

**United Nations Conference on Succession of States
in respect of State Property, Archives and Debts**

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34th meeting of the Committee of the Whole

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34th meeting

Friday, 25 March 1983, at 10.25 a.m.

Chairman: Mr. ŠAHOVIĆ (Yugoslavia)

Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982 (continued) (A/CONF.117/4, A/CONF.117/5 and Add.1)

[Agenda item 11]

Article 32 (Effects of the passing of State debts)

New article 31 bis (Passing of State debts)

1. The CHAIRMAN invited the Committee to consider article 32 and the amendment thereto submitted by the Netherlands (A/CONF.117/C.1/L.48) and, at the same time, the United States amendment involving the addition of a new article 31 *bis* (A/CONF.117/C.1/L.47). Remarking that the issues involved had already been discussed at length, he appealed for brevity.
2. Mr. ROSENSTOCK (United States of America), introducing his delegation's amendment involving the addition of a new article 31 *bis*, said that the problem to which that amendment and his delegation's other proposal for the addition of a new article 19 *bis* (A/CONF.117/C.1/L.42) were addressed stemmed partly from the fact that the International Law Commission's text was only half rationalized. Some points common to Parts II, III and IV were treated together in Part I while others were not and there was no self-evident logic to the pattern. He hoped that the Drafting Committee would in due course rationalize all the articles common to the three Parts, thus simplifying the text and making clear both the similarities and the differences between the Parts. Until such rationalization was accomplished, his delegation felt it its duty, in the absence of express reasons to the contrary, to seek identity of approach as between Parts II, III and IV, since failure to do so would entail a risk of confusion and misunderstanding.
3. The point of the amendment was to make clear that the act of passage from the predecessor State to the successor State neither increased nor decreased that which passed. That fact might have more immediate obvious importance in some Parts, such as Part II, than in others, but its fundamental validity with regard to all Parts should be beyond dispute. The point was, in sum, fundamentally a drafting one, and if the Drafting Committee had not been paralyzed by the obduracy of one member, the matter could have been referred to it. Indeed, if the Chairman were to recommend that the matter should be submitted to the Drafting Committee and if no State objected, his delegation would see no need to press its proposals to the vote. Failing such a decision, it saw no alternative but to request a vote on the amendments.
4. Mr. MAAS GEESTERANUS (Netherlands), introducing his delegation's amendment to article 32, pointed out that, unlike the United States amendment, it had not yet formed the subject of any discussion in the Committee. In the particular context of Part IV, dealing as it did with a special triangular relationship, the wording of article 32, which followed the lines of that adopted earlier for articles 9 and 20, seemed to imply that the fact of State succession had legal consequences in respect of, on the one hand, the relationship of the predecessor State with a third State and, on the other hand, the relationship of the successor State with a third State. Article 34, paragraph 1, however, seemed to deny such legal consequences, at least with regard to creditors, for it stated that their rights and obligations were not affected by the State succession as such. In other words, creditors—whether third States, other subjects of international law or private individuals—remained creditors of the predecessor State, and the State succession as such did not create any obligation on the part of the successor State towards them. The latter rule was subject to an important exception in paragraph 2 of article 34, to which his delegation would return in due course. The two rules laid down in articles 32 and 34, respectively, appeared to be mutually contradictory. In order to avoid any misunderstanding as to how those rules would operate and to forestall difficulties with creditors that might otherwise arise, his delegation was simply proposing the inclusion of a cross-reference to article 34 at the beginning of article 32.
5. Mr. MARCHAHA (Syrian Arab Republic) said that there was no practical justification for the United States proposal for a new article 19 *bis* since, in practice, archives were usually photocopied. He opposed the United States proposal for a new article 31 *bis*, which was in direct contradiction with the provisions of article 36 on newly independent States.
6. Referring to the Netherlands amendment to article 32, he said that the proposed addition would be inconsistent with the phrase "in accordance with the provisions of the articles in the present Part" at the end of the article. There was no legal foundation whatsoever for making a specific reference to article 34 rather than to any other article in Part IV.
7. The CHAIRMAN reminded the Committee that he had not yet invited discussion on the proposed new article 19 *bis*.
8. Mr. NATHAN (Israel) said that article 32 as drafted gave rise to considerable legal difficulties. By employing identical terms in articles 9, 20 and 32, the International Law Commission gave identical treatment to legal situations which, in fact, were quite distinct. Parts II and III were concerned with bilateral relations between the predecessor State and the successor State, whereas Part IV, as the Netherlands representative had pointed out, dealt with the tripartite relationship of the predecessor State, the successor State and a creditor State as third party.
9. Paragraph (5) of the commentary to article 34 spelt out clearly the basic proposition underlying that arti-

cle—that the predecessor State retained its debtor status and full responsibility for the old debt. In three of the five specific categories of succession of States envisaged in Part IV—that of transfer of part of the territory of a State, that of newly independent States and that of separation of part or parts of the territory of a State—the personality of the predecessor State remained intact; so did the creditor-debtor relationship between that State and the third-party creditor State and the original liability of the former to the latter.

