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Summary record of the 1428th 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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of symmetry. In the negotiations to decide the passing of debts, there would have to be some symmetry between the factors of enrichment and the factors of impoverishment.

50. Mr. DADZIE said that he had no difficulty in accepting the first paragraph of the consolidated article, but both the versions of the second paragraph caused him some problems. For example, each contained the phrase "equitable proportion": quite apart from the question of the complexity of equitable considerations, to which Mr. Reuter had drawn attention, there was the question who, in a situation in which the predecessor and successor States were in disagreement, would decide what was equitable. Similarly, who would decide what, as the first version of the paragraph required, corresponded to the property, rights and interests which passed to the successor State? The second version of the paragraph contained the phrase "taking into account the relationship between the State debt concerned and the property, rights and interests which passed to the successor State", thereby indicating that the question at issue was the passing of localized debt. If that were so, the question of equity would not arise, for the localized debt would relate to property, rights and interests situated in the transferred territory and, as the Special Rapporteur had already pointed out in paragraph 14 of his report, would therefore pass to that territory in accordance with the maxim *res transit cum suo onere*.

51. Mr. CALLE Y CALLE said that, in introducing article Z/B, the Special Rapporteur had indicated that the basis for it was to be found in chapter IV of his report, which would to a large extent constitute the commentary to the article to be submitted to the General Assembly. The Special Rapporteur had stated in his report that "the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice".[27] He had advanced theories in support of transfer of part of the general debt, but had said that they were inadequate, and had quoted weighty arguments against such transfer from authorities like Hall and Borel.[28] He had, however, been unable to find any clear rule governing the fate of general State debt, but had concluded from his treatment, in section C of chapter IV, of special State debts of benefit only to the ceded territory, that such debts passed to the successor State. Notwithstanding that situation, the article the Special Rapporteur was now proposing looked to the future in that it seemed designed to establish an embryonic rule to the effect that both general and special State debt could pass to the successor State.

52. If that was a correct interpretation of the article, it would, as Mr. Ago had already said, be better if the first paragraph referred to the "total or partial" passing of the debt of the predecessor State to the successor State, for passage would be partial in the case of general State debt and total in the case of localized State debt.

53. It would also be better to adopt the alternative version of paragraph 2, but in a modified form. Since equity would be an important factor in the apportionment of the general State debt, but less so in relation to the passage of localized State debt, the paragraph might be re-worded to read:

"2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, taking into account both the relationship of the debt to the transferred territory and the property, rights and interests passing to the successor State."

The meeting rose at 1 p.m.

1428th MEETING

Thursday, 26 May 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/301 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE Z/B (Transfer of part of the territory of a State)[1] (*concluded*)

1. Mr. YANKOV said that, in general, he agreed with the approach and conclusions adopted by the Special Rapporteur in the commentary and articles he proposed in chapter IV of his report, which covered a complex subject for which there were no generally accepted rules of international law. While the consolidated article Z/B in some ways represented an improvement over the original proposals, it also gave rise to some problems.

2. For example, while he did not wish to challenge the Special Rapporteur's change in the first paragraph of article Z/B of the phrase "the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty", which had appeared in the first paragraph of article Z (A/CN.4/301 and Add.1, para. 214), he wondered what was the reasoning behind the change. The new version seemed to lay greater emphasis on the operational aspect of the question, namely, the passing of the State debt of the predecessor State to

[27] A/CN.4/301 and Add.1, para. 209.

[28] *Ibid.*, paras. 194-195.

[1] For text, see 1427th meeting, para. 16.

the successor State, whereas it seemed to him equally—and perhaps more—important to put forward a rule of law setting out the rights and obligations of the predecessor State and the successor State in the event of the transfer of part of the former's territory. Such a rule would be particularly necessary in cases where the parties had been unable to reach agreement on the question. It would, therefore, be desirable to consider to what extent the requirements of equity and the relevant elements of substantive law could be incorporated in the article.

