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Summary record of the 1326th meeting

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

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authority decided to communicate the archives to both States, and they concerned the future of the newly independent State, that State might suffer. In any event, it would not be on an equal footing with the State which had taken proceedings against it, because it would not be able to obtain access to that State's archives. Perhaps a special status, analogous to that of joint property, should be accorded to the archives of which the predecessor State was the depositary, but not the sole owner.

The meeting rose at 5.50 p.m.

1326th MEETING

Tuesday, 10 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

Succession of States in respect of matters other than treaties (A/CN.4/282)[1] [Item 2 of the agenda] (*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Currency)[2] (*continued*)

1. Mr. PINTO said there were a number of points he hoped the Special Rapporteur would clarify. First, he found difficulty in distinguishing, in legal terms, between transfer of part of a territory—articles 12 to 15—and secession or separation of one or more parts of one or more States—articles 28 to 31 (A/CN.4/282). He assumed that in the first case a State, acting voluntarily, ceded part of its territory to another State by treaty. If that was so, it would seem that the difference between the two cases was that transfer involved a fusion of the detached territory with another State, whereas in secession, the detached territory did not join another State, but became a viable separate entity. That view was supported by the inclusion in article 13, paragraph 2, and the absence from article 29, paragraph 2, of a stipulation imposing certain liabilities on the successor State.

2. Articles 12 to 15 referred to specific types of State property, in contrast with articles 8 and 9, which established the general principles of the passing of State property. He assumed that the "monetary tokens of all kinds" mentioned in article 12, paragraph 1, were paper obligations such as bills and the like, and that the "assets of the central institution of issue" mentioned in paragraph 2 were the assets of the central bank. He further assumed that the difference between the "liquid or invested funds" mentioned in article 13, paragraph 1, and "currency", was that the former belonged to the State, whereas "currency" might belong to anyone at all. No doubt the various kinds of property discussed in articles 12 to 15 had been treated separately because the mode of passing was different in each case. The rule stated in article 15, though worthy of consideration, would be very difficult to apply; presumably, preference would be given to the principle of equity in the event of union.

3. If the Commission decided to retain draft articles of the type proposed, provisions would have to be included concerning, for example, immovable property belonging to a municipality rather than to the State, museums and *objets d'art*. The need for a detailed classification of property could be avoided by simply distinguishing between movable and immovable property.

4. He reiterated his view that the draft articles should include a rule relating to sovereignty over natural resources in the event of succession. He would have expected such a rule to be included among the general principles governing the passing of State property. At all events, the matter was far too important to be ignored.

5. Mr. SETTE CÂMARA, speaking on a point of order, said that the Commission appeared to be embarking on a discussion of the whole sub-section concerning the transfer of part of a territory. He had no objection to that, although he preferred the traditional procedure of discussing draft articles one by one. If the discussion was to be on the whole sub-section, however, the Special Rapporteur should be given an opportunity to introduce the remaining articles.

ARTICLES 13, 14 AND 15

6. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 13, 14 and 15, which read:

Article 13

Treasury and State funds

1. Liquid or invested funds of the predecessor State, situated in the transferred territory and allocated to that territory, shall pass to the successor State.

2. The successor State shall receive the assets of the Treasury and shall assume responsibility for costs relating thereto and for budgetary and Treasury deficits. It shall also assume the liabilities on such terms and in accordance with such rules as apply to succession to the public debt.

Article 14

State archives and libraries

1. State archives and libraries of every kind relating directly to or belonging to the transferred territory shall, irrespective of where they are situated, pass to the successor State.

2. Indivisible State archives shall be copied and apportioned.

Article 15

State property situated outside the transferred territory

The ownership of property belonging to the predecessor State which is situated in a third State shall pass to the successor State in the proportion indicated by the contribution of the transferred territory to the creation of such property.

