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Summary record of the 1400th meeting

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

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take that clarification, but keep the provisions in a single article.

The meeting rose at 6 p.m.

1400th MEETING

Tuesday, 29 June 1976, at 10 a.m.

Chairman: Mr. Paul REUTER

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenga, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/292)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur (concluded)

ARTICLE 17 (Succession to State property in cases of separation of parts of a State)¹ (*concluded*)

1. Mr. NJENGA said that he agreed substantially with article 17, which was the last of the series of articles under consideration. It was a well-balanced article which provided a good basis for the Drafting Committee to work on.

2. He fully concurred with the Special Rapporteur's approach, which aimed at ensuring a just distribution of State property in cases of separation of parts of a State. He agreed with the Special Rapporteur that it was not necessary to specify whether the predecessor State continued to exist after the separation or whether there was a complete dissolution. The principles applicable in both situations were identical: those of justice and equitable distribution.

3. It had been said during the discussion that equity could mean anything or nothing. It was certainly difficult to specify the conditions that had to be taken into consideration in order to ensure a just outcome in every case. The situations concerned differed considerably and the factors to be taken into account varied accordingly.

4. In the present context, however, equity was not a concept of absolute justice but rather a principle of law. That point had been well brought out by the International Court of Justice in the *North Sea Continental Shelf* cases, in a passage quoted by the Special Rapporteur in his report:

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-

up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.²

That passage afforded a good basis for the application of the principle of equity as a rule of law in the cases covered by article 17.

5. Secession was usually an unhappy process and the examples given by the Special Rapporteur confirmed that. In modern times, cases of separation of part of a State were very rare. The only situations of that kind that could be mentioned were the separation of India and Pakistan in 1947, the separation of Singapore from Malaysia in 1965 and the more recent case of Bangladesh. There had been a few attempts at secession in Africa, which had constituted very unfortunate incidents. He was thinking of the case of Katanga and of the more recent situation in Angola, where mercenaries had tried to break the State into several portions to the detriment of its people. He suggested that the wording of article 17 should take into account the unhappy character of the situations which the article covered.

6. The provisions in paragraph 1 on the attribution of immovable property would not always make for a just solution. It would not be fair to attribute a dam, a hydroelectric scheme or some other major public work to the successor State in whose territory it was situated if the cost of construction had been paid by all parts of the predecessor State. He suggested that a different rule was necessary to deal with cases of that kind. The property should go to the State where it was situated, but the rule to that effect should be coupled with an obligation to work out an agreement to compensate the other States which had contributed to the formation of the property in question. There was clearly no reason to apply one and the same rule to different categories of State property such as State land and major hydroelectric schemes. He also suggested that the Drafting Committee should take into account the fact that in African law immovable property was subject to different kinds of régime, including communal ones.

7. By way of illustration, the Special Rapporteur had referred to the case of the dissolution of the East African Currency Board³ and the treatment of the funds attributed to the three States which had been its members. Another case conceivable was that of three States forming an association of that kind and building a harbour or port in the territory of one of them as the common property of all three. In the event of the dissolution of the association, it would be totally unjustifiable to attribute the harbour or port automatically to the State in whose territory it was situated. The Special Rapporteur had not ruled out the possibility of a more just solution, since he had said that the parties concerned were completely free to settle the matter among themselves by agreement. The parties were clearly under an obligation to enter into an agreement to effect an equitable

¹ For text, see 1399th meeting, para. 1.

² See A/CN.4/202, chap. III, para. 16 of the commentary to article 17.

³ *Ibid.*, para. 28 of the commentary.

apportionment by making compensation where appropriate.

8. With regard to movables, the two criteria set forth in paragraph 2 of the article, namely that of the direct and necessary link and that of apportionment on the basis of equity, should be taken not as independent of each other but as cumulative, since both aimed at achieving a just distribution of movables.

9. Lastly, he agreed with the rule embodied in paragraph 3; if applied in good faith, that rule should provide a satisfactory solution to the problem of property situated outside the territory of the predecessor State.

