. KEARNEY asked the Special Rapporteur to explain what distinction he made between State property and public property, and the effect of that distinction on article 9. That article, if adopted in its new text, [13] would specify that State property which, on the date of succession of States, was situated in the territory to which the succession of States related, passed to the successor State. The question arose whether that provision would cover a corporation or similar entity performing an economic function, such as production or marketing, completely within the territory to which the succession of States related.

18. Mr. BEDJAOUI (Special Rapporteur) said that in his sixth report he had submitted some very detailed articles dealing collectively with all questions relating to public property. [14] After a long discussion, the Commission had decided to consider, first, public property which really belonged to the State, in other words, State property. It had been pursuant to that decision that article 5 (A/CN.4/282), which contained a definition of State property, had been drafted. The disposal of property belonging to the patrimony of an entity other than the State would not be considered until later. Personally, he considered that the fate of such property was not affected by a succession of States. It changed "nationality" in consequence of the change of sovereignty, but it did not pass in full ownership to the successor State.

19. Mr. KEARNEY explained that he had not been referring to the items of property belonging to a corporation, but to the stocks or other securities representing the ownership of the corporation itself.

20. Mr. BEDJAOUI (Special Rapporteur) pointed out that in his sixth report he had laid down, in article 8, a rule that public property belonging to public bodies remained their property, but passed within the juridical order of the successor State. Because that wording had been considered vague, he had dropped it. He had used it to mean that such property was governed by the new laws of the successor State. Once a territory was affected by a change of sovereignty, public companies were governed by the juridical order of the successor State, not only in regard to ownership, but also in regard to supervision and the legislation applicable. It was obvious that after a succession of States, the successor State could change its juridical order as it saw fit.

21. Mr. KEARNEY said that the question he had raised had a bearing on the problem mentioned by Mr. Ustor and also on Mr. Ushakov's proposal for a general article. To take the example of rolling stock belonging to a railway company, if the ownership of the company passed to the successor State, the ownership of the rolling stock would pass with it. The proposal by Mr. Ushakov that State property should be divided into movables and immovables would affect the operation of article 9 which, as it stood, would cover both movables and immovables. In his opinion, the introduction of such a sub-division would not add anything of value to article 9. It had been suggested during the discussion that the predecessor State might remove movables from

[12] See General Assembly resolution 3315 (XXIX), section I, para. 4.

[13] See next meeting, para. 2.

[14] *Yearbook ... 1973*, vol. II, pp. 9-12.

the territory before the passing of sovereignty and that some provision should be included in the draft to deal with that contingency. As he saw it, the problem was connected with that of property which was outside the transferred territory and in which the successor State had or ought to have some interest. Problems of that kind could give rise to conflicts with other treaties in force.

22. With regard to the method to be adopted, he was not at all certain that working out general principles would necessarily be easier than dealing with specific problems. Articles 12 to 15 dealt with somewhat marginal cases, and there might be no need for provisions specifying what would happen in those cases in the event of transfer of part of a territory. If the currency of the predecessor State previously in circulation in the transferred territory was to remain a charge on the predecessor State, there was no need to provide for the transfer of any part of the gold and foreign exchange backing of that currency. Only if the successor State intended to withdraw the currency and replace it with its own currency would it be entitled to part of those reserves. The matter was one which could well be left to the decision of the States concerned. The example given by Mr. Tsuruoka illustrated that point. In the case of Okinawa no problem had arisen, because the United States dollars in circulation in that island could continue to be freely used by their holders and thus remained an obligation of the United States after the succession. The position had been different in the case of other islands, in which a special currency called B yen had been in circulation and which had moved into the Japanese currency system. The long negociations between the two countries concerned had resulted in an arrangement covering a great many issues; the concession made by Japan on the currency question had been matched by advantages secured by that country on other points. His conclusion was that States were well aware of the problems involved; there appeared to be no need for a residuary rule to cover the situation if they decided to take no action regarding currency. In fact, the States concerned might find it unacceptable to be told what rules to apply where they themselves considered that no problem existed.

23. There might be some advantage in dealing with all the articles on currency together. One good reason for doing so was that the position was not the same in the case of newly independent States as it was in that of the transfer of part of a territory. When a new State attained independence, the hostility prevailing between the parties concerned might make it impossible to arrive at an agreed solution. A residuary rule on currency for newly independent States might therefore be useful.

24. Article 20 (A/CN.4/282) was almost certainly unnecessary. An article on currency was pointless in the case of uniting of States: all gold and currency reserves would come under the legal régime of the newly-formed union, which was the successor State. That State might decide to continue with separate currencies in the various component parts of the union, or it might decide to replace the old currencies by a new one. There was no logical need to include in the draft, provisions covering matters that came within the internal law of the successor State. Where the dissolution of a union was concerned, experience since the end of the Second World War had shown that questions of currency were usually dealt with by agreement. In the fourth type of succession—the separation of part of a State—a provision on currency would be needed only if the separation took place in circumstances similar to those attending the emergence of a new State. He was thinking of a case of the kind described in article 33, paragraph 3 of the Commission's 1974 draft articles on succession of State in respect of treaties.[15] In other cases of secession, there was no need for the Commission to substitute its judgement for that of the States concerned.

