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Summary record of the 1502nd meeting

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ment of settlement between two protagonists which, given the separation and the conditions in which it occurred, would tend to show very little flexibility towards each other.

42. However, if the Commission invoked the principle of equity, it would have to establish some parallelism between the rule on State debts set out in article 24 and the rule on State property set out in article 15 to cover the same case of the separation of a part or parts of the territory of a State. There would have to be some correlation between the "property, rights and interests" that passed to the successor State and the State debts relating thereto. It was also necessary to take account of any just and equitable claim, so as to achieve the essential balance in the apportionment of debts between the predecessor State and the successor State. Consequently, paragraph 1 of article 24 stressed the principle of equity, while giving due place to the element of agreement.

43. It would be remembered that in article 15, paragraph 2, the Commission had assimilated to the case where a part or parts of the territory of a State separated from it to form a new State the different case of a part of the territory of a State separating from it and uniting with another, pre-existing State. The latter case was not the one contemplated in article 12, which related to the transfer of part of the territory of a State. Article 12 referred to the case of a small area of territory being transferred by one State to another, whereas article 15, paragraph 2, referred to a case where a large area of territory voluntarily separated from one State and united with another. The wording of article 24, paragraph 2, which was similar to that of article 15, paragraph 2, met the need for parallelism between the provisions relating to State property and those relating to State debts.

44. Mr. VEROSTA thought the Drafting Committee would be able to adopt article 24 without change, for it was a clear and well-worded provision covering most of the problems that were likely to arise.

The meeting rose at 12.50 p.m.

1502nd MEETING

Friday, 16 June 1978, at 10.40 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work (*continued*)*

1. The CHAIRMAN said that the Enlarged Bureau had recommended at its latest meeting that, in response to an invitation contained in a note dated 6 March 1978 from the Secretary-General, the Commission should be represented as an observer at the World Conference to Combat Racism and Racial Discrimination, to be held in Geneva from 14 to 26 August 1978. The Enlarged Bureau had authorized him to enter into consultations with members to determine who should represent the Commission at the Conference.

2. If he heard no objection, he would take it that the Commission approved the recommendation.

It was so agreed.

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that a letter be addressed to the European Committee on Legal Co-operation explaining that the Commission would be unable to send a representative to the forthcoming session of the Committee because it would be in session itself during the period in question.

4. If he heard no objection, he would take it that the Commission approved that recommendation.

It was so agreed.

5. The CHAIRMAN informed the Commission that the Enlarged Bureau had recommended the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law, consisting of Mr. Quentin-Baxter (chairman), Mr. Ago, Mr. Castañeda and Mr. Njenga, and of a working group on jurisdictional immunities of States and their property, consisting of Mr. Sucharitkul (chairman), Mr. El-Erian, Mr. Francis and Mr. Riphagen.

6. If he heard no objection, he would take it that the Commission approved those recommendations.

It was so agreed.

7. The CHAIRMAN informed the Commission that the Enlarged Bureau had proposed that the review of State practice, international jurisprudence and doctrine relating to "force majeure" and "fortuitous event" as circumstances precluding wrongfulness (ST/LEG/13), prepared by the Codification Division of the Office of Legal Affairs, should be published in the Commission's *Yearbook* for 1978. In an exchange of views with the Office of Legal Affairs, the Department of Conference Services had expressed some hesitation and had sought to apply a criterion under which the length of certain documents was limited to a maximum of 32 pages. Such a criterion should obviously not apply in the case of important documents of scientific value.

8. The Commission might therefore decide to include the aforementioned study in its 1978 *Yearbook*

* Resumed from the 1486th meeting.

as a document of the current session, and to inform the Department of Conference Services accordingly.

*It was so agreed.*¹

9. The CHAIRMAN stated that, in the course of the Enlarged Bureau's meeting, Mr. Ushakov had made a number of suggestions with a view to advancing the work of the Drafting Committee, and thus of the Commission, in connexion with the second reading of the draft articles on the most-favoured-nation clause, the General Assembly having recommended in its resolution 32/151 that the Commission should complete its consideration of that topic at the current session.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1,² A/CN.4/313)

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (continued)

ARTICLE 24 (Separation of a part or parts of the territory of a State)³ (concluded)

10. Mr. CASTAÑEDA said that the Special Rapporteur, with his customary broad historical approach, had rightly pointed to the emergence of a new phase in the exercise of the right of peoples to self-determination. In recent times, centrifugal forces appeared to have prevailed over centripetal forces and the phenomenon of dismemberment of States would doubtless prove to be of enormous importance in the future. Article 24 was therefore one of the most important of the draft articles.

