

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

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35th meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

35th meeting

Friday, 25 March 1983, at 3.10 p.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 33 (Date of the passing of State debts)

1. Mr. SHASH (Egypt), introducing, on behalf of its sponsors, the amendment contained in document A/CONF.117/C.1/L.49, said that the reasons which had prompted his delegation to submit amendments to articles 10, 11 and 22 had also prompted it to propose amendment of article 33. While the sponsors agreed with the basic principles enunciated in the draft article, they felt that it should include some provision for a decision by an appropriate international body. Such an amendment, in addition to meeting the concerns of some delegations, would make Part IV consistent with the other Parts of the draft convention.

2. Mr. JOMARD (Iraq) expressed support for the amendment.

3. The CHAIRMAN said that, in the absence of further comment, he would take it that the Committee agreed to adopt the amendment without a vote.

It was so decided.

4. The CHAIRMAN said that he also took it that the Committee agreed to adopt article 33, as amended, without a vote, and to refer it to the Drafting Committee.

It was so decided.

Article 34 (Effects of the passing of State debts with regard to creditors)

5. Mr. RASUL (Pakistan), introducing the amendment submitted in document A/CONF.117/C.1/L.12, said that his delegation could not see the real import of paragraph 2(a) of the draft article, despite the explanations provided by the International Law Commission in paragraph (11) of its commentary. His delegation did not take a very firm position on its amendment and would be pleased to withdraw it if the Expert Consultant could satisfactorily explain paragraph 2(a), and if the Committee, in the light of that explanation, were to decide that that subparagraph had a definite and independent meaning and should be retained.

6. Mr. OESTERHELT (Federal Republic of Germany) said that his delegation welcomed the clear formulation of the rule contained in paragraph 1 of article 34. It was juridically well founded and necessary in a draft convention which contained, in other articles, provisions that might be misunderstood without a clear rule to protect the rights of creditors. That rule belonged to the sphere of codification since it was a re-statement of a rule of general international law. It was

also in line with article 12, which was concerned with the rights of third States.

7. His delegation had some difficulty however in understanding the exact meaning of paragraph 2 of article 34, and particularly its relation to the rule embodied in paragraph 1. Paragraph 2(a) indicated that an agreement between the predecessor State and the successor State could be invoked against a third State provided that the consequences of that agreement were in accordance with the provisions of Part IV; the only conclusion therefore was that it was not necessary for the third State to have accepted the agreement. If acceptance were a prerequisite under subparagraph (a), then the two subparagraphs should not be connected by the word "or" but by the word "and", because paragraph 2(b) clearly referred to acceptance of the agreement by the third State. Instead of there being a cumulative connection therefore, the two subparagraphs had been presented as alternatives.

8. On that basis, the first question which arose was whether or not the rule contained in paragraph 2(a) violated the principle of *pacta tertiis nec nocent nec prosunt*, which was embodied in article 34 and subsequent articles of the 1969 Vienna Convention on the Law of Treaties.¹

9. Paragraph (11) of the International Law Commission's commentary clearly referred to that rule of general international law in stressing that paragraph 2(a) dealt only with the consequences of the agreement and not with the agreement itself, whose effect would be subject to the general rules of international law concerning treaties and third States. The commentary also referred to articles 34 and 36 of the 1969 Vienna Convention. If the general rules applied, his delegation failed to understand why the International Law Commission had made a distinction between the two cases in subparagraphs (a) and (b). There was no reason why subparagraph (a) could not be deleted. If however subparagraph (a) was intended to establish a rule whereby an agreement could be invoked against a creditor State without prior acceptance by the latter, the inner logic of article 34 in its relationship to article 35 was incomprehensible.

10. According to paragraph 1 of article 34, a succession of States did not as such affect the rights and obligations of creditors, even though that entailed the consequence that State debts passed to the successor State in accordance with the provisions of section 2 of Part IV. According to paragraph 2(a) of article 34, however, an agreement whose consequences were in accordance with the provisions of article 35 did affect the rights and obligations of creditors, because it could be invoked against a third State.

¹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

11. From a creditor's point of view, an agreement between the predecessor and the successor State could have considerable consequences even if it was in perfect harmony with section 2 of Part IV. If the succession took place in equal harmony with section 2 of Part IV, however, but without an express agreement, then the position of the creditor remained unaffected by virtue of paragraph 1 of article 34. His delegation could see no explanation for that inconsistency and therefore supported Pakistan's request for a clear explanation of what the Commission had in mind.