3. Mr. Reuter had referred [2] to the principle of symmetry between the modalities for the passing of State debt and those for the passing of the related property, rights and interests to the successor State. He agreed that the Commission should try to elaborate a general rule of conduct to which would be attached certain legal rights and obligations, while at the same time taking into consideration the requirements of equity, common sense and reality.

4. Again, he wondered why the Special Rapporteur had decided not to reproduce in either of the versions of paragraph 2 the phrase "proportionate to the contributory capacity of the transferred territory", which had appeared in the second paragraph of article Z. To what extent did the words now proposed in place of that phrase bring the Commission closer to the statement of a general rule of law which could apply in the event of a transfer of part of the territory of a State?

5. It seemed to him that the essence of the problem of the codification and progressive development of international law in the field with which the Commission was now dealing lay in the elaboration of a rule which would state the basic legal principles involved and indicate the main modalities of identifying the bases for determining what was, as the Special Rapporteur now put it, an "equitable proportion" of the debt of the predecessor State corresponding to the benefits, property rights and interests which passed to the successor State. The existence of such a rule might encourage the predecessor and successor States to reach agreement amongst themselves, if only because they believed that sometimes the worst amicable agreement was better than the best judicial decision, and it would, of course, facilitate adjudication and third party procedures.

6. Mr. ŠAHOVIĆ asked why the Special Rapporteur had thought it better to use the words "property, rights and interests", in paragraph 2 of article Z/B, rather than speak simply of "State property". According to the definition in article 5,[3] "State property" meant property, rights and interests.

7. The CHAIRMAN, speaking as a member of the Commission, said that the questions he had wished to raise in connexion with article Z/B had, in general, been the same as those which had been put by other speakers. He did, however, wish to draw particular attention to a point similar to that which had been raised by Mr. Šahović. Whereas article O[4] spoke specifically of "State debt" as being a "financial obligation", article Z/B referred in more general terms to the passing of a "proportion of the debt of the predecessor State", a phrase which gave rise in his mind to two questions. Firstly, if the phrase in question meant "passing of a proportion of the financial obligations" of the predecessor State, how could arrangements be made for the passing of specific financial obligations? Secondly, did the term "debt" mean "State debt" as defined in article O, or all the financial obligations of the predecessor State?

8. Mr. BEDJAOUI (Special Rapporteur) said that members of the Commission who had participated in the discussion on article Z/B had, generally speaking, approved of his proposed text and had shown a preference for the alternative version of paragraph 2. He would not linger over matters of form, which would be considered by the Drafting Committee, but would deal mainly with the comments on the substance.

9. Some members of the Commission had pointed out, in connexion with paragraph 1, that the debt could pass either completely or partially, and had suggested various formulations to take that aspect into account. Some had noted that the term "agreement" was broader than the term "treaty" and had emphasized the value of clarifying the notion of agreement by including a reference, even in paragraph 1, to equitable principles.

10. His reply to the question by Mr. Šahović concerning the use of the expression "property, rights and interests" instead of "State property" was that if the principle of equity was to be applied, account must be taken of the content of State property, as defined in article 5, for it included not only physical property but also rights and interests. The formula "State property" would not be sufficiently comprehensive and would not encompass all the elements that had to be taken into consideration in applying the principle of equity.

11. Members of the Commission had clearly seen that the rule stated in paragraph 2 was a residuary rule, for the passing of the debt should be settled in most cases by agreement between the parties, and the majority had preferred the alternative, which established an equitable relationship between debts and property and applied primarily to localized State debts. However, a relationship between debts and property did not mean an absolute, automatic and complete link between the two. Any passing of property and debts had to be governed by equitable principles. The "equitable proportion" had to be sought not only in relation to the passing of property but in the light of all the circumstances. Thus, the problem of the passing of debts should be viewed first and foremost in relation to the principles of equity and their context.

12. Mr. Ago had proposed [5] the criterion of the benefit derived by the territory from the utilization of the debt. That was a possible operational criterion. He (the Special Rapporteur) had already used it once and he used it again in chapter V of his report, concerning succession to debts in the case of newly independent States. The criterion of benefit had been invoked in doctrine in the case of the transfer of part of a territory and in the case of newly independent States. But at what

[2] 1427th meeting, para. 49.