25. At a previous meeting, he had suggested a rewording of the article on currency,[16] which raised a number of problems. The first was whether special drawing rights should be included among the reserves, together with gold and foreign exchange; the second was whether gold should be valued at the market price or at the official price. The answer to those and similar questions would, of course, affect the manner in which currency reserves were apportioned as between the States concerned. Considerations of that kind indicated that there was merit in Mr. Tsuruoka's suggestion that technical experts should be consulted. Those problems could be avoided if a general rule was adopted which would rely on the good faith of the parties concerned, but unfortunately such a rule would offer no guarantee of equitable action in particular cases.

26. Mr. USHAKOV said that the Special Rapporteur should not regard the wording of the draft article he had submitted to him as final. He had taken that step on realizing that it was not possible to deal separately with all classes of State property. Such an approach would mean drawing up an exhaustive list of State property, which was impossible; hence it would be better to deal with State property in general, distinguishing only between movable and immovable property. No matter how laws might differ, immovable property was always attached to a territory; in the absence of agreement, it must obviously pass to the successor State. Movable State property—the only kind which articles 12 to 15 appeared to cover—could not, being movable, be considered to be situated in a territory. In the absence of agreement it passed to the successor State, no matter where it was situated. If not connected with the activity of the predecessor State in the territory in question, however, it passed to the successor State in an equitable propertion. It was not possible to establish in advance how movable State property should be connected with the activity of the predecessor State in the territory in question, or to determine what an "equitable proportion" would be. Those notions could only be defined precisely in concrete cases, though some examples could be given in the commentary to the article he had proposed.

27. Mr. EL-ERIAN said he wished to deal briefly with a few questions of method and approach. In the first place, the question whether it was necessary to consult

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

[16] See 1326th meeting, paras. 24-26.

experts should be left to the Special Rapporteur. It was the Commission's practice to leave Special Rapporteurs free to decide what kind of assistance they required from the Secretariat.

28. He had himself taken part in negotiations concerning the uniting of States and the dissolution of unions. That experience showed how desirable it was that the draft should contain a residuary rule offering guidance to States. It was not at all easy for the States concerned to settle all the complex problems which arose in situations of that kind, so the existence of residuary rules would be very helpful.

29. He supported the general approach. The Commission should not undertake the drafting of a series of detailed provisions, which would be better suited to a contract than to a codifying convention. The draft should contain only general norms and should not go into such matters as would be covered by an instrument settling a particular succession.

30. The CHAIRMAN suggested that, in view of the short time left for the consideration of the topic of succession of States in respect of matters other than treaties, all the articles in section 2 of the draft (A/CN.4/282) should be referred to the Drafting Committee.

It was so agreed. [17]

The meeting rose at 12.20 p.m.

[17] For resumption of the discussion on article 12 see next meeting, para. 46.

1329th MEETING

Friday, 13 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

Eleventh session of the Seminar on International Law

(resumed from the 1316th meeting)

1. The CHAIRMAN said that at the close of the Seminar on International Law, he had been asked to express the gratitude of Mr. Raton, the Senior Legal Officer in charge, to the members of the Commission who had given lectures. The Seminar not only provided instruction for young jurists from different continents, but also afforded an opportunity for members of the Commission to hold a useful exchange of views with the younger generation. He wished the participants every success in their careers and hoped to see them again at other United Nations meetings.

Succession of States in respect of matters other than treaties

(A/CN.4/282; [1] **A/CN.4/L.226 and Add.1)**

[Item 2 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 9 [2]

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce article 9 as proposed by the Drafting Committee, which read:

Article 9

General principle of the passing of State property

Subject to the articles of the present Part and unless otherwise agreed or decided, State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates, shall pass to the successor State.

3. Mr. QUENTIN-BAXTER (Chairman of the Drafting Committee) said that in the light of the discussion in the Commission, the Drafting Committee had decided not to retain in article 9 the phrase "State property necessary for the exercise of sovereignty" originally proposed by the Special Rapporteur, and had found that the phrase "State property used for the exercise of governmental authority" did not constitute an adequate alternative. The article, as adopted by the Committee, referred simply to "State property", which had been defined in article 5 (A/CN.4/282). The word "all" had been deleted from the title in order to bring it into line with the text. The Committee had added the introductory phrase "Subject to the articles of the present Part and unless otherwise agreed or decided"; in order to stress the residual nature of the article, in accordance with the general trend of the Commission's discussion. It was the belief of the Committee that, in an article of very general scope, it was preferable to use the formula "State property which, on the date of the succession of States, is situated in the territory to which the succession of States relates". The Committee had recognized that the question of property situated outside that territory and the general question of distinguishing between movable and immovable property would have to be considered in more specific contexts at a later stage.

4. Mr. USHAKOV said that he accepted the text of article 9 proposed by the Drafting Committee, subject, however, to a reservation concerning the word "situated", which was unsuitable for movable property. As a matter of drafting he suggested that the opening words of the article should read "Subject to the provisions of the articles of the present Part . . .".

5. Mr. BEDJAOUI (Special Rapporteur) said he accepted the drafting change suggested by Mr. Ushakov.

6. Mr. USTOR said that his support for article 9 as proposed by the Drafting Committee was provisional, since its exact form would depend on that of subsequent articles. The effect of the phrase "Subject to the articles

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

[2] For previous discussion see 1318th meeting, paras. 7 *et seq* and following meetings.