12. Mrs. BOKOR-SZEGŐ (Hungary) also called for the help of the Expert Consultant in connection with paragraph 2(a) of article 34. As she understood it, where the consequences of the agreement were in accordance with the provisions of Part IV and the third State was also a party, an agreement was not necessary. However, in the case of an international organization, which could not be a party to the convention, did the rule *res alius inter acta* apply?

13. Mr. PIRIS (France) said that paragraph 2 of article 34, as it stood, imposed an agreement concluded between two States on a third State which might or might not be party to the future convention. The wording of the paragraph was not clear and required revision. He suggested that the reference to an international organization or any other subject of international law should be deleted from the main part of paragraph 2, since neither could become a party to the convention, or that both subparagraphs (a) and (b) should be replaced by the following:

“(a) if that third State is a party to the present convention and if the consequences of that agreement are in accordance with the provisions of the present Part; or

“(b) if the agreement has been accepted by that third State”.

As drafted, paragraph 2 was inadequate.

14. Mr. EDWARDS (United Kingdom) said that his delegation considered paragraph 2(a) as proposed by the International Law Commission defective and a possible source of misunderstanding. An agreement concerning the allocation of State debts between the States concerned could be invoked against a third State only if the latter had signified its acceptance of the agreement in some appropriate manner. There were very serious juridical objections therefore to paragraph 2(a), as the representative of the Federal Republic of Germany had eloquently pointed out. Those objections could be met, however, by adoption of Pakistan's amendment. Another possibility, which would be less satisfactory, would be to make subparagraphs (a) and 2(b) conjunctive, linking them with the word “and” instead of the word “or”.

15. Mr. BEDJAOUI (Expert Consultant) suggested that, in view of the complexity of paragraph 2(a), the Committee should postpone its decision on article 34 until the next meeting.

16. Mr. OESTERHELT (Federal Republic of Germany) said that he could agree to a postponement of action by the Committee of the Whole on article 34. Such had been the thought and spirit behind the unfortunately defeated Canadian proposal concerning all

the articles of Part IV in the light of their complexity and close interrelationship.

It was decided to defer further consideration of article 34 and the amendment thereto until a later stage.

*New article 24 bis (Preservation and safety of State archives) (continued)**

17. Mr. A. BIN DAAR (United Arab Emirates) introduced the revised version (A/CONF.117/C.1/L.50/Rev.1) of his delegation's proposal. It was based on the substance of the original text and the essential elements of the suggestions put forward by other delegations during the discussion. His delegation hoped that its revised amendment might be adopted without a vote and that delegations which still had reservations concerning it would agree simply to place their reservations on record.

18. Since archives had been destroyed in the past in the process of succession and since State property had also been destroyed, steps should be taken by the Conference to ensure that such instances did not recur in the future. That concern was a legitimate one and was consistent with the purposes and meaning of the proposed convention and of the Conference. Should the revised amendment be accepted, his delegation would be in favour of including a similar provision in Part II, wherever appropriate and perhaps as article 9 *bis*, in the interest of consistency.

19. Mr. HAWAS (Egypt) said that the revised version of the proposal submitted by the United Arab Emirates responded to many of the concerns which had been voiced earlier. The Egyptian delegation maintained the views it had expressed previously and considered that the revised text could be approved without a vote. The Drafting Committee might perhaps consider whether article 24 and the proposed new article 24 *bis* would not be better combined.

20. Mr. ROSENSTOCK (United States of America) said that his delegation could not accept the revised amendment in document A/CONF.117/C.1/L.50/Rev.1. Article 18 of the 1969 Vienna Convention imposed an obligation to refrain from frustrating the object and purpose of a treaty. In order to meet the concern that material should not be damaged, and instead of assuming bad faith from the outset, a new article could be inserted in Part I, to read as follows:

“Where there is an obligation to transfer property or archives, there is a consequential obligation of due care to avoid damage or deterioration prior to transfer.”

21. Such a provision, particularly if placed in the general part of the draft convention, would in certain respects go beyond the proposed new article 24 *bis*. His delegation did not insist on its proposal but felt that it might meet the concerns of other delegations which, like his own, could not accept article 24 *bis* as proposed by the United Arab Emirates.

