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Summary record of the 1662nd meeting

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

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

administering Power. It was none the less true that the interests of both parties usually overlapped to such an extent that some problems could be resolved only by means of agreements. That was why they were referred to in second place. Furthermore, such agreements should not infringe the right of peoples to dispose of their wealth and natural resources. The reference made to that right in paragraph 4 of the article was based on the relevant resolutions of the General Assembly, and should be supplemented by a reference to economic activities, which were also alluded to in the Charter of Economic Rights and Duties of States.

91. As to whether it was better to speak of the right of every "people" or of every "State", both expressions were used interchangeably in General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, whereas the term "State" alone appeared in the Charter of Economic Rights and Duties of States. It seemed better to retain the word "people" in paragraph 4, since it might well provide better protection of the rights of newly independent States.

92. As far as immovable property was concerned, a distinction could be made according to whether the property was situated in the territory of the former colony, in metropolitan territory or in another territory. Certain immovable property was created by the metropolitan State with the assistance, financial or other, of a colony. However, property of that kind was not necessarily situated in the territory of the colony or in that of the metropolitan State, and history afforded a number of examples of that kind. The Drafting Committee would therefore have to reconsider the problem.

93. Lastly, he recognized the need pointed out by Mr. Ushakov for better concordance between the English and French versions of the last phrase in paragraph 4.

94. The CHAIRMAN suggested that article 11 should be referred to the Drafting Committee.

It was so decided.[8]

ARTICLE 12 (Uniting of States)

95. The CHAIRMAN invited the Commission to consider article 12, which read:

Article 12. Uniting of States

1. When two or more States unite and so form a successor State, the State property of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State property of the predecessor States as belonging to the successor State or, as the case may be, to its component parts shall be governed by the internal law of the successor State.

[8] For consideration of the text proposed by the Drafting Committee, see 1692nd meeting, paras. 71–75.

96. Mr. BEDJAOUI (Special Rapporteur) pointed out that article 12 had not elicited comments from States, with the exception of the German Democratic Republic (A/CN.4/338), which had found it to be acceptable.

97. If such was the opinion of the members of the Commission, and since he himself had no suggestions to improve it, the article might be retained in its present form.

98. The CHAIRMAN suggested that article 12 should be referred to the Drafting Committee.

It was so decided.[9]

The meeting rose at 1.05 p.m.

[9] *Idem*, para. 76.

1662nd MEETING

Friday, 29 May 1981, at 10.20 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–3, A/CN.4/345)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 13 (Separation of part or parts of the territory of a State) *and* ARTICLE 14 (Dissolution of a State)

1. The CHAIRMAN invited the Commission to examine articles 13 and 14, which read:

Article 13. Separation of part or parts of the territory of a State

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree:

(*a*) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(*b*) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory

to which the succession of States relates shall pass to the successor State;

(c) movable State property of the predecessor State, other than that mentioned in subparagraph (b), shall pass to the successor State in an equitable proportion.

2. Paragraph 1 applies when part of the territory of a State separates from that State and unites with another State.

3. The provisions of paragraphs 1 and 2 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

Article 14. Dissolution of a State

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated;

(b) immovable State property of the predecessor State situated outside its territory shall pass to one of the successor States, the other successor States being equitably compensated;

(c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned;

(d) movable State property of the predecessor State other than that mentioned in subparagraph (c) shall pass to the successor States in an equitable proportion.

2. The provisions of paragraph 1 are without prejudice to any question of equitable compensation that may arise as a result of a succession of States.

2. Mr. BEDJAOUI (Special Rapporteur) recalled that articles 13 and 14 had been the subject of a joint commentary by the Commission. No Governments had commented on article 13, except for the German Democratic Republic, which had endorsed the article (A/CN.4/338).

3. As to article 14, one representative to the Sixth Committee, referring to the draft code of international law by E. Pessoa quoted in the commentary,[1] wondered if priority could not be given to the successor State which might have "retain[ed] or perpetuate[d] the personality of the State which has ceased to exist". The idea of the successor State retaining or perpetuating the personality of the State which had ceased to exist was actually self-contradictory, for there was no disappearance if personality was retained or perpetuated.

4. In its written comments (A/CN.4/338/Add.1), the Italian Government had wondered whether the provision made in article 14, subparagraph 1 (*b*) for the passing of immovable State property of the predecessor State situated outside its territory to one of the successor States, the other successor States being equitably compensated, might not bring successor States into competition with each other. Such competition was certainly conceivable, and the Commission had never been so naive as to think that the solutions it was proposing, particularly in the provision in question, would never give rise to problems and would exempt States from concluding agreements among themselves to settle them. But the Commission could not go into detail and weigh down article 14 with all sorts of criteria for designating one successor State rather than another. While the comment by the Italian Government was relevant, the Commission could not take it into account without complicating article 14.