11. Obviously, agreement between the predecessor State and the successor State was a significant element in the apportionment of State debts, but the Special Rapporteur had pointed out in paragraph 20 of his tenth report (A/CN.4/313) that no such agreement might exist, precisely because secession had occurred in circumstances of violence. The principle of equity was therefore an essential element in the solution of the problem of the passing of debts to the successor State.

12. It had been noted that, whereas article 21⁴ related to the transfer of a relatively small and unimportant territory, article 24 concerned a larger area of a State's territory. However, from the examples cited in connexion with the two articles, it was not possible to determine conclusively which rule would apply in a particular case. The commentary to article 21 showed that, according to Fauchille, for example, the principle of equity was fundamental, for if the suc-

cessor State acquired some of the property of the predecessor State it must necessarily assume a part of the latter's debts.⁵ On the other hand, in the arbitral award rendered in the *Case of the Ottoman Public Debt*, Borel had taken the view that the principle that a State acquiring part of the territory of another State must at the same time take responsibility for a corresponding portion of the latter's public debts was not established in positive international law and that such an obligation could stem only from a treaty in which the obligation was assumed by the State in question.⁶ The Commission must think of the future and adopt the new rule proposed by the Special Rapporteur, a rule that was perfectly justified in law and equity and had his full support. The rule embodied the principle that there must be an equitable passing of debts, in some sense proportional to the portion of the property of the predecessor State acquired by the successor State.

13. Again, some parallel might be drawn between article 24 and article 22, on newly independent States, since the latter article stipulated that the provisions of the agreement between the newly independent State and the predecessor State "should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources". That might be regarded as a rule of *jus cogens*, for if the agreement failed to observe that principle, it could be held invalid. Admittedly, articles 24 and 22 did not deal with the same situation; however, article 24 reflected a consideration that was of the utmost importance to international public order and could be likened to a rule of *jus cogens*, namely, that the principle of equity was an essential factor in the apportionment of debts and must therefore be taken into account in the agreement between the predecessor and successor States. Article 24 specified that "unless the predecessor State and the successor State agree otherwise, an equitable proportion of the State debts of the predecessor State shall pass to the successor State"; it thus gave pre-eminence to the principle of equity. Nevertheless, he wondered whether it might not be advisable to state explicitly in article 24 that the agreement between the predecessor State and the successor State must not infringe the principle of equity in the apportionment of State debts, the same way as article 22 called for observance of the principle of the permanent sovereignty of every people over its wealth and natural resources.

14. Mr. TSURUOKA also wished to congratulate the Special Rapporteur, and thought the Commission could now refer article 24 to the Drafting Committee. However, he hoped that the Drafting Committee would establish more of a parallel between paragraph 1 of article 24 and article 14, relating to State property, since greater emphasis on the link that existed between the State debt and "the property, rights and interests which pass to the successor

¹ The document will appear under the symbol A/CN.4/315 in *Yearbook... 1978*, vol. II (Part One).

² *Yearbook... 1977*, vol. II (Part One), p. 45.

³ For text, see 1501st meeting, para. 33.

⁴ See 1500th meeting, foot-note 8.

⁵ See *Yearbook... 1977*, vol. II (Part Two), p. 72, doc. A/32/10, chap. III, sect. B, 2, art. 21, para. (2) of the commentary.

⁶ *Ibid.*, p. 76, para. (21) of the commentary.

State” would bring out more clearly the idea underlying article 24.

15. Mr. FRANCIS said that the dismemberment of any State through secession was always something that grieved the bystander. The excellent rule formulated by the Special Rapporteur could not be faulted in either substance or wording, and he had no hesitation in recommending its referral to the Drafting Committee.