22. Mr. BOSCO (Italy) said that, in the view of his delegation, it would be more appropriate to consider the revised proposal of the United Arab Emirates in a different context from that of the convention.

* Resumed from the 33rd meeting.

23. Destruction of a part of State archives could be carried out in good faith. That was certainly the case at his own country's Ministry of Foreign Affairs, which every year burned tonnes of documents for which it would have been impossible to find storage space. It was of course true that archives could be damaged or destroyed in bad faith; in such a case the State which had permitted such damage or destruction would be responsible. The question of State responsibility was, however, thorny and was under consideration by the International Law Commission which was preparing a text on the subject. The point at issue should perhaps be considered in that context. There was no provision in the convention covering wrongful acts. To contemplate the possibility of such wrongful acts in a particular case would involve the introduction of an extraneous concept into the convention and would have the effect of unbalancing the harmony of the text.

24. If, however, it was felt desirable to introduce such a provision, his delegation would be prepared to support the proposal made by the representative of the United States.

25. Mr. RASUL (Pakistan) considered that the revised proposal of the United Arab Emirates should be approved without a vote.

26. Mr. KIRSCH (Canada) said that, as the representative of the United States had suggested another approach to the problem, delegations might wish to consult with a view to discussing the possibility of producing a text which could be adopted without a vote.

27. The CHAIRMAN agreed with the representative of Canada. He was not sure, however, whether the proposal of the United States representative was an amendment or a proposal for insertion of a new article.

28. Mr. ECONOMIDES (Greece), supported by Mr. LAMAMRA (Algeria), suggested that the Committee might wish to accept the revised proposal of the United Arab Emirates without a vote and to refer it to the Drafting Committee with the suggestion that it consider the possibility of producing a text which would also cover State property and which could then be included in Part I.

29. Mr. ROSENSTOCK (United States of America) said that it had become clear to his delegation, when it had received the revised version of the proposal of the United Arab Emirates, that a vote on that text would be required. In his view, adoption of the Greek representative's suggestion would not solve the problem. He had hoped that it might be possible to include in Part I of the convention a more generally acceptable provision along the lines he had indicated. Such a provision might be sufficient to meet the concerns which had given rise to the proposed article 24 *bis*, while at the same time avoiding the problems that some delegations, including his own, faced in connection with the proposed article.

30. Mr. MONNIER (Switzerland) said that the idea incorporated in the revised proposal was generally acceptable and the concern which had given rise to the proposal must be respected. It was desirable to find a formula which could be accepted without a vote. The proposal of the Canadian representative therefore merited consideration.

31. The representative of the United States had proposed another formula which differed from the proposal of the United Arab Emirates both in wording and in basic content and which would cover not only State archives but also State property. He therefore wished to be informed whether, in the circumstances, the delegation of the United Arab Emirates maintained its proposal.

32. Mr. A. BIN DAAR (United Arab Emirates) said that the essence of his delegation's proposal was not in contradiction with the proposal of the United States representative.

33. His delegation supported the suggestion of the representative of Greece that the revised proposal contained in document A/CONF.117/C.1/L.50/Rev.1 should be adopted by consensus. The Drafting Committee might then consider the possibility of using that text as the basis of two separate articles, one for inclusion in Part II and the other for the inclusion in Part III.

34. Mr. EDWARDS (United Kingdom) said that his delegation could not accept the revised proposal of the United Arab Emirates, for reasons which he had already explained. It could therefore not join any consensus on that text. While his delegation would, as a matter of principle, prefer not to see proposed article 24 *bis* adopted, it could agree to the proposal of the United States representative and would be willing to assist in drafting an appropriate text for submission to the Committee.

35. He would, however, insist on a vote being taken on the proposal contained in document A/CONF.117/C.1/L.50/Rev.1.

36. Mr. PIRIS (France) said that he could not accept the revised proposal of the United Arab Emirates without a vote, in view of legal issues which might arise in connection with its assumption of bad faith. He agreed with the representative of Canada regarding the desirability of further consultations.

37. The CHAIRMAN said that, in the absence of objection, he would take it that the Committee wished to defer further discussion of the proposed new article 24 *bis* and the new article proposed orally by the United States representative until a later stage.

It was so decided.