7. Mr. BEDJAOUI (Special Rapporteur) said that the typology he had adopted should not raise difficulties for

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

[2] For text see previous meeting, para. 6.

the time being, since it corresponded to that which the Commission had initially adopted for the draft articles on succession of States in respect of treaties. Since 1968, the Commission had distinguished four types of succession: the transfer of part of a territory, newly independent States, uniting of States and the dissolution of unions, and secession or separation of one or more parts of one or more States. On the second reading of the draft on succession of States in respect of treaties, in 1974, the Commission had entitled the first type "Succession in respect of part of territory" and had joined together the last two types under the heading "Uniting and separation of States". The fourth type of succession he had adopted, namely "secession or separation of one or more parts of one or more States", had thus been envisaged by the Commission up to 1974. The draft adopted on first reading had contained an article 28 entitled "Separation of part of a State", paragraph (1) of the commentary to which had indicated that the article applied to the case in which "a part of the territory of a State separates from it and becomes itself an independent State, but the State from which it has sprung, the predecessor State, continues its existence unchanged except for its diminished territory".[3] The Commission had thus distinguished that type of succession from the particular case of decolonization referred to under the heading "Newly independent States". Since the articles under consideration had been drafted before the Commission had decided to merge the third and fourth types of succession, it was clear that could only have been based on the initial typology. Hence the draft should be examined in its present form, although the Commission might later have to carry out some re-arrangement, as it had done with the draft articles on succession in respect of treaties. Moreover, it was in deference to the Commission's wish that he had followed the four-part presentation it had chosen. Personally, he had always had doubts about the advisability of that classification and he had expressed them in his sixth report.[4]

8. In the draft articles on succession of States in respect of treaties, the Commission had dealt, in article 14, with the case in which "any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".[5] That complicated wording simply referred to the case of a non-self-governing territory which achieved decolonization by integrating with a State other than the colonizing State. It was not a case of "transfer of part of a territory" or of "succession in respect of part of territory"; for the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[6] provided that a non-self-governing territory could not be treated as part of the metropolitan territory. Nor was it part of the territory of the successor State; it could not be that until the succession had taken place. Besides, the Commission was studying succession of States as a phenomenon affecting the territory for which the predecessor State was responsible, not as a phenomenon affecting the territory of the successor State. Lastly, the reference was not to a part of the territory to which the succession related, but to the whole territory. That example was sufficient to show the limitations of the four-part typology.

9. Referring to the comments made at the previous meeting by Mr. Ushakov, he said it would indeed be necessary to define each of the types of succession considered. The reason why he had not already done so was that he had thought the Commission would probably have to regroup articles relating to different types of succession.

10. So far as the substance of the problem was concerned, treaties and textbooks of public international law dealt with it only briefly, but always recognized that State property must pass to the successor State. The general principle was that of passing, even in cases of uniting of States. That was the idea he had tried to establish in the articles under consideration, though he had had to introduce some nuances. He thought he had succeeded in identifying, first, a principle of the passing of property to the successor State, applying the criterion of attachment to the territory, and secondly, a principle of the sharing of property, applying the criterion of equity. Taking those two criteria as a guide and sometimes combining them, he had presented the material broken down both according to class of State property and according to type of succession. In view of the resultant repetitions, that presentation might appear simple. But the Commission should make no mistake: the subject was extremely complicated and could not be studied schematically.

11. At the previous meeting, Mr. Ushakov had proposed that a small number of residuary rules should be drafted for each type of succession, distinguishing between movable and immovable property.[7] Those rules would be applicable only in the absence of agreement between the parties concerned. In his (the Special Rapporteur's) opinion, the articles under consideration should certainly apply only in the absence of agreement; that would have to be specified later. It was not possible, however, to dispense with an examination of each class of State property *in concreto*. That solution would no doubt have made his task easier: it would have saved him the trouble of studying monetary, economic, financial and other problems, with which he had had to familiarize himself. It would also have avoided the question put by Mr. Ustor, who had asked why he had confined himself to certain classes of State property to the exclusion of others.[8] Nevertheless, the solution advocated by Mr. Ushakov would encounter a number of obstacles. New definitions of movable and immovable property would be needed, for which it would be necessary to refer to the internal law of a State, and everyone knew the difficulties involved in such a *renvoi* because of the diversity of national laws. It was true that the localization of movable property in a territory was a fiction since, by definition, such property could be moved; thus before the succession occurred, the predecessor State could remove all movable property liable to be affected by the succession. The main reason

[3] *Yearbook . . . 1972*, vol. II, p. 296.

[4] *Yearbook . . . 1973*, vol. II, pp. 30 *et seq.*

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

[6] General Assembly resolution 2625 (XXV), annex.

[7] See previous meeting, para. 28.