10. Article 17 might be referred to the Drafting Committee, which he felt sure would make the text fully acceptable.

11. Mr. SETTE CÂMARA said that he had no objection to the text of article 17 as submitted by the Special Rapporteur.

12. The Special Rapporteur's starting-point was that the situation dealt with in article 17 constituted a return to the situation existing prior to the uniting of States, after the latter had proved a failure. He himself was not at all certain that the return to the *status quo ante* was the real starting-point. The Special Rapporteur had acknowledged that there could be a separation of parts of a State, or a dissolution of a State, which throughout its history had been a unitary State and not a union, although the Commission itself had recognized that "almost all the precedents of a disintegration of a State resulting in its extinction have concerned the dissolution of a so-called union of States".⁴

13. The practical effects of the distinction between dissolution and separation had given rise to divergent opinions on the part of States which had commented on the 1972 draft articles on succession of States in respect of treaties.⁵ The distinction had some meaning in the context of the present draft, where it was impossible to ignore the fact that the predecessor State disappeared in the case of dissolution but survived in the case of separation. Where the predecessor State survived, it should qualify for treatment at least equal to that of the other successor States in the distribution of State property. The Special Rapporteur, however, had decided to combine the two cases, as had been done in the 1974 draft articles on succession of States⁶ in respect of treaties following the comments on the 1972 draft.

14. In providing for the passing of State property, the Special Rapporteur had remained faithful to the distinction in treatment between movable property and immovable property which was now a general feature of the whole draft.

15. As far as immovable property was concerned, the rule in paragraph 1 attributing it to the State in which

it was situated was logical and natural. The location of immovable property constituted evidence of a physical link which had to be taken into account in a case of succession. The saving clause "except where otherwise specified in treaty provisions" preserved the freedom of action of States which decided to settle the question of succession by treaty. He himself, however, doubted whether the location of the property alone should be taken as a permanent criterion in the absence of express agreement. He cited the example of a union of States in which a constituent State had important property, such as a building for its representation, in the capital of the union; with the separation, the capital remained the territory of the predecessor State, which continued to exist. In that case, the separated State should not be deprived of that property merely because it was in the territory remaining to the predecessor State. Perhaps the rule in paragraph 1 should be modified to cater for such situations.

16. Paragraph 2, dealing with movable property, specified that its attribution would depend on the criterion of the direct and necessary link, but it did not make it very clear whether that criterion excluded the one specified in the second subparagraph, namely that of apportionment. As he saw it, apportionment would take place only if there was no direct and necessary link, or if such a link existed with all the States disputing a succession.

17. It was hardly necessary to repeat everything which had already been said during the discussion about the dangers of relying on the vague concept of equity in matters of apportionment. The Special Rapporteur himself had recognized that equity meant everything and nothing.⁷ It was true that the Special Rapporteur, on the basis of the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, had differentiated slightly between the meaning of "equity", seen as abstract or natural justice as opposed to formal justice, and that of "equitable principles" which were applicable as a result of a rule of law.⁸ He himself, however, still believed that the use of some vague formula such as "reasonable and normal", which appeared in paragraph 1 of article 11 of the 1961 Vienna Convention on Diplomatic Relations⁹ and in article 14 and 46 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character,¹⁰ would be less dangerous than relying on "equity", which was the ultimate remedy for *non liquet*.

18. With regard to paragraph 3, which dealt with the apportionment of movable and immovable property situated outside the territory, he failed to see why the principle of consideration for the contribution of each territory to the formation of the property, a principle which appeared in a number of the previous articles,

⁴ *Yearbook... 1972*, vol. II, p. 295, document A/8710/Rev.1, chap. II, sect. C, para. 12, of the commentary to article 27.

⁵ *Ibid.*, pp. 230 *et seq.*, document A/8710/Rev.1, chap. II, sect. C.

⁶ *Yearbook... 1974*, vol. II (Part One), pp. 174 *et seq.*, document A/9610/Rev.1, chap. II, sect. D.

⁷ A/CN.4/292, chap. III, para. 34 of the commentary to article 17.

⁸ *Ibid.*, paras. 13-16 of the commentary.

⁹ United Nations, *Treaty Series*, vol. 500, p. 95.

¹⁰ See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II, *Documents of the Conference* (United Nations publication, Sales No. E.75.V.12), pp. 171 and 175.

should not be applied in the cases covered by articles 16 and 17 when an equitable apportionment had to be arrived at.

19. Subject to those comments, he had no major objection to the substance of article 17. The article should be referred to the Drafting Committee.

20. The CHAIRMAN, speaking as a member of the Commission, said that he approved the substance of article 17. For reasons which were not merely a question of drafting, however, he suggested that the expression "principle of equity" should be in the plural and that the notion of equity should be developed either in the text of the article itself or in the commentary. To that end, the Commission might perhaps include a reference to the source of funds. Subject to that reservation, article 17 might be referred to the Drafting Committee.