Article 35 (Transfer of part of the territory of a State)

38. Mr. RASUL (Pakistan), introducing the amendment submitted in document A/CONF.117/C.1/L.13, said that his delegation understood that the purpose of paragraph 2 of article 35 was to cater for the situation which would result from the failure of the States concerned to reach agreement on the passing of debts. Paragraph 2 was therefore intended to afford the States concerned an alternative but automatic method for the determination of the portion of debts to be passed to the successor State.

39. His delegation had no difficulty in accepting the basis of the paragraph itself but felt that, for both legal and practical reasons, the presence of the words "in an equitable proportion" could frustrate the intent of the paragraph. The words could refer either to the principle of *ex aequo et bono* as incorporated in Article 38 of the

Statute of the International Court of Justice or to the concept of equity. If the words referred to the former, then the application of the principle would be subject to the agreement of the States concerned. That raised the question of the difference between such an agreement and the agreement envisaged in paragraph 1 of the article. It could be argued that, while the agreement envisaged in paragraph 1 was an agreement finally settling the question of debts, the other was simply an agreement on application of the principle. It was consequently necessary to determine who would apply the principle. It could be applied by a third party such as a court or an arbitral tribunal, or by the States concerned themselves.

40. While the International Law Commission's commentary did not indicate that it was the intention of the Commission that paragraph 2 called for settlement by a third party, application of the principle by the States concerned would convert the paragraph into an ironical provision because, if the States were expected first to agree to apply the principle of *ex aequo et bono* and then to reach a second agreement on application of the principle, that would imply that whatever was agreed by the States was not based on the principle. The dangers implicit in such a situation were clear.

41. If, however, the words "in an equitable proportion" referred to the concept of equity, then it should be borne in mind that equity was not a principle of international law. His delegation was not opposed to the efforts of the International Law Commission to draw on a concept of municipal law if it fitted the situation and helped to alleviate rather than accentuate the problems of the States concerned. Such a concept could, however, be applied only by a court or an arbitral tribunal.

42. The practical reasons for his delegation's opposition to the phrase related basically to the manner in which "an equitable proportion" would be determined. Such determination could be made either by laying down a universal formula or by the States concerned through agreement. In the view of his delegation, it would be almost impossible to produce such a formula for the simple reason that the words "equitable proportion" emphasized the fact that each case had to be treated on its merits.

43. Mr. MARCHAHA (Syrian Arab Republic) said that, since the principal points his delegation had wished to introduce through its amendment (A/CONF.117/C.1/L.38) were largely covered by the text of article 36 as drafted by the International Law Commission, his delegation would withdraw its amendment but reserved the right to revert to the matter when the Committee of the Whole took up draft article 36.

44. Mrs. THAKORE (India) said that her delegation supported the International Law Commission's text of draft article 35, which reflected State practice. It was therefore unable to support the amendment submitted by Pakistan.

45. Mr. BEDJAOU (Expert Consultant) expressed doubts as to the wisdom of deleting the reference to the notion of equity in paragraph 2 of article 35. Were that reference deleted, then an exact correspondence would have to be established between movable and immovable property which passed to the successor State and

the share of the debt which passed to that State. He was not sure if that could cover all situations equitably. The part of the territory which passed to the successor State might well have contributed in a substantial manner to the activity of the predecessor State and might have no connection with that part of the movable or immovable property which passed to the successor State under article 13, paragraph 2. The insertion of the idea of an equitable proportion seemed to rectify the rather mechanical correspondence between the property and the debt which passed to the successor State. If the text of paragraph 2 of article 35 was maintained unchanged, it would not necessarily have a limiting effect but might even broaden the scope of the article. He was aware, however, that problems might arise precisely because of the introduction of the idea of equity. He himself had no firm views on the matter but he thought it preferable to maintain the original wording in order to ensure greater flexibility.

46. Mr. NATHAN (Israel) said that paragraph 2 of article 35 presented certain problems. Under the first part of that paragraph, it appeared that the successor State would assume a certain proportion of the general debt of the predecessor State whereas, in the second part, he was somewhat puzzled by the use of the phrase "that State debt", which could be interpreted as a reference to what was known in international law as a localized debt, namely, a debt incurred by the predecessor State and having specific reference to the part of the territory transferred to the successor State because it was specifically attached to it. If the reference was indeed to such a localized debt, the debt should indeed pass *in toto* to the successor State, being a specific encumbrance on a specific piece of property which passed to the successor State in accordance with the maxim *res transit cum onere suo*.

