# State succession

**Succession of States**

*Matters other than Treaties. ILC Draft Articles.*

Following is an extract from a statement of the Legal Adviser at the Sixth Committee of the United Nations General Assembly at the 32nd Session on the Draft Articles of the International Law Commission on the subject, State Succession in Respect of Matters Other than Treaties:[26]

> I should now like to turn to a second substantive aspect of the Commission's work—State succession in respect of matters other than treaties. We believe that the work of the Commission on this subject is still warranted despite the fact that in the last thirty years so many States have become independent. Problems relating to their succession to property and obligations will remain to be solved for an indefinite period.
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> There are two interrelated aspects of the matter which we believe would bear better consideration by the Commission. They both involve recourse to equity as an element in determining succession to State property and State debts. Last year our preoccupation with other aspects of the Report led us to forbear from comment on the references in Articles 15 and 16 to 'equitable proportion' as the factor controlling succession to movable property unconnected with the activity of the predecessor State in the successor territory. This year a comparable provision appears in Article 21(2) relating to succession to debts in the case of transfer of part of the territory of the State.
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> The Chairman of the Commission noted in his statement that 'perhaps the point which calls for consideration here is the last part of paragraph 2—that is to say—whether the indications of what is equitable should be retained, discarded or expanded'. The only indications so given are in these words: 'Taking into account, inter alia, the property, rights and interests which pass to the successor State in relation to that State debt.' The comment (paragraph 38 of Chapter III) sheds little light on what is meant by equity. If we go back to the commentary in the Report of the Commission for 1976, we find some general discussion of 'equity' at pp 316-319. The substantive part of this discussion reproduces the views of the International Court of Justice in the *North Sea Continental Shelf* cases; but it does not contain any identification of what specific considerations determine the equities in this particular connection.
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> My delegation believes that there may be value in observing these references to 'equitable proportions' as part of a broader development in which the international community appears increasingly to be turning to the idea of equity as what might be called 'a formula of last resort'. In various situations where it is not possible, or is

26. Text supplied by the Department of Foreign Affairs, Canberra.

difficult, to prescribe in advance precise solutions for delicate problems and where the most that one can hope to achieve is a fair or reasonable solution in the light of the special circumstances of each situation, a number of emerging texts use expressions such as 'equity' or 'equitable principles'. If we look, for example, at the Informal Composite Negotiating Text which has emerged from the current Law of the Sea Conference, we may note that references to equity appear some eleven times, and, in particular, in relation to the delimitation of economic zones and continental shelves. We find it also in international texts relating to the use of common resources—where equitable use of the resource is prescribed for each party.

As we have just said, in itself this practice is not reprehensible provided that we are aware of what we are doing. In effect, we are identifying an area in the law in which we do not wish, or are unable, to prescribe objective rules with a specific and predictable content. Instead, we are leaving it to the parties to agree as to what is equitable in a particular case. And if the parties cannot agree, then there is no applicable rule of law. All that we can hope for is that the parties will have accepted, or will be prepared to accept, third party settlement. In such a case, we are conferring on the third party what is, in effect, a quasi-legislative power. We are saying to him: 'We have not been able to prescribe controlling rules of law in sufficient detail. You must now decide what it is right to do in the particular circumstances'.

However, this approach to a solution leaves us with the question: Ought we to be attempting in advance to identify more precisely the factors which a third party should be taking into account when exercising the subjective discretion which a mandate to decide what is 'equitable' necessarily confers upon him?

In the present situation, the Commission in its comment (see paragraph 38 on p 186) has stated that all relevant factors should be taken into account in each particular case and that they 'must include, among others, "the property, rights and interests" which pass to the successor State in relation to the debt in question'. The Chairman has expressly invited us to say whether the indication of what is equitable should be retained, discarded or expanded. My delegation, for its part, feels that it would be right to answer the Chairman's question by saying that the indication of what is equitable should be expanded. We believe it is the task of the Commission to probe more deeply the range of factors which may affect an equitable decision in such circumstances and to make the not inconsiderable effort involved in specifying that some are more relevant than others. If the Commission should find that, after making this attempt, the relevant equitable factors cannot be adequately specified, then it is right that we should be told of the nature and extent of the difficulties and divergencies. Only then can we be aware of the full implications of

signifying our willingness to accept the application of equity. In this connection we are bound to advert to at least one difficulty which arises in connection with the expression 'property, rights and interests' which the Commission is now using in this context. We believe it would be helpful if the Commission were to specify more clearly what it has in mind in the use of the word 'interests' of which the imprecision was so strikingly demonstrated in the *Barcelona Traction* case.

These remarks about the desirability of giving fuller consideration to the identification of equitable factors bring us to a closely connected problem which arises by virtue of the comparison to be drawn between Articles 21 and 22. Article 21 deals with the effect upon debts of 'transfer of part of the territory of a State'. It does so in terms of a specific rule that if the matter is not settled by agreement between the predecessor and the successor, an equitable proportion shall pass. Article 22 deals with the situation in the case of newly independent States. Here the solution is approached in different terms. There is to be no succession, unless an agreement is reached which reflects the link between the debt and the territory to which the succession relates, as well as the property, rights and interests which pass to the newly independent State.

