CHAPTER 16

Protest in International Law

16.1 Introductory Remarks

Protest is mentioned as an example of unilateral acts in almost every doctrinal catalogue of such acts. What must be underlined at the outset is the practical importance of that act. It is used very frequently. The great number of protests, both publicly declared and officially lodged, is almost certainly due to the preservative and protective character of the act. In some situations states do not make a protest for political reasons, so in fact the potential number of protests is even larger. Protest could be perceived as the antithesis of recognition. Hence it is no wonder that the main goal of the present chapter is to examine whether protest is in fact a unilateral legal act (international legal transaction) of international law. To this end the definition of protest, its forms and legal effects will be analysed.

E. Suy remarked in 1962 on the small number of publications devoted to protest. Despite the fact that since the publication of his book protest has been the topic of two monographs, one of them being quite new, the very number of publications devoted to the issue does not reflect the true level of interest of the doctrine in protest. It is rather moderate overall. So when the special rapporteur wrote in his fourth report, that ‘Declarations which constitute protests are frequent in practice, and thus have been examined by international doctrine and case law,’ it may said that he was overly optimistic in his assessment of the doctrine as such. E. Brüel was probably most correct when he noted (in 1932) that the doctrine analysing protest was usually part of works dealing with other problems of international law.

1 Vide: part 1 of the present work.
2 J.C. McKenna, Diplomatic Protest in Foreign Policy. Analysis and Case Studies, Chicago, 1962, pp. 1–2. He cites 598 protests made within 14 chosen years of the 20th century. He meant only protests which were made publicly available.
3 Which does not necessarily mean that protest will be always sufficient for the preservation of rights.
6 4. report, p. 21, par. 96.
7 E. Brüel, La protestation en droit international, Nordisk Tidsskrift Int. Ret, 1932, p. 75. The above-mentioned work of J.C. McKenna is a good example of this, inasmuch as its author is not a lawyer nor is the book is limited to legal aspects. It touches upon them, however, and because of that must be taken into consideration in the present analysis.
The above remarks should not be understood as criticism of the existing doctrine. Their aim is rather to point out some characteristics which may have to do with the very essence of protest. In any case it could not be overlooked in the present book. If a lawyer would like to say anything important about protests, he/she rather looks for it in a wider context when discussing such concepts as *acquiescence*, tacit consent, opposability of situations and so on. In this sense protest is quite atypical as compared with other classical acts.

The attitude of the special rapporteur toward protest is instructive (though perhaps in the negative meaning of the term) in this regard. He decided to devote a large part of his seventh report to protest. It fact that part became a list of about 70 protests, or situations which gave rise to protests. Inasmuch as this list does not shed significant light on the essence of the act, it is not my aim here to present this list nor make a competing list.

16.2 Definition of Protest

The very effort to define protest is quite difficult. Clearly protest is connected with opposition, lack of consent, or lack of approval of or acquiescence to a given situation or action. However if the definitions proposed by several authors are compared, it becomes clear that they differ to a considerable extent.

D. Anzilotti presents protest as an expression of will not to recognize a given claim, act or state of affairs as legitimate (*légitime*). This definition is accepted by some other authors. However, others replace the reference to legitimacy with reference to legality. In this sense protest reveals an intent to perceive a given situation, claim or behaviour as being not in conformity with international law. In other words, it reveals a position that such a situation or activity is a breach of international law.

What is visible in all the definitions is their interrelationship with the views on the essence of recognition. It is thus no wonder that, according to D. Anzliotti, recognition is connected with legitimacy (*légitime*), while according to the

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8 D. Anzilotti, Cours de droit international, traduction française par G. Gidel, Paris, 1929, p. 349.