16. Mr. RIPHAGEN said that the rule enunciated in article 24 reflected the practice of States admirably; it referred, like a number of the draft articles, to a proportion of debts that was equitable in the light, *inter alia*, of “the property, rights and interests” that passed to the successor State. He had always thought that the word “interests” in that phrase signified every kind of interest; territory passed to the successor State, and an essential aspect of the whole matter of the passing of debts was the possibility open to the successor State of using that territory for tax purposes. It would be noted, however, that article 25 (A/CN.4/313, para. 77), in referring to the equitable proportion of debts to be assumed by the successor State, spoke of “such factors as its tax-paying capacity and the property, rights and interests passing to it”. It might be advisable for the Drafting Committee to consider whether the formula regarding the equitable proportion of debts should not be the same in all instances, either mentioning the successor State’s “tax-paying capacity”, which was an essential factor, or implying that tax-paying capacity was covered by the words “property, rights and interests”.

17. Mr. SCHWEBEL endorsed the idea of referring the excellent text of article 24 to the Drafting Committee.

18. Mr. Castañeda had expressed the view that the concept of equity or of an equitable apportionment of State debts might partake of *jus cogens*. Personally, he had always considered equity a general principle of law and believed that *jus cogens* should be regarded as a more specific and more precise concept. It was also doubtful whether the principle of the permanent sovereignty of every people over its wealth and natural resources mentioned in article 22—the content of which was disputed—could be regarded as an example of *jus cogens*. It was well known, of course, that the Commission had experienced difficulties in agreeing on what in fact came under the heading of *jus cogens*. Where so much dispute existed over the *jus*, i.e. over the law itself, it was difficult to call it imperative; what in fact was the imperative content of the principle?

19. Mr. USHAKOV said that article 24 raised the problem of the definition of State debt that had already arisen in connexion with article 18. If “State debt” meant exclusively the financial obligations contracted internationally by a State, it was right to say that “the State debts of the predecessor State shall pass to the successor State”. On the other hand, if “State debt” also meant the debts contracted by a State towards its own nationals, whether in-

dividuals or bodies corporate, there could not be said under international law to be a passing of State debt. That remark held true not only for article 24 but also for all the other articles relating to the passing of State debts.

20. He thought the commentary should indicate that, if a debt had been contracted solely for the purpose of developing a part of a State’s territory that later separated to become an independent State, that debt should not simply pass to the successor State in “an equitable proportion”, but in its entirety. In any case, the Special Rapporteur had already referred in his ninth report to localized property financed through certain debts (A/CN.4/301 and Add.1, paras. 221 *et seq.*).

21. As to the drafting, in order to bring the text of article 24 into line with that of article 21, it would be best to refer, in the middle of paragraph 1, to “State debt” in the singular.

22. Regarding the words “unless the predecessor State and the successor State agree otherwise”, he wondered whether the agreement between the parties would prevail or whether it would be defeated by the refusal of a creditor third State to accept the agreement, as authorized in article 20. That question applied to article 21 (Transfer of part of the territory of a State) as well.

23. However, he approved article 24 as a whole, and proposed that it be referred to the Drafting Committee.

24. Mr. PINTO said that he could not fail to praise the formulation of article 24, which should be referred to the Drafting Committee. In particular, he welcomed the fact that the article took account of the principle of equity.

25. The phrase “property, rights and interests” was used in other articles of the draft but was somewhat difficult to understand in the context of article 24. No mention was made of obligations, yet debts were not the only obligations that might be incurred by a State. Under the article, in order to apportion State debts equitably, account must be taken, *inter alia*, of the property, rights and interests that passed to the successor State. Perhaps the Special Rapporteur might explain the difference between “property”, “rights” and “interests”, and also consider the advisability of including a reference to obligations that passed to the successor State, in other words obligations other than the debt or debts in question.

26. Mr. SUCHARITKUL fully supported the principle of the passing of the debts of the predecessor State to the successor State in “an equitable proportion”, which seemed to be the only formula acceptable and applicable in the type of State succession in question, except where, as article 24 prescribed, “the predecessor State and the successor State agree otherwise”. In practice, the application of that formula called for sound judgement and was not always an easy matter, as the Special Rapporteur had clearly shown (1501st meeting) in two cases of State succes-

sion, those of Singapore and Bangladesh. The problem of succession to debts had been easier to resolve in the first case than in the second; the solution depended on different factors in the negotiations and on the successor State's capacity to pay.