10. There would therefore be no necessary or crucial connection between the passing of the debt and its extinction, nor would the passing necessarily entail extinction. Indeed, as he had already stated, there would be no such extinction in three out of five cases. Hence, use of the terms “extinction” and “arising” might be inappropriate and even run counter to the obvious intention of article 34, as was also borne out by the commentary to that article. A possible solution might be to delete article 32 altogether but, in the circumstances, his delegation would support the Netherlands amendment, which would bring article 32 into line with article 34.

11. So far as the United States amendment to introduce a new article 31 *bis* was concerned, he suggested that it should be referred to the Drafting Committee.

12. Mr. EDWARDS (United Kingdom) formally moved that the proposed new article 31 *bis* and, in due course, the proposed new article 19 *bis*, should be referred to the Drafting Committee under rule 47, paragraph 2 of the rules of procedure for advice as to whether those new articles should be incorporated in the draft convention.

13. Mrs. BOKOR-SZEGÖ (Hungary) formally opposed that proposal. The United States amendment touched on substance and the Drafting Committee, a body with restricted membership, was not competent to offer advice on it. As she had pointed out in connection with new article 8 *bis* (19th meeting), which her delegation had not supported, the International Law Commission's intention in drafting articles 9, 20 and 32 had not been to emphasize, as a principal rule, the passing of State property, archives and debts but, rather, to define the consequences of such passing in those cases where it took place in accordance with the provisions of the convention. Those provisions differed according to the specific category of succession of States involved; in particular, those governing State debts in the case of newly independent States were exempt from the principal rule. Admittedly, the United States amendment included the phrase “in accordance with the provisions of the articles in the present Part”; nevertheless, by emphasizing as the principal rule the passing of State debts, it was at variance not only with the International Law Commission's intentions but also with the interests of newly independent States. For those reasons, her delegation was unable to accept the amendment and categorically opposed the proposal that it should be referred to the Drafting Committee.

14. Mr. MORSHED (Bangladesh) said that he entirely agreed with the view expressed by the Hungarian representative and shared her difficulty in accepting the proposal made by the representative of the United

Kingdom. As had been stated many times, each Part of the draft convention had its own specific character and should be interpreted in its own context. In his view, articles 19 *bis* and 31 *bis* should be considered separately and put to the vote if necessary.

15. Mr. ROSENSTOCK (United States of America) said that there appeared to be a profound misunderstanding as regards the object and purpose of articles 9, 20 and 32. Those articles merely indicated the effects of the act of passing of State property, archives and debts and had nothing to do with what precisely it was that passed. His delegation's amendments were intended merely to clarify the wording of the International Law Commission's draft of articles 20 and 32 which was somewhat opaque, particularly in the English version. There was no conceivable way in which those amendments could be understood as conflicting with any other article of the draft convention in the manner the Hungarian representative had suggested.

16. The CHAIRMAN noted that the proposal made by the United Kingdom representative did not enjoy the support of the Committee as a whole.

17. Mr. EDWARDS (United Kingdom) withdrew his proposal.

18. Mr. OESTERHELT (Federal Republic of Germany) said that his delegation supported the amendment proposed by the delegation of the Netherlands.

19. A reading of the text of article 32 as it stood, in isolation and detached from other provisions of the same Part, led unavoidably to the conclusion that the effect of the article was to extinguish the obligations of the predecessor State without any further exception. He pointed out, however, that the “extinction” of that State's obligations would by juridical necessity imply also the “extinction” of the rights of the creditor State, since the latter were the obverse of the same coin; debts were debt-claims when viewed from the other side of the relationship between debtor and creditor. So as not to be misleading, therefore, it was necessary to guide the reader of article 32 to the provision of article 34, which embodied the basic rule that a succession of States did not as such affect the rights of creditors, and without which the importance of article 32 could not be fully appreciated. No material change was needed, since the material provisions were already present in the draft. A cross-reference to article 34, however, was necessary and would be helpful in avoiding any possible misunderstandings.