[3] See 1416th meeting, foot-note 2.

[4] *Ibid.*, para 1.

[5] 1427th meeting, para. 34.

point in time was the benefit to be assessed? Was it when the utilization of the debt had created property or satisfied a need, or was it later, at the time when the succession of States occurred? The benefit could have disappeared by then, for the property created by the utilization of the debt might have been destroyed in a war between two States that had led to the transfer of part of the territory of one State to the other, or in a war of national liberation that had led to the birth of a newly independent State. The notion of benefit had many facets and could be viewed from different angles.

13. As for decolonization, the case of the Cabora Bassa dam in Mozambique, mentioned by Mr. Njenga,[6] was a borderline case; although the dam had been built for the purposes of Portuguese colonization, it could now be considered as useful to Mozambique. However, there were instances of property which had been of benefit only to part of the population of the colonial territory—for example, in Algeria, where wine growing had been a colonizers' activity specifically designed to meet the needs of the metropolitan State. Following Algeria's independence, the vines had had to be uprooted in order to reconvert Algerian agriculture, because wine production had exceeded the capacity of the national market and it had been difficult to find outlets abroad.

14. Again, port or highway infrastructures, military installations and so on might have been built during the period of colonization for the benefit of the colonizers. An industrial or agricultural complex might have been created, in the colonial context, in order to tie the colony's economy to that of the metropolitan State, since colonial development was then conceived in terms of ties to make the colonial economy dependent on the metropolitan economy. As a consequence, some economic developments, both industrial and agricultural, had proved very difficult to convert after the territory's accession to independence and had become a burden rather than a benefit. Again, highly sophisticated military bases installed by the metropolitan State in a dependent territory might be totally useless to the newly independent State. The notion of benefit was therefore difficult to define, since the economic and political courses followed by the newly independent State might be different from those which had been imposed on it by the former metropolitan State.

15. Consequently, if the aim was to apply the principles of equity, the benefits gained by the colonizers over many years or even centuries of colonization had to be taken into consideration. The case of the Cabora Bassa dam could itself be posed in such terms. Moreover, the various conferences of Heads of State or Government of the non-aligned countries, from that of Belgrade in 1961 to that of Colombo in 1976, had all talked about compensation for colonial exploitation.

16. What had to be emphasized first and foremost was the principle of equity and that meant taking into account the circumstances of each particular case, for equity did not mean equality or an automatic symmetry between the passing of property and the passing of debts. In its judgment of 20 February 1969 in the *North Sea Continental Shelf* cases, the International Court of Justice had stated that

> 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 Court had added: "The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case".[7]

17. Mr. Yankov had rightly noted that the agreement between the parties should itself be equitable and, consequently, the notion of equity should also be introduced into paragraph 1. It might well be asked who was to apply the criterion of equity in the event of disagreement between the predecessor State and the successor State. In his opinion, that problem did not fall within the scope of the draft article, but was a matter for the procedure to be followed for the settlement of disputes, which would form the subject of later articles. The International Court of Justice had made a distinction between obligations of means and obligations of result. States could be required to engage in negotiations, which was an obligation of means, but they could not be required to reach an agreement, which was obligation of result.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article Z/B to the Drafting Committee.

It was so agreed.[8]

19. The CHAIRMAN announced that there would be a meeting of the Enlarged Bureau after the closure of the present meeting.

The meeting rose at 11.05 a.m.

[6] 1426th meeting, para. 21.

[7] *Yearbook ... 1976*, vol. II (Part Two), p. 133, document A/31/10, chap. IV, sect. B, para. (23) of the introductory commentary to section 2 of part I of the draft.

[8] For the consideration of the text proposed by the Drafting Committee, see 1447th meeting, paras. 3 and 10, and 1449th meeting, paras. 1-3.

1429th MEETING

Friday, 27 May 1977, at 11.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.