At first sight, this approach may in itself appear to be a reasonable one. But when it is read in conjunction with those provisions which refer to equity as the ultimate formula, one is bound to question what equity in Articles 15, 16 and 21 can mean if its use is abandoned in the case of newly independent States? Are newly independent States to have something that we should call 'better than equitable' treatment? The answers to both these questions appear to be in the affirmative. In a sentence in the commentary (paragraph 64 on p 220) heavy with implications, the Commission, after referring to the 'special and unique considerations not found in other types of succession', says that this 'implies the necessity to avoid such general language as "equitable proportion" which has proved appropriate in other types of succession but which would raise serious questions of interpretation and possible abuse in the context of decolonization'.

While my delegation is far from denying the special situation and needs of newly independent States, it feels bound to ask what are those 'serious questions of interpretation and possible abuse' which could affect the application of the concept of equity. If, as one must be bound to assume, settlements involving equity are to be reached only by agreement or third party decision, what questions of interpretation and abuse could affect newly independent States which would not also operate in other situations. In other words, it is not merely the rule established for newly independent States which occasions questions, but, even more important, the impact of that rule upon the value and application of equity elsewhere that excites our curiosity and concern.

**Treaties**

*United Nations Conference on Succession of States in Respect of Treaties*

Following is text of a report of the Conference:[27]

> The United Nations Conference on Succession of States in Respect of Treaties was held in Vienna from 4 April to 6 May 1977. Despite a generally co-operative atmosphere and the demonstrable willingness of the eighty-eight delegations to conclude a convention, a second negotiating session will be necessary next year.
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> It had been hoped that the Conference would be able to negotiate a convention codifying and developing the rules of public international law which determine whether treaties which applied to a territory when it was within the international responsibility of one state shall continue to apply when the territory changes hands, either by becoming part of another state or by becoming independent.
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> Australia was represented at the Conference. Australia's main interest relates to the status of treaties affected by changes in the international responsibility for Australia itself (succession from the United Kingdom); for Papua, Norfolk, Cocos, Christmas and other islands over which Australia assumed sovereignty since federation; and for Nauru and New Guinea, accepted originally as Mandated Territories.
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> An additional interest is the succession of Nauru and Papua New Guinea to Australia's treaties. Just as Australia has been entitled to succeed to many British treaties which were applicable in respect of Australian territory before Australia assumed full treaty-making competence, so Nauru and Papua New Guinea, upon attainment of their independence, became entitled to succeed to relevant Australian treaties.
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> Although the rush to independence of former colonial territories is almost over, the conference is not an academic exercise. The proposed convention remains directly relevant to Namibia and Rhodesia; it potentially applies to changes of sovereignty of territory through voluntary transfer, secession or merger in the future; and it will have a strong practical influence, as a handy manual of law, on the solution of problems arising from successions which have taken place before it enters into force.
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> The previous Vienna codification conference, in 1975, on representation of states in their relations with international organisations completed its work in one session. But it can hardly be regarded as successful, because the convention that it produced seems unlikely to attract sufficient support from states to make its application effective. This came about because there was a failure to reach consensus on the more important issues; there was a breakdown of informal consultations between groupings of delegations, and over-enthusiastic resort to voting procedures by groups with the numbers. Such 'quick-hammer' procedures disposed of work expeditiously,

27. Aust FA Rec, May 1977, 260.

but alienated important delegations in the minority and left them with a convention which would impose on their governments obligations which they were unable or unwilling to assume.

The Succession of States Conference has so far avoided the mistakes of the 1975 conference. Several draft articles which proved contentious were referred by the formal working committee to an informal working group for more intensive examination and consultation. In the result, of the thirty-nine substantive draft articles contained in the main working paper of the Conference (the draft articles prepared over a number of years by the International Law Commission [ILC]), twenty-nine were debated. Twenty-five articles have been adopted substantially as drafted by the ILC; articles on possible retroactivity of the convention, its applicability to only legitimate situations and its effect on territorial regimes attaching to territory have been deferred.

In articles adopted so far it has been confirmed that a succession of states does not disturb boundaries established by treaties. Rules for the more controversial area of succession by 'newly independent states' (essentially ex-colonial territories) have been settled, confirming that pre-independence agreements with the colonial power are to be discounted in favour of decisions made independently by the new state in its own sovereign right in regard to each treaty. Provisions adopted give a new state the right to succeed to most multilateral treaties, and the facility to arrange the continuation in force of relevant bilateral treaties in force at independence between its parent state and a third state.

The Conference confirmed the astuteness of the ILC in boldly adopting aspects of third world practice in treaty succession as the basis of its draft articles, notwithstanding that at the time much of that practice was still undeveloped and at variance with the preferred practice of older established states. The ILC gave direct effect to the right of self-determination of peoples and the principle of the sovereign right of newly independent states by adopting the 'clean-slate'[28] principle as the cornerstone of its draft articles. Although the ILC's approach, when originally propounded, was considered by some western foreign ministries and jurists to be founded on insufficient state practice, and to disregard the need for continuity and certainty in legal relations of states, at the Conference the great majority of delegations endorsed the clean-slate principle. Indeed, the ILC draft articles tended to be treated by many as sacrosanct, so that amendments so far made to them have been of a drafting or minor procedural nature.

The Conference resolved to recommended that the United Nations

28. 'Clean-slate' (or '*tabula rasa*') is a metaphor for the principle that a newly independent state is not obliged to succeed to treaties of its predecessor state. It may elect to succeed to most treaties. As an exception to 'clean-slate', a succession of states does not affect boundaries established by treaty.

General Assembly approve a second session of four weeks in Vienna about April 1978.