20. Mr. PHAM GIANG (Viet Nam) said that his delegation unreservedly supported the text of article 32 as it stood.

21. Referring to the amendment proposed by the United States, he said that, while it was necessary to ensure the internal consistency of the convention as a whole, it was inadvisable to pursue formal consistency at the cost of failing to recognize the unity of each Part of the draft. The proposed new article 31 *bis* would establish a general rule for the passing of State debts in Part IV. That rule, however, patently contradicted article 36, which dealt with the passing of debts in cases where the successor State was a newly independent State. In that respect his delegation concurred with the statement made by the representative of the Syrian

Arab Republic. A careful comparison of the proposed article 31 *bis* with paragraph 1 of article 36 showed that an awkward legal situation would arise if the former were incorporated in the draft, in that two contradictory rules on the passing of State debts would be established in Part IV. His delegation therefore felt that, from the points of view of both form and substance, the new article was unacceptable and would prove particularly disadvantageous or even dangerous for newly independent States which, as was acknowledged in the commentary, were in a precarious economic and financial situation.

22. Mr. BEDJAOUI (Expert Consultant) said that there seemed to be general agreement that parallels should be drawn between articles 9, 20 and 30, which were similar in construction and dealt with the effects of the passing of State property, State archives and State debts, respectively. He stressed that those articles, like article 32, did not themselves organize the passing in those cases: they merely described the legal consequences which would ensue if such passing occurred. If debts passed pursuant to the articles in Part IV, a legal situation arose which involved the extinction and arising of obligations, just as rights were extinguished and arose under articles 9 and 20.

23. In connection with the proposed article 31 *bis*, he said that he wondered whether it would be justifiable to establish a general rule for the passing of State debts when there was at least one case in which such debts did not in fact pass. In view of the possibility of serious misunderstandings, he thought that the Committee might consider dispensing both with article 32 and with the proposed new article 31 *bis*, the two provisions being inseparable. Such action would however raise the issue whether articles 9 and 20 could be retained.

24. Mr. ROSENSTOCK (United States of America) asked whether the Expert Consultant took the view that article 31 *bis* would introduce any substantive change. In his delegation's view, articles 8 *bis*, 9, 19 *bis*, 20, 31 *bis* and 32 were all perhaps not absolutely essential in that they could be eliminated without rendering any Part of the draft inoperable. He wondered whether, on the assumption that article 32 was retained, there was any element in his delegation's proposed article 31 *bis* that would disturb the pattern established by article 32.

25. Mr. BEDJAOUI (Expert Consultant) said that there was a technical problem involved in establishing a general norm declaring the passing of State debts when there was at least one case in which that norm did not apply. The proposed paragraph 31 *bis* certainly implied a change of direction but it was for the Committee to decide whether it also involved a change in substance.

26. Mr. ECONOMIDES (Greece) said that articles 8 *bis*, 19 *bis* and 31 *bis* were all concerned with the principles involved in passing. The Committee had adopted article 8 *bis* and he did not understand how it was logically possible for any delegation which had found the principle enunciated in that article acceptable to oppose its extension to State archives in new article 19 *bis*, and to State debts in new article 31 *bis*. Some delegations had maintained that, whereas the rules regarding the passage of State property were very general, those rules were less clear in the case of archives

and sometimes inapplicable in the case of State debts. In his delegation's view, however, the rules were very flexible and he could not understand why the new articles 19 *bis* and 31 *bis* had met with opposition. In fact, the two new articles were just as necessary as articles 20 and 32.

27. The Expert Consultant had suggested that both new article 31 *bis* and article 32 might be dispensed with. Such a radical solution would, in his delegation's view, cause an imbalance of the draft: there would be provision for the effects of passing in Parts II and III, but not in Part IV. The solution would entail removal of all the articles relating to the effects of passing.

28. Other less radical solutions remained which might be acceptable. If the article 31 *bis* proposed by the United States should not be adopted, his delegation would submit a compromise text aimed at meeting the concerns of delegations which felt that the rule on passing approved in Part II (State property) was ill-suited to the Parts dealing with State debts and State archives. The text of article 31 *bis* to be proposed by his delegation would read:

“The provisions of article 8 *bis* concerning the passing of State property apply *mutatis mutandis* to State debts to the extent that such debts pass from the predecessor State to the successor State in accordance with the provisions of the present Part.”¹

29. His delegation would also propose an analogous text for a new article 19 *bis*.²

30. Mr. BEDJAOUI (Expert Consultant) said that it had been argued that there might be an imbalance in the convention if articles 32 and 31 *bis* were dropped. He stressed however that parallelism should not become a fetish. The situation with regard to State property and State archives was quite different from the situation with respect to State debts: a third State was not involved in the first two cases, whereas, in the case of a succession of States that affected debts, the position of a third creditor State had to be taken into account. If the Committee decided that there must be a correspondence between all three Parts, it would have to find a counterpart to article 34. In fact the subjects of State property, archives and debts were completely independent. He doubted whether there was really an imbalance between the three Parts of the draft convention.