21. Speaking as Chairman, he invited the Special Rapporteur to reply to the observations made on article 17.

22. Mr. BEDJAOUI (Special Rapporteur) noted that all the members of the Commission had considered article 17 acceptable and had found that his proposals for it were justified. The test of equity on which the article was based had given rise to many observations.

23. As far as the need to rely on the criterion of equity was concerned, the situations contemplated in article 17 could not be resolved without it, since no legal rule could settle in detail the variety of situations of that kind which arose. As pointed out by Mr. Yasseen,¹¹ the approach to the notion of equity in article 17 was different from that which had guided the Permanent Court of International Justice and the International Court of Justice in deciding cases *ex aequo et bono* where the parties had agreed to that. In many cases, those Courts had touched only superficially on the problem of equity, having been unable to go very far because the parties had not consented to a judgment being given *ex aequo et bono*.

24. After mentioning a number of cases in which the Permanent Court of International Justice had raised the question of equity, he said that, in the *Serbian Loans* case, counsel for one of the parties had held that equity was conceivable without law but not law without equity; he had defined equity as "the law which stood above written law, the law which was engraved on the human conscience, the natural law which proceeded from the very nature of beings and things without the positive intervention of any legislator."¹² In the present case, the legislator would intervene, since article 17 stipulated that the principle of equity should be applied. In the *Oscar Chinn* case, one of the parties had contended that the application of the criterion of equity implied that the judge should make an *ex aequo et bono* assessment of what was "reasonable" in the particular case and place and at the particular time.¹³ It was precisely on that understanding that the question should be decided whether or

not it was reasonable to attribute a particular item of State property.

25. In referring to equity in article 17, he had not intended to refer to a source which the judge would apply *ex aequo et bono* if the parties agreed, but to a notion which was an integral part of the positive rule embodied in the article. It was equity construed as a rule of positive law and a source of substantive law. As pointed out by Mr. Njenga,¹⁴ the application of equity meant the application of a principle of law. International courts could not invoke equity without the consent of the parties because otherwise they might be tempted to stray from the field of law into that of political controversy. For the purposes of article 17, however, equity formed part of the substantive content of a rule of positive law.

26. Several members of the Commission had discussed the problem of the constituent elements of equity. Thus, on the subject of archives, Mr. Ramangasoavina had stressed, at the previous meeting, the importance of the territory, its extent, its wealth and its population. Equity did not imply a division into equal shares but rather a division which took those various elements into account. That was why Mr. Bilge¹⁵ and Mr. Reuter¹⁶ preferred the wording "*principles of equity*" to the words "*principle of equity*".

27. With regard to the role and place of equity in the article under consideration, he wished to make three comments. In the first place, paragraphs 1 and 2 contained two objective criteria which predominated, namely that of location and that of the direct and necessary link; the criterion of equity merely operated to redress unbalanced results. In paragraph 3, on the other hand, the criterion of equity had a creative role, since it was an essential ingredient in the apportionment of property situated outside the territory of the predecessor State. Secondly, it was precisely for that reason that the effects of article 17 were different from those of the previous articles. Lastly, he referred to the observations by Mr. Ushakov¹⁷ and Mr. Castañeda,¹⁸ both of whom had suggested that the property should be apportioned by agreement between the parties and, failing such agreement, in accordance with the rules of equity set forth in article 17. Personally, he was of the opinion, like Mr. Pinto, and other members of the Commission, that paragraph 1 should provide that even an agreement of the parties must respect the principles of equity applicable in the matter.

28. Several members of the Commission had proposed that an obligation to negotiate in good faith should be introduced into the article. Mr. Bilge, for his part, had pointed out that the obligation to negotiate was part of the very idea of equity.¹⁹ Mr. Castañeda had urged that the substantive rules of article 17 should not be mingled

¹¹ See 1399th meeting, para. 15.

¹² *P.C.I.J.*, Series C, No. 16 (III), p. 211 (translation by the United Nations Secretariat).

¹³ *Ibid.*, No. 75, p. 106 (translation by the United Nations Secretariat).

¹⁴ See para. 4 above.

¹⁵ 1399th meeting, para. 57.

¹⁶ See para. 20 above.

¹⁷ See 1399th meeting, para. 34.

¹⁸ *Ibid.*, para. 65.