47. However, if the reference was not to such a specific debt but rather to the general State debt of the predecessor State, it would be necessary, in order to avoid confusion, to establish specific criteria for the passing of an equitable proportion to the successor State. The main criterion would be the general benefit derived by the successor State as a result of the transfer of part of the territory from all the property, rights and interests transferred. He would welcome clarification on that point.

48. Mr. PIRIS (France) reminded the Committee of its lengthy discussion concerning article 13, paragraph 1 (11th and 12th meetings), which contained the words "when part of the territory of a State is transferred by that State to another State". At that time his delegation had submitted an amendment (A/CONF.117/C.1/L.16 and Corr.1) calling for the deletion of the words "by that State". Unfortunately, that amendment had not been adopted. He now wished to propose the deletion of the words "by that State" from article 35, paragraph 1, and also the deletion of paragraph 2 of article 38. His delegation had no difficulty in accepting the reference to "an equitable proportion" in article 35, paragraph 2.

49. Mr. ECONOMIDES (Greece) expressed his delegation's support for the draft article because in that provision the notion of an equitable proportion was accompanied by objective criteria.

50. The CHAIRMAN invited the Committee to vote on the amendment submitted by Pakistan (A/CONF.117/C.1/L.13).

The amendment was rejected by 40 votes to 1, with 18 abstentions.

51. The CHAIRMAN invited the Committee to vote on the text of article 35 as proposed by the International Law Commission as a whole.

Article 35 as proposed by the International Law Commission was adopted by 57 votes to none, with 5 abstentions and referred to the Drafting Committee.

52. Mr. PIRIS (France) said that he had voted in favour of draft article 35 but wished the points he had made before the vote to be reflected in the summary record of the meeting.

53. Mr. ABED (Tunisia) said that his delegation had voted in favour of article 35 as proposed by the International Law Commission because it responded to the objectives pursued.

54. Mr. EDWARDS (United Kingdom) said that his delegation had abstained in the vote on article 35 because paragraph 2 contained the unsatisfactory formula "in an equitable proportion". His delegation had explained, with reference to other articles where that phrase occurred, why it considered it unsatisfactory.

55. The United Kingdom delegation had also been unable to vote in favour of Pakistan's amendment because, although it deleted that particular phrase, it left paragraph 2 in an unsatisfactory form since there would still be no objective test.

56. Mr. RASUL (Pakistan) said that his delegation had voted in favour of the draft article, despite the rejection of its own amendment, because the remainder of the text proposed by the International Law Commission was acceptable.

57. Mr. SUCHARIPA (Austria) reminded the Committee that, during the discussion of article 31, his delegation had welcomed the detailed analysis of the different kinds of State debts in the International Law Commission's commentary but had regretted that no actual application of that analysis had been made in the following articles. That had led to the introduction of the concept of equity into article 35, which caused his delegation some disquiet. His delegation therefore had some sympathy for the amendment submitted by Pakistan. Even if that amendment had been adopted, however, some elements would still have been lacking in the text of article 35.

58. Consequently, his delegation had felt obliged to abstain in the vote on the amendment of Pakistan. It had, however, voted in favour of article 35 as proposed by the International Law Commission because it supported the main thrust of that text.

59. Mr. MURAKAMI (Japan) said that, while his delegation had voted in favour of the draft article, it considered the phrase "in an equitable proportion" too vague.

60. Mr. KADIRI (Morocco) said that his delegation had also voted in favour of the draft article because it supported the introduction of the idea of equity in relations between the predecessor and successor States.

61. Mr. OESTERHELT (Federal Republic of Germany) said that his delegation had abstained in the vote on draft article 35 because of its close interrelation with the other articles in Part IV. It felt unable to take a definitive position on article 35 until questions raised in other articles had been answered.

62. Mr. SHASH (Egypt) said that his delegation had voted in favour of the draft article. It had no objection to the inclusion in that text of the phrase "in an equitable proportion" since paragraph 2 provided for taking into account *inter alia* the property, rights and interests which passed to the successor State. His delegation's interpretation of paragraph 1 of the article was that the agreement between the States would take into account the criteria mentioned in paragraph 2.