27. Mr. TABIBI said that in article 24 the Special Rapporteur had laid down a clear rule on a subject concerning which there was no great wealth of State practice. Moreover, the matter was somewhat complex, as illustrated by the recent secession of Bangladesh. It should, however, be made quite clear in the commentary that, in applying the rule, it was essential to ensure that the debt burden did not fall on a separated part of a State that had not benefited from the loan. A debt might have been incurred, while a State had still been united, for the benefit of one part of the territory only; in such a case, it would be contrary to all justice and equity for that debt to be apportioned on secession. A case in point was that of the Shaba province of Zaire, into which massive investments had been poured from all over the world. Should that province secede and the debt then be apportioned, it would mean the further impoverishment of the poorer parts of the country.

28. Mr. DADZIE expressed his support for article 24, which embodied the principle of equity and took account of the property, rights and interests that passed to the successor State in relation to the State debt. The rule laid down was also rightly made subject to the agreement of the parties. He would therefore recommend that the article be referred to the Drafting Committee for consideration in the light of members' comments.

29. Mr. EL-ERIAN, also expressing support for article 24, said that it dealt with an uncharted area of international law for which no universally accepted rules existed.

30. It might be advisable to place the words "unless the predecessor State and the successor State agree otherwise" at the beginning of paragraph 1. The Drafting Committee might consider that point.

31. In his view, the Special Rapporteur had been right to exclude cases of decolonization from his examples; such cases were concerned more with a change in administration than with the separation of part of a State's territory. In that connexion, he would refer the Commission to the case of *Rex v. Jacobus Christian* (1923),⁷ turning on the question whether an inhabitant of South West Africa, a territory at the time under the Mandate of the Union of South Africa, could be charged with high treason. The Supreme Court of South Africa had held in that case that the person concerned could not be considered a national, although South West Africa was a "C" mandated territory.

32. Mr. CASTAÑEDA said that he recognized that article 24 did not reflect a rule of *jus cogens* but laid

down a new rule. In his earlier comments, he had compared that rule with the rule in article 22, which was similar in certain respects. Article 22 referred to the principle of the permanent sovereignty of every people over its wealth and natural resources and, in his view, involved a rule of *jus cogens*; he appreciated, however, that opinions differed on the matter. His point had been that the principle of equity was of such paramount importance to international public order that any agreement reached between the parties must necessarily take that principle into account. That did not mean, however, that he thought a rule of *jus cogens* was involved. There was always a risk of misinterpretation in thus comparing situations that were similar but not identical.

33. Mr. BEDJAOUI (Special Rapporteur) noted that article 24 had given rise to only brief discussion; in the main, members had approved the text proposed. He would therefore confine his remarks to a few clarifications.

34. The Commission did not have to deal with the question raised by Mr. El-Erian regarding colonies, which some had regarded as an integral part of the metropolitan country, or regarding the various categories of mandate, since the draft drew a clear distinction between separation of a part of a State's territory and decolonization, which gave birth to newly independent States. For some 30 years the United Nations had recognized that mandated territories and colonies could not be deemed an extension of the territory of the administering or metropolitan Power. That theory had been enunciated in 1970 in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁸ Under the terms of the fifth principle set forth in the Declaration,

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

35. As Mr. El-Erian and Mr. Castañeda had pointed out, the rule proposed in article 24 included an element of progressive development of international law, since it introduced the principle of equity. In his view, international law must be increasingly imbued with that principle in the future. A future system of international law based on equality was inconceivable. The notion of the sovereign equality of States, invoked all too often, was mere hypocrisy: too many *de facto* inequalities, whether of natural resources, population or other kinds, separated States. The international law of tomorrow would have to be the law of equity, taking account of each and every factor and removing the inequalities.

⁷ *The British Year Book of International Law*, 1925, London, vol. 6, p. 211.

⁸ General Assembly resolution 2625 (XXV), annex.