¹⁹ *Ibid.*, para. 56.

with procedural questions relating to the settlement of disputes.²⁰ On that point, the draft articles as a whole might be accompanied by a set of provisions for the settlement of disputes which was distinct from its substantive rules.

29. Several members of the Commission had stressed the limitations of the principle of equity, in particular with regard to cultural property and the cultural heritage. As he saw it, there were no limits to the principle of equity, only different applications of that principle. In one case, the principle might require the apportionment of certain property among the States concerned; in another, it might require the attribution of the property to one of those States in order to preserve the integrity of the property.

30. Members of the Commission had also been concerned about the geographical criterion of the location of the property, which was bound to play an important part. In particular, Mr. Quentin-Baxter had compared article 17 with the previous articles from that point of view.²¹ In article 17, the test of location played an important but not an exclusive role. The geographical link created a very strong presumption but, where necessary, it had to be qualified by the principle of equity. In that connexion, several members of the Commission had given examples of the need to make compensatory equalization payments, financial or otherwise, and also to share public debts. As Mr. Castañeda had rightly pointed out, however, those examples in no way detracted from the fundamental criterion of the location of the property.²²

31. Reviewing the observations made in connexion with each of the three paragraphs of article 17, he mentioned first the suggestion by certain members of the Commission that the notion of equity should be expressly introduced into paragraph 1. It was an idea which he himself had touched on in his report;²³ it would be particularly relevant in cases of succession to dams and other public works, especially where a unitary State dissolved. The notion of equity should also operate in the event of succession to a mine or jointly invested funds.

32. The question of succession to public debts had also been raised, by Mr. Kearney²⁴ and Mr. Martínez Moreno.²⁵ In that connexion, a "localized" debt would probably be taken over by the State in whose territory a dam or other public work, for example, had been constructed with the aid of the loan which was the counterpart of that debt. If the case related to a national public debt and the successor State had benefited from the corresponding loan, it would shoulder the burden of the loan to the extent of the value of the assets which it had obtained. Whatever the case, the successor State

would in all probability take over the corresponding debts in some manner or other. The question was one which would have to be examined at a later stage, but he was not opposed to its being dealt with briefly in the commentary.

33. Also, as pointed out by Mr. Sette Câmara,²⁶ certain immovables covered by paragraph 1 might be situated outside the territory of a predecessor State which continued in existence. That would be another case in which the criterion of equity should be applied.

34. With regard to paragraph 2, several members of the Commission had raised the question whether the criterion of the direct and necessary link and that of equity should be applied cumulatively or alternatively. In actual fact, the two criteria should operate concurrently, as some members had observed. It would be for the Drafting Committee to clarify the relationship between the two criteria.

35. The question also arose whether paragraph 2 covered all movable property wherever situated, in which case paragraph 3 was perhaps superfluous. Paragraph 3 concerned property situated outside the territory of the predecessor State, i.e. in a third State. Movable property might also be situated in the predecessor State but outside the territory of one of the successor States to which it should be attributed under the principle of equitable apportionment or in accordance with the criterion of the direct and necessary link. That case was covered by paragraph 2. Paragraph 2 accordingly covered two cases: first, that of a movable situated in the territory of the successor State. In that case, there was a presumption that the property would devolve to that State but that another successor State could invoke the criterion of the direct and necessary link, or that of equity, in order to claim the property for itself. The second case was that of a movable which was not located in the territory of the successor State but was nevertheless located in the larger territorial area constituted by the predecessor State. That property could be situated in the territory of another neighbouring successor State.

36. Generally speaking, the arrangements proposed in paragraph 3 had been considered acceptable but certain problems had nevertheless been raised. Mr. Tammes had stressed the difficulties which the non-recognition of a dissolution or of a separation could involve in the case of property situated in a third State.²⁷ However, important though that issue might be, it was not peculiar to article 17: it might arise in connexion with any type of succession. Mr. Kearney had raised the question whether the applicable internal law was that of the third State or that of the predecessor State.²⁸ His own answer was that the rule in paragraph 3 was penetrated throughout by the notion of equity and that it had to be observed both by international courts and by the national courts of a third State. Mr. Ushakov had drawn attention to the

²⁰ *Ibid.*, para. 64.

²¹ *Ibid.*, paras. 48 *et seq.*

²² *Ibid.*, para. 66.

²³ See A/CN.4/292, chap. III, paras. 22-24 of the commentary to article 17.

²⁴ 1399th meeting, para. 29.