Article 36 (Newly independent State)

63. Mr. ECONOMIDES (Greece), introducing his delegation's amendment (A/CONF.117/C.1/L.51), said that a positive wording had been used in preference to a negative formula, because it avoided certain misinterpretations to which the latter might have given rise. The text followed the wording already used in the 1978 Vienna Convention on Succession of States in Respect of Treaties² by referring to every people and every State. That wording should be used whenever there was no imperative reason against it.

64. His delegation had also introduced the words "in accordance with international law" because, in earlier discussion, all members of the Committee of the Whole had seemed to agree that it provided a useful safeguard to ensure that the provision would be applied only in so far as it was consistent with international law. That avoided any application based merely on national law. The amendment also called for the deletion of the last phrase of paragraph 2 of the International Law Commission's text, because of its imprecision.

65. Mr. BOSCO (Italy) said that the fact that his delegation had submitted an amendment (A/CONF.117/C.1/L.52) to paragraph 1 of article 36 did not affect its position on the article as a whole, nor on paragraph 2, with respect to which his delegation had strong reservations. His delegation had deemed it necessary to introduce into paragraph 1 a reference to debts relating to public works in the process of execution in the territory of the successor State from which the predecessor State had derived no benefit.

66. Mrs. THAKORE (India) expressed her delegation's satisfaction with the International Law Commission's text of article 36. Paragraph 1 set out the two necessary conditions for the conclusion of an agreement between the predecessor and successor State and paragraph 2 was designed to avoid exploitation and to ensure that the debt liability of newly independent States, all of which were developing countries, did not impose impossible financial burdens upon them. In that connection, she referred to paragraphs (62) and (65) of the International Law Commission's commentary on the article.

² *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

67. The text of article 36 was the result of a compromise between those members of the International Law Commission who had considered that the article should stipulate more categorically for the non-transferability of any debt whatsoever to the newly independent State and others, particularly from the developed countries, who had felt that it did not give sufficient weight to the need to assign to such States certain debts incurred for the benefit of the former dependent territory and who were in favour of a reference to the possibility of an agreement between the two States concerned.

68. Turning to the amendments to article 36, she said that the Italian proposal to add a reference to "public works in the process of execution" introduced into paragraph 1 an exception which was capable of a very broad interpretation and was therefore unacceptable. Her delegation also had serious reservations regarding the reformulation of paragraph 2, called for by the Greek amendment, since it considerably weakened the International Law Commission's text, which was cast in mandatory terms. It also made no reference to the safeguard that the implementation of agreements between the predecessor and the successor State should not endanger the fundamental economic equilibrium of the latter, to which her delegation attached extreme importance in view of the increasingly grave debt burden of the developing countries.

69. At the inaugural meeting of the recent Seventh Conference of Heads of State and Government of Non-Aligned Countries, Mrs. Gandhi had drawn attention to the fact that, since 1979, the debt burden of the developing countries had doubled to reach a total of US\$ 600 billion. That alarming situation was being compounded by sharply rising trade deficits. The International Law Commission had therefore rightly taken the view that international law could not be codified or progressively developed in isolation from the political and economic context.

70. The problems connected with the succession of States in respect of State debts were more lasting than those in respect of treaties, State property or State archives and they should command the earnest attention of the Committee of the Whole. On the other hand, it should not be concluded that a newly independent State would not discharge its debt obligations, particularly when they had been incurred for its development. Indeed, the debt servicing records of developing countries had been excellent on the whole, but greater difficulties were likely to arise in the future. For that reason, the correlation between debt liability and development should never be overlooked: in view of the history of colonialism, that was the humanitarian approach to be adopted in the progressive development of international law.

71. Mr. MARCHAHA (Syrian Arab Republic) reiterated the view he had expressed in his comments on article 14 (14th meeting), namely that newly independent States were in need of the protection of international law. He therefore supported the International Law Commission's text of article 36. His delegation would be unable to support the Italian amendment to paragraph 1, which it found ambiguous. It was not sufficient that public works should be in the territory of

the successor State. They must be first and foremost for the benefit of the successor State. In many instances that had not been the case. Furthermore, the term "public works" was also ambiguous since the definition varied according to internal law.