[8] *Ibid.*, para. 18.

why he had not put his articles in the form suggested by Mr. Ushakov was that it would have involved great drafting difficulties. If an article provided that movable property passed to the successor State, the predecessor State would hasten to remove it during the so-called transitional period, and would sell immovable property to save it from the succession.

12. Referring to the comments made by Mr. Ustor at the previous meeting, he said it was essential to consider *in concreto* a certain number of classes of State property rather than state a general principle. That was the approach adopted by writers, though the literature was very terse and incomplete on that point; the only State property it dealt with was the treasury, currency and, especially, State archives. The articles he proposed also reflected State practice, as expressed in a certain number of agreements in which State property was specifically designated. He was prepared to deal in his draft with any important State property he might have omitted. *Objets d'art* and State museums, however, to which Mr. Pinto had referred, did not form a class of property separate from State archives and libraries.

13. The articles under consideration showed similarities, both within one type of succession and between different types. For example, in the case of transfer of part of a territory, the principle of the passing of State property was settled, because the property was allocated to the territory by the predecessor State, whether it belonged to that territory or was connected with it. It was immaterial whether the property consisted of currency, the treasury, State funds or archives. The same idea of a territorial link arose in two other types of succession—newly independent States and secession or separation of one or more parts of one or more States. On the other hand, in regard to State property situated in the part of the territory for which the predecessor State remained responsible, he had applied the principle of equitable apportionment, although that principle was not definitely and absolutely applicable to each of those three types of succession.

14. The similarities between the different types of succession also derived from the fundamental principle of attachment to the territory and from the secondary principle of equitable apportionment. The differences between the types of succession were appreciable if cases of the uniting or merging of States were compared with the three other types of succession. In the case of a union, the principle of attachment to the territory could not apply; everything, in theory, passed to the new successor State. In the other types of succession, State property also passed to the successor State, but only to the extent that it was attached to the territory. It was then that the question arose what happened to State property situated in the part of the territory retained by the predecessor State. For that situation, it was possible to apply the rule of equitable apportionment.

15. He hoped that the members of the Commission would agree to consider, first, only the transfer of part of a territory and, in particular, article 12, even if they needed to refer incidentally to one or other of the provisions relating to each type of succession.

16. Mr. USHAKOV, speaking on a point of order, requested the Chairman to invite the Special Rapporteur to submit in writing a definition of what he meant by "transfer of part of a territory".

17. Mr. BEDJAOUI (Special Rapporteur) said that it had been at the Commission's request, and in the precise meaning it had given to that expression, that he had dealt with the case of "transfer of part of a territory", which the Commission had subsequently called "Succession in respect of part of territory". Consequently, he had drafted the relevant articles from the point of view of a predecessor State which surrendered part of its territory to another pre-existing State. He hoped that made the position perfectly clear.

18. Mr. TSURUOKA said that, in the light of the Special Rapporteur's explanations, he thought it would be better to consider each type of succession separately. Two points should nevertheless be settled previously. First there was the question of the relationship between section 1 and section 2 of Part I of the draft entitled "Succession to State property". Were the provisions in section 2, relating to each type of State succession, examples of the application of the general provisions in section 1, or did they relate to cases different from those to which the general provisions applied? Secondly, it was important to align the draft under consideration as closely as possible with the draft on succession of States in respect of treaties. In particular, each type of succession should be defined, otherwise it might be difficult to understand and apply the articles. The Commission would not be able to begin its examination of section 2 article by article until both these points had been cleared up.

19. Mr. KEARNEY said he assumed that article 12 would be preceded by an article introducing the subsection on transfer of part of a territory. That article would reproduce substantially the opening passage of article 14 (Succession in respect of part of territory) of the Commission's draft articles on succession of States in respect of treaties.[9] The passage in question read: "When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State".

20. A succession of that type raised problems relating to currency, treasury and State funds, and the other items covered by articles 12 to 15; those problems were specific to each category of assets and could not be dealt with easily in a general article.

21. Article 12, concerning currency, illustrated that point very well. Paragraph 1 of the article dealt in one sentence with "Currency, gold and foreign exchange reserves and, in general, monetary tokens of all kinds". But it was not possible to put all those items on the same level and give the same treatment to issued currency on the one hand, and to gold and foreign exchange reserves on the other. Issued currency was a liability, not an asset of the State. In the absence of a promise to redeem the currency in gold or foreign exchange it was,

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

admittedly, an obligation which the issuing State would never have to meet. Nevertheless, although it was a somewhat notional obligation, it could not be combined with the assets which article 12 purported to cover.