36. Mr. Castañeda had rightly said that any agreement between the seceding State and the predecessor State would have to be consonant with international public order; it could therefore be affirmed that such an agreement must respect equity. In that connexion it should be emphasized that, as Mr. Castañeda had pointed out, article 24 did not involve a rule of *jus cogens*; equity was a general principle of law but, unlike the principle of the sovereignty of States over their natural wealth, did not partake of *jus cogens*. The Drafting Committee might seek a formula that would indicate how the agreement between the predecessor State and the successor State should be designed in order to conform to the principle of equity. In that connexion, it should be noted that in practice an equitable agreement benefited not only the part of the territory that seceded but also the predecessor State.

37. Mr. Tabibi, citing the example of Katanga, had mentioned the possibility of a separation of a particularly wealthy part of a State's territory that would leave the predecessor State so impoverished that it would no longer be viable; undoubtedly, the only way for the Commission to deal with such situations would be to provide in general terms that equity must be determined in the light of all the surrounding circumstances. Mr. Sucharitkul had mentioned the opposite case, in which the seceding party's capacity to pay was doubtful, and had expressed the hope that the principle of equity would be applied with sound judgement, which was not always easy. In his own view, it would be necessary in either case to adhere faithfully to the principle of equity.

38. Mr. Ushakov had first emphasized the difficulties that might arise with the definition of the term "State debt" in article 18. The definition did not seem entirely satisfactory, but the Commission should disregard that for the moment. In drawing a distinction between a State's debt under international law and its debt towards its nationals, Mr. Ushakov had reopened the Commission's discussion of the year before. The question was a very delicate one and would have to be dealt with in the commentary to article 24.

39. On the other hand, the words "in relation to that State debt" at the end of paragraph 1 of the article clearly showed that the provision covered localized debts, a point to which Mr. Ushakov had rightly drawn attention. If the proceeds of a loan had been assigned by a State to a part of its territory that later seceded, it was obvious that, in keeping with the principle of equity, the burden of that debt should lie chiefly with the successor State. As the International Court of Justice had indicated in its decision in the *North Sea Continental Shelf Cases*, all the surrounding circumstances must be taken into account in the application of principles of equity.⁹

40. Mr. Ushakov had also posed the question of the position of the creditor third State in the light of arti-

cle 20. It was to be emphasized that article 20 formed part of the general provisions applicable to succession to State debts and was therefore applicable, in theory, to all types of succession governed by specific provisions. In cases of secession, therefore, the creditor had no choice if the debt was shared equitably, a state of affairs that the creditor could not fail to welcome but that none the less raised certain problems that would have to be dealt with in the commentary.

41. As to the comments made by Mr. Pinto in connexion with the phrase "property, rights and interests", as close a parallel as possible had been established between article 24 and the corresponding provision relating to State property, namely, article 15. In article 15, however, the Commission had not used the formulation "property, rights and interests" but had spoken of "State property". According to the definition given in article 5, State property meant the assets of the predecessor State, i.e. the rights, property and interests owned by it at the time of the succession. Perhaps the Commission should review that question of terminology at the next session. Equity obviously required that account be taken of any obligations, over and above the purely financial obligations of debts, that might be assumed by the successor State when the assets and liabilities were apportioned. For the moment, however, it would be best to retain the formula already employed in the draft. In any event, it would not be possible to draw on article 14, as suggested by Mr. Tsuruoka, or even on article 15, which in respect of State property was the equivalent of the article now under consideration, since neither contained the phrase "property, rights and interests".

42. Lastly, Mr. Riphagen had suggested a review of the formulae for determining the "equitable proportion" that appeared in articles 24 and 25, the latter speaking of the "tax-paying capacity" of the successor State. The Drafting Committee might usefully endeavour to reconcile the wording of those two articles.

43. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 24 to the Drafting Committee or consideration in the light of the discussion.

*It was so agreed.*¹⁰

The meeting rose at 12.40 p.m.

¹⁰ For consideration of the text proposed by the Drafting Committee, see 1515th meeting, paras. 55-63.

1503rd MEETING

Monday, 19 June 1978, at 3.10 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. El-Erian, Mr. Francis,

⁹ *I.C.J. Reports 1969*, p. 3.