5. Articles 13 and 14 could be referred to the Drafting Committee without change.

6. Mr. USHAKOV said that in his opinion both the articles could be referred to the Drafting Committee.

7. However, he believed that paragraph 3 of article 13 and paragraph 2 of article 14, the contents of which were similar, were each worded rather abstractly. In particular, they did not indicate between whom a "question of equitable compensation" could arise. Moreover, article 14 mentioned equitable compensation in subparagraph 1 (*b*) as well as in paragraph 2, and it was open to question whether the compensation meant was the same in each case.

8. Mr. JAGOTA said that he found the text of articles 13 and 14 basically acceptable and that the question raised by Mr. Ushakov could probably be resolved by the Drafting Committee.

9. He himself had one suggestion to make concerning article 14, subparagraph 1 (*b*), which differed from the comment by the Government of Italy to which the Special Rapporteur had replied in paragraph 114 of his report (A/CN.4/345). As he saw it, the problem to which the subparagraph gave rise was not the question what factors should be taken into account in disposing of the property of the predecessor State, but the question who should determine which of the successor States was entitled to the property and which to compensation. He did not think that the inclusion in the introductory portion of paragraph 1 of the phrase "and unless the successor States concerned otherwise agree" could be held to be an advance answer to that question; instead, he saw that phrase as authorizing successor States to derogate from the broad principles set out in the succeeding subparagraphs.

10. Consequently, he felt that it might be useful to add at the end of subparagraph 1 (*b*) a phrase such as "as may be agreed between them".

11. Mr. SUCHARITKUL supported the referral of articles 13 and 14 to the Drafting Committee.

12. He wondered, however, whether the interests of third States had been taken sufficiently into consideration in each case. He cited the example of the Federation of Malaya, a newly independent State created in 1957 which had subsequently joined other States to form Malaysia. In 1965, the State of Singapore separated from Malaysia. Malaysian Airways had been an airline having the status of a State enterprise and had owned buildings abroad. Following the separation of Singapore, problems had arisen with

[1] See *Yearbook ... 1979*, vol. II (Part Two), p. 38, para. (7).

respect to those buildings, and the only solution had been to establish a joint company, Malaysian Singapore Airways, with the result that, at least until an alternative had been devised, the buildings had been owned both by the predecessor State and by the successor State. As for immovable State property belonging to third States and situated in the territory of Singapore, it was inconceivable that any of the numerous successions of States of which that territory had been the subject should have affected the right of ownership of those States; the situation in question was dealt with in draft article 9.

13. Finally, he cited as an example of the perpetuation of the personality of the predecessor State the fact that the Socialist Republic of Viet Nam, a unified State, had considered itself to be the successor to the Republic of Viet Nam within the Committee for Co-ordination of Investigations of the Lower Mekong Basin.

14. Mr. TABIBI subscribed to the view that articles 13 and 14 could be referred to the Drafting Committee.

15. He did, however, wish to know whether the Special Rapporteur considered the articles adequate to cater for the possibility of multiple claims to the property of a predecessor State when that property was situated outside the territory to which the succession of States related. As an illustration of such claims, he cited the situation which persisted with regard to embassies of the former British colony of India that had been built in Nepal and Afghanistan. Following partition of the colony, both India and Pakistan had claimed that those embassies had been built with their resources. Settlement of those claims had yet to be achieved, and had been complicated by the claims that Bangladesh had entered in the same connection when it had, in its turn, become independent.

16. He also wished to emphasize that he considered it vitally important to show in the body of article 13 and in the commentary to that article that the provisions of the article would apply only in the event of a separation of part or parts of the territory of the State in application of the principle of the self-determination of peoples. Separations occurring otherwise than in accordance with that principle should be considered illegal and incapable of entailing the effects listed in article 13.

17. Sir FRANCIS VALLAT said that he did not think that the Commission should devote too much time to the question of the appropriateness of the use of the word "equitable" in relation to the proportion in which property should pass or to compensation for the non-receipt of property. It had already had an extremely long debate on that subject and had examined innumerable possibilities of providing concrete indications of what might be considered equitable. The conclusion of the Commission itself and of the Drafting Committee in that respect had been that to attempt to draw attention to specific points might destroy the balance of the term "equitable" itself, and that it was therefore better to retain the general formula. Furthermore, the use of the word had elicited little comment from States.

18. Mr. Jagota's proposal for an amendment to article 14, subparagraph 1 (*b*), had drawn his attention to certain inconsistencies in the drafting of the articles in general. In addition to the phrase which might be added (at the end of that subparagraph) at Mr. Jagota's instigation, article 14, paragraph 1, contained the words "and unless the successor States concerned otherwise agree", while article 13, paragraph 1, contained a similar formula, and article 11, paragraph 4, referred to agreements for which no foundation was laid elsewhere in the article. He hoped that the Drafting Committee would take those comments into account in reviewing the articles and would seek to provide texts that were as harmonious as possible.