The meeting was suspended at 11.40 a.m. and resumed at 12.25 p.m.

31. The CHAIRMAN announced that the Committee would consider the two amendments by Greece when they became available in written form. He added that the representative of Kenya wished to introduce an amendment before the Committee adjourned.

32. Mr. MUCHUI (Kenya) said that there was clearly some contradiction between article 32 and article 36. Since some delegations wished to maintain article 32, he proposed that it should be amended by deleting the words “A succession of States entails” at the beginning of the article and replacing them by “The passing of State debts entails”.³

¹ Subsequently issued under the symbol A/CONF.117/C.1/L.53.

² Subsequently issued under the symbol A/CONF.117/C.1/L.54.

³ Subsequently issued under the symbol A/CONF.117/C.1/L.55.

33. He explained the reasons behind the amendment. Article 9, on the effects of the passing of State property, and article 20, on the effects of the passing of State archives, were drafted in terms similar to those of article 32. He pointed out however that State property passed to the successor State irrespective of the type of succession involved, either by agreement or by virtue of the rules in the articles of the convention. The same was true of archives. The situation with respect to debts was different. Under article 36 a debt did not pass from the predecessor State to the successor (newly independent) State unless there was an agreement between the two. The rule in fact was that State debts would not pass to a newly independent successor State. It might be better therefore to be more specific in article 32, which as drafted did not really deal with what happened on succession of States but with what happened on the passage of debts from the predecessor State to the successor State. In fact the title of the article was "Effects of the passing of State debts".

34. The proposed amendment would entail no change of substance but would merely make the article clearer. It was offered by his delegation in an attempt to solve the problems before the Conference.

35. Mr. KOLOMA (Mozambique) said that, since a dogmatic desire for parallelism between the three Parts of the convention was slowing down the work of the Conference, he wished to propose, in accordance with rule 31 of the rules of procedure, that the Conference should reconsider article 8 *bis* for, if that article were withdrawn, the problem of matching articles 19 *bis* and 31 *bis* could be solved by the withdrawal of those articles as well.

36. After a procedural discussion in which Mr. ROSENSTOCK (United States of America), Mr. MONNIER (Switzerland), Mr. LAMAMRA (Algeria), Mr. MAAS GEESTERANUS (Netherlands), Mr. TEPAVITCHAROV (Bulgaria) and Mr. NATHAN (Israel) took part, the CHAIRMAN suggested that the Committee should defer further consideration of the proposed new article 31 *bis* and of article 32 pending circulation in written form of the amendments proposed by the delegations of Greece and Kenya, to enable delegations to study those amendments together with the proposal made by the representative of Mozambique.

It was so decided.

37. The CHAIRMAN said that it had become necessary for the representative of Bangladesh to leave the Conference. He had asked for the floor to state his

delegation's position on a number of articles yet to be considered.

38. Mr. HOSSAIN (Bangladesh) said that extraordinary circumstances obliged him to leave the Conference immediately. He apologized to the Committee on behalf of his delegation and thanked the Chairman for giving him the opportunity to place on record a few comments which his delegation wished to make in connection with articles to be considered subsequently.

39. Articles 35 and 38 as drafted by the International Law Commission were well balanced and were acceptable to his delegation. The amendments to those articles proposed by Pakistan (A/CONF.117/C.1/L.13 and L.14) appeared upon preliminary study to be unacceptable, and his delegation hoped that the delegation of Pakistan would reconsider them during the Committee's deliberations.

40. The draft articles as they stood did not provide for any machinery for the settlement of disputes between the predecessor State and the successor State. His delegation believed strongly that a separate article should make provision for the peaceful settlement of such disputes, as was normal in codifying conventions. It was worth noting in that regard that the 1978 Vienna Convention on Succession of States in Respect of Treaties devoted a whole Part to the question of the settlement of disputes.

41. The lack of any machinery for the settlement of disputes might ultimately defeat the main purpose of the future convention, in a situation where a successor State owed its existence to a liberation struggle, to the right of self-determination or to the right of succession. Even when a transfer of sovereignty had taken place, differences of opinion between the predecessor State and the successor State might make the issues relating to succession very difficult to resolve between them. In such circumstances, dispute settlement machinery would play a very important role.

42. It might perhaps be premature at that stage in the Committee's proceedings to suggest in what form new articles, forming a separate Part, might be included in the convention. An attempt had been made in that direction by the delegation of the Netherlands in the form of a proposed new article, co-sponsored by Denmark (A/CONF.117/C.1/L.25 and Add.1). While his delegation appreciated the intentions underlying that proposal, it nevertheless felt that the matter required general consultation and a broad consensus on the adoption of suitable articles governing dispute settlement.

The meeting rose at 1.05 p.m.