22. In the same paragraph, the statement that the items in question "shall pass to the successor State" was much too general. It was necessary to specify whether it was the ownership of the currency, control over currency, or the obligation relating to issued currency, which passed from one State to the other. As far as currency in circulation was concerned, its ownership remained in the hands of the persons holding it. The shift of frontier did not affect that ownership. It did, however, affect the legal régime applicable to the actual circulation of the currency. From the moment of the succession, the laws of the successor State applied for the purpose of determining what constituted legal tender in the transferred territory. The currency of the successor State replaced that of the predecessor State as legal tender in the territory. A further question was whether the provision in paragraph 1 meant that the successor State undertook responsibility for converting the currency of the predecessor State, previously in circulation in the transferred territory, into the currency of the successor State. If that was so, it would be necessary to determine the rate at which the conversion would take place.

23. Paragraph 2 of article 12 related to the "assets of the central institution of issue in the predecessor State". If it was agreed that there should be a proportional transfer of those assets to the successor State, it followed that the successor State must have a corresponding obligation in respect of the currency issued by the predecessor State. Only in that way could it be ensured that the operation would not result in unjust enrichment of the successor State and a loss for the predecessor State. The approach adopted by the Special Rapporteur was a different one. He took the view that the successor State was the new sovereign over the transferred territory, with the consequence that the currency passed into its jurisdiction. In logic, that position was defensible, but he (Mr. Kearney) would prefer the question of currency in circulation to be treated separately from that of gold and foreign exchange reserves, in an article which would provide some degree of protection for the predecessor State.

24. State practice in the matter was meagre. The few cases mentioned by the Special Rapporteur in his sixth report[10] threw little light on the question; one of the examples given went back to 1898 and another dealt with a very special case. Without the guidance of practice, the Commission was obliged to rely on logic. He therefore proposed that article 12 should be redrafted so as to remove the reference to currency from paragraph 1; the paragraph would then refer exclusively to gold and foreign exchange reserves.

25. In paragraph 2 the central idea should be retained, but language should be introduced to clarify the temporal element involved and to lay down a suitable basis for establishing the ratio of apportionment. He therefore proposed that the last part of that paragraph should be amended to read:

> "... in the proportion which the average volume of currency in circulation in the transferred territory during the six months prior to the date of succession bears to the average volume of currency in circulation in the predecessor State as a whole during the same period".

He was suggesting a six-month period in order to avoid the effect of erratic fluctuations which might result, precisely, from the contemplated transfer of territory.

26. It was necessary to deal with the problem of the currency backed by the allocated reserves and to eliminate that currency as a charge against the predecessor State. In the absence of a provision having that effect, the balance of payments of the predecessor State would be adversely affected by claims on its currency. He therefore suggested the insertion of an additional paragraph drafted on the following lines:

> "Currency and monetary tokens of the predecessor State that are in circulation in the transferred territory on the date of succession shall be converted into the currency of the successor State at the exchange rate notified to the International Monetary Fund or, if there is no such exchange rate, at the average of the middle rate in the financial markets of the predecessor State and of the successor State on the date of succession. Currency and tokens acquired by the successor State in the conversion shall be delivered to the predecessor State together with any gold and foreign exchange reserves stored in the transferred territory but not allocated to that territory."

In a world in which exchange rates were not pegged, a complicated formula on those lines was necessary. Where the exchange rate was notified to the IMF, that rate would be taken. Otherwise, it would be necessary to adopt the middle rate between the selling rate and the buying rate prevailing in the appropriate financial markets on the date of succession.

27. Mr. USTOR said that he would comment on the whole set of articles concerning transfer of part of a territory, namely, articles 12 to 15. Those articles related to the case in which part of the territory of one State became part of the territory of another State. The case was one of simple transfer of territory, not the case contemplated in article 14 of the 1974 draft articles on succession of States in respect of treaties. A transfer of that kind was effected in most cases by means of a treaty whereby the predecessor State and the successor State agreed that a part of the territory of the former would pass to the latter.