²⁵ *Ibid.*, para. 42.

²⁶ See para. 15 above.

²⁷ See 1399th meeting, para. 21.

²⁸ *Ibid.*, para. 31.

difficulty of sharing certain types of property.²⁹ On that point, he wished to explain that the notion of equitable apportionment in no way ruled out compensatory equalization payments of a financial or other character.

37. Several members of the Commission had spoken on article 17 as a whole and had compared it to other provisions of the draft articles. Mr. Quentin-Baxter, for instance, had observed that the notion of a contributory share expressed in paragraph (b) of article 15 did not appear in article 17.³⁰ In actual fact, it was not excluded by article 17. In the case contemplated in article 15, there was only one successor State, namely, the newly independent State. In the case covered by article 17, there were several successor States and the principle underlying the idea of contribution was replaced by the principle of equitable distribution among all the successor States in proportion to their respective contributions.

38. Comparisons made between article 17 and the previous articles had also led members to raise the problem of presumption and burden of proof. The application of the principle of self-determination could lead either to the situation provided for in articles 14 and 15—namely, the creation of a newly independent State, or to the situation provided for in article 17—namely, that of the separation of one or more parts of a State. At the 1399th meeting, Mr. Kearney and Mr. Tammes had more or less explicitly declared themselves in favour of aligning article 17 on articles 14 and 15. In accordance with article 14, movable property passed to the newly independent State unless there was no direct link between that property and the territory of that State. The burden of proof thus fell on the predecessor State. In the case covered by article 17, it would be difficult to place the burden of proof on the shoulders of the predecessor State, since that might disappear. Besides, paragraph 2 of article 17 was a neutral provision: it did not specify the State on which the burden of proof rested. One member of the Commission had suggested a solution half way between that of articles 14 and 15 and that of article 17, in the form of a presumption in favour of the successor State based on the fact that the property was situated in its territory. In actual fact, that was exactly what paragraph 2 proposed. The test of the direct and necessary link would be decisive precisely because the property was situated in the territory of the successor State.

39. The comparisons between article 17 of the present draft and article 33, paragraph 3, of the 1974 draft articles on succession of States in respect of treaties had raised the problem of a separation which occurred in circumstances essentially the same as those existing in the case of the formation of a newly independent State. Several members of the Commission had suggested that it might be advisable to deal with that case separately. Mr. Ushakov had rightly pointed out that the case in question could not be dealt with in isolation because, where State property was concerned, the circumstances

in which the separation had occurred were scarcely material.³¹

40. Several members of the Commission had also made comparisons between the various provisions of article 17 itself. They had suggested that a clearer distinction should be drawn between the cases of separation and dissolution and that slightly different treatment should be specified for each. In particular, Mr. Njenga had stressed that cases of separating invariably led to an unhappy situation.³² In point of fact, it was not easy to deal in one and the same provision with the cases in which the predecessor State disappeared as a result of dissolution and the cases in which it survived after separation. In his own view, the Drafting Committee should endeavour to draw a distinction between those two categories of cases but should not treat them differently. The wording of article 17 would in any case depend on how article 16 was finally drafted.

41. Lastly, Mr. Ushakov had referred to property belonging to the various component States of a federation such as the United Arab Republic.³³ The question arose whether, in the event of the dissolution of a federation of that kind, works of art which had previously belonged to one of the component States but which had subsequently become the property of the federation should be shared among the successor States. Neither the principle of equity nor that of the direct and necessary link, or of the origin of the property, dictated such a result. If the point could not be clarified in the text of article 17, it should at least appear in the commentary to it. Whatever the position, there was no doubt that the principle of equity referred to in article 17 required the origin of the property to be taken into account.

42. The CHAIRMAN said that, if there were no other comments, he would take it that the Commission decided to refer article 17 to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³⁴

The meeting rose at 11.05 a.m.

³¹ *Ibid.*, para. 33.

³² See para. 5 above.

³³ See 1399th meeting, para. 34.

³⁴ For consideration of the texts proposed by the Drafting Committee, see 1405th meeting, paras. 54-62.

1401st MEETING

Thursday, 1 July 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, Mr. Kearney, Mr. Martínez Moreno, Mr. Njenda, Mr. Quentin-Baxter, Mr. Raman-gasoavina, Mr. Reuter, Mr. Šahović, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

²⁹ *Ibid.*, para. 35.

³⁰ *Ibid.*, para. 50.