19. Mr. BEDJAOUI (Special Rapporteur), summing up the discussion, observed that in the situation dealt with in article 14 there were two essential considerations: the need for an agreement between successor States and the need for compensation. Whatever the provisions that might be envisaged, an agreement in due form between the successor States was absolutely necessary; without it the States could not settle their succession problems. Such an agreement should therefore be mentioned in article 14.

20. Since the rules being drafted by the Commission were residual, article 14 contained, in the introductory portion of paragraph 1, the reservation "unless the successor States concerned otherwise agree". A few members of the Commission felt that that reservation was not sufficient and that another should be added at the end of subparagraph 1 (*b*). While he fully agreed with that suggestion, the Drafting Committee would have to try to find wording that avoided all contradiction between the two reservations.

21. It had also been said that the articles under examination showed a certain lack of uniformity. That had, in fact, been the Commission's intention. The same concern had led it deliberately to favour the newly independent successor State, in the case of article 11 and to permit an agreement between the predecessor State and the successor State only if that agreement was not abusive and did not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources. However, the Drafting Committee should try to make the texts of the articles as homogeneous as possible.

22. As to the idea of compensation, it was absolutely necessary whenever two or more successor States were involved. The general principle of the passing of State property without compensation was stated in article 8, but that rule was liable to exceptions, as was apparent from the first clause of the article. That was why both article 13 and article 14 referred to equitable compen-

sation. Such compensation was mentioned twice in article 14 because, in the first case, compensation was inevitable: the immovable State property of the predecessor State was situated outside its territory and could not, therefore, be physically divided among the successor States.

23. Mr. Tabibi's remarks concerning immovable State property of the predecessor State situated outside its territory were relevant, but the example that he had given to illustrate them came under the situation treated in article 11. He himself had drawn attention to the problem in question in connection with article 11. Just as the Commission should supplement article 11, it should supplement article 13 to cover the case mentioned by Mr. Tabibi.

24. However, article 13 concerned the separation of part or parts of the territory of a State, a process which should take place within the context of the self-determination of peoples. In that case, the predecessor State could not be deprived of State property situated in the territory of a third State. It would have to be seen how far the part of the territory that separated had contributed to the creation of the property in question. If that part could show proof of its contribution, it would be right for the property to pass to the successor State. It was, however, unlikely that any such demonstration of proof could be made, for article 13 assumed the existence of a unitary State, and a part separating from the territory of such a State would not necessarily have enjoyed any degree of autonomy before its separation. On the other hand, in the case referred to in article 11 a colony was not considered to be an integral part of the territory of the metropolitan State, and enjoyed a degree of autonomy which might have enabled it to contribute to the acquisition of immovable State property abroad.

25. Consequently, the Drafting Committee should either seek appropriate wording for the text of article 13 or provide the necessary explanations in the commentary.

26. The CHAIRMAN suggested that articles 13 and 14 should be referred to the Drafting Committee.

It was so decided.[2]

The meeting rose at 11.10 a.m.

[2] For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 77–82 and paras. 83–84.

1663rd MEETING

Monday, 1 June 1981, at 3.10 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/331 and Add.1,[1] A/CN.4/340 and Add.1, A/CN.4/343 and Add.1–4)

[Item 7 of the agenda]

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

ARTICLE 8 (Consent of State),

ARTICLE 9 (Voluntary submission),

ARTICLE 10 (Counter-claims) *and*

ARTICLE 11 (Waiver)[2] (*continued*)

1. Mr. SUCHARITKUL (Special Rapporteur) recalled, for the benefit of members who had not been present during the Commission's earlier consideration of his third report (A/CN.4/340 and Add.1), that draft article 7 had been referred to the Drafting Committee (1656th meeting) and that the Commission had then gone on to consider draft articles 8, 9, 10 and 11 (1657th meeting).

2. In attempting, in draft article 7, to define the concept of proceedings against a State, the Special Rapporteur had pointed out that State practice appeared to indicate that there was in normal circumstances, an assumption of fact in favour of the absence of consent. In other words, in proceedings involving the interests of a foreign State, it would be correct to assume, in the absence of any indication to the contrary, that the foreign State did not consent to submit to the jurisdiction of the territorial State. There was thus a possibility of the principle of State immunity coming into play. However, it followed as a corollary that, if there was an indication of consent, there could be no question of State immunity.

3. The existence of consent could be viewed as an exception to the principle of State immunity, and had been so viewed in certain national legislation and regional conventions; but, for the purpose of the draft articles, he preferred to consider consent as a con-

* Resumed from the 1657th meeting.

[1] *Yearbook ... 1980*, vol. II (Part One).

[2] For texts, see 1657th meeting, para. 1.