28. In reply to a question he had asked at the previous meeting, the Special Rapporteur had said that certain assets had been selected because State practice showed that, in the treaties relating to the voluntary transfer of territory, the parties usually made express provision for the disposition of those assets. That explanation raised an issue which concerned all of articles 12 to 15. Those articles had been drafted as residuary rules on the assumption that, except as otherwise provided in the treaty between the States concerned, the various items in question

[10] *Yearbook ... 1973*, vol. II, pp. 34-57, commentaries to articles 12, 16, 20, 24 and 28.

passed from the predecessor State to the successor State. His own view was different. Under contemporary customary international law, the predecessor State had no obligation to transfer the currency, treasury, State funds and other items in question. It was precisely because no such obligation existed under international law that the States concerned found it necessary to settle those questions expressly by treaty.

29. Mr. SETTE CÂMARA said he had no difficulty about the principle underlying article 12. An article of that kind would be necessary if the Commission decided to make specific provision for the transfer of the various kinds of State property, though it was doubtful whether currency could be described as State property.

30. He supported the Special Rapporteur's decision to drop from article 12 the former paragraph 1 which stated that the privilege of issue belonged to the successor State throughout the transferred territory.[11] The right to issue currency was an inherent sovereign right; it did not depend on any rule.

31. In the new text of paragraph 1, the reference to the transferred territory was a source of difficulty. The provision related to currency and gold reserves in the transferred territory; but in modern times most States kept considerable reserves abroad, including much of their gold. For example, all the members of the International Monetary Fund had to keep their IMF quotas with that organization; one quarter of those reserves consisted of gold and the remainder of certain currencies. It would be necessary to clarify paragraph 1 in that respect, for as the text now stood, no part of the reserves held abroad would pass from the predecessor State to the successor State. Another difficulty was created by the reference to currency and other reserves "allocated to" the transferred territory. In a modern State, it was not possible to determine the share of the currency, gold and foreign exchange reserves allocated to a particular territory.

32. Paragraph 2 of article 12 provided that the assets of the central institution of issue in the predecessor State would be apportioned "in proportion to the volume of currency circulating or held" in the transferred territory. In view of the high mobility of currency, it would be virtually impossible to ascertain what amount was in circulation on the date of succession. Hence Mr. Kearney's suggestion that an average for a period of six months should be taken seemed realistic, despite the practical difficulties involved. But he did not see any justification for adopting a ratio based on the volume of currency circulating or held in the transferred territory. That criterion was inappropriate because a financial centre would have an enormous amount of money in circulation, whereas an industrial area making a much greater contribution to the economy of the country would have far less. A number of other criteria had been suggested, such as the gross national products of the country and of the transferred territory. Other factors which could be taken into account were taxation revenue and population.

The meeting rose at 12.50 p.m.

[11] *Ibid.*, p. 34, article 12.

1327th MEETING

Wednesday, 11 June 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

Succession of States in respect of matters other than treaties

(A/CN.4/282)[1]

[Item 2 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Currency)[2] (*continued*)

1. Mr.TSURUOKA said that the rule stated in article 12 was not the only possible solution for the currency problem. It should therefore be presented as a residuary rule, with the addition of the proviso "unless otherwise agreed". In his opinion, the Special Rapporteur had over-stressed the claim and debt aspect of currency; for its nature had changed considerably in recent years. A distinction should be made between currencies that were traded on the world market and other currencies. In the case of a worldwide currency like the dollar, it was not necessary to make provision for compensation in gold or foreign exchange; but where a currency was not in worldwide use, the question of compensation might arise. For example, when the island of Okinawa had been returned to Japan, since the dollar was a worldwide currency universally accepted as means of payment, the agreement concluded between Japan and the United States of America had not contained any special provision concerning currency. As an internal measure, however, the Japanese Government had decided to make up the difference between the dollar rate of exchange prevailing at the date of the return of the island—305 yen—and the rate before the monetary crisis—360 yen. It had accordingly paid the difference of 55 yen to all dollar holders who wished to convert their dollars into yen. On the other hand, when the island of Amami Ô shima had been returned to Japan, the currency question had been settled differently, because the American occupation authorities had issued a currency which had been legal tender in that island only. The Japanese Government, by the agreement concluded on the matter with the United States, had waived all claim against the United States Government for monetary compensation.

2. Those examples showed that the currency problem could not be settled in the same way in all cases, even when the same countries were involved, and that each case required separate treatment. Thus the Commission should be extremely cautious about stating a rule

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

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