72. With regard to the Greek amendment, his delegation had never been opposed to reference to international law. Its main objection to the amendment was that it would weaken the mandatory effect of paragraph 1, which was of great importance. In spite of certain guarantees provided in the 1969 Vienna Convention, a newly independent successor State was in a weak negotiating position. His delegation was therefore unable to support the Greek amendment. The question arose as to who should interpret the term "fundamental economic equilibrium" contained in paragraph 2 of article 36 in specific cases. In his view, it should be decided by an appropriate international organization.

73. Mr. ROSENSTOCK (United States of America) said that, although there was some justification for special treatment for newly independent States in regard to debts, the International Law Commission's text of article 36 was not acceptable. Paragraph 1 was far too broad in its rejection of the passing of debt and reflected neither sound law nor prudent policy. Any prospect for agreement in that area would be along the general lines proposed in the Italian amendment, with appropriate modifications.

74. Paragraph 2 of the draft article was completely unacceptable. The concept of "economic equilibrium" and the extensive International Law Commission's commentary on the debt burden of developing countries had no place in the work of the International Law Commission, which had considerable responsibility for the intellectual confusion which had plagued the Conference. Issues relating to succession had been mixed up with issues of economic development, to the detriment of all concerned. Countries might vary in their degree of wealth and democracy but they were all predecessor States. That was a characteristic that Algeria, the Soviet Union and the United States shared in common. To divide along the lines of developed and developing countries was a reflex action irrelevant to the future of the draft convention. He urged delegations to unite in an attempt to develop sensible rules for the future.

75. Mr. MUCHUI (Kenya) said that his delegation supported the International Law Commission's text of article 36, which was well balanced and took account of the economic realities attendant upon the succession of States in the case of newly independent States. It was an important step forward in the development of international law.

76. The Italian amendment was unacceptable because it proposed an exception to the general rule which was ambiguous in view of the broad interpretation which might be given to the term "public works". The Greek amendment resembled a similar one which had been proposed in respect of article 14, paragraph 4. He had stated at that time (*ibid.*) that such an amendment was unacceptable because it attempted to water down the important principle of permanent sovereignty over wealth and natural resources. The Greek amendment

also deleted the last part of paragraph 2 of article 36, which contained a very important provision.

77. Mr. TÜRK (Austria) said that his delegation was not happy with the International Law Commission's text of article 36. One of its drawbacks was that it made no distinction between the different categories of State debts. In that connection he drew attention to the distinction made in paragraph (18) of the Commission's commentary on article 31 between local debt and localized debt. Although he favoured special treatment for newly independent States, the rule stated in paragraph 1 of the draft article went beyond protection of the legitimate interests of such States: it was not in accordance with State practice and it was not consistent with the principle *res transit cum suo onere*.

78. He found the arguments in the commentary unconvincing, particularly those relating to the weak financial position of newly independent States. Other countries were in a similar position. Austria played an active role in the North-South dialogue, but his delegation nevertheless considered the economic considerations which had been adduced to be out of place at a codification conference. Local debts should pass to the

successor State and any exceptions should be determined by means of an agreement.

79. His delegation much preferred to the present draft article 36 the provision in footnote 468 in paragraph (67) of the International Law Commission's commentary on that article. Paragraph 1 of that text attempted to strike a balance between divergent interests, having regard to the basic principle of equity. Paragraph 2 contained terminology with regard to permanent sovereignty over natural resources that was to be found in the International Covenant on Economic, Social and Cultural Rights and in the International Covenant on Civil and Political Rights³ which most Members of the United Nations had ratified.

80. His delegation could accept the Greek delegation's reformulation of that paragraph and it would give further study to the Italian amendment to paragraph 1 of the draft article.

The meeting rose at 6 p.m.

³ General Assembly resolution 2200 A (XXI).

36th meeting

Monday, 28 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 36 (Newly independent State) (continued)

1. Mr. SHASH (Egypt) said that article 36 as proposed by the International Law Commission was a well-balanced provision which sought to regulate the passing of State debts to newly independent States on the basis of equity. The article as it stood consisted of a general rule, an exception and an imperative rule. The rule was that no State debt should pass from the predecessor State to a newly independent State unless an agreement was concluded between them; however, such agreement had to fulfil certain conditions. Paragraph 2 set forth the imperative rule applicable to agreements between the predecessor and the successor State, namely, that they should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, nor should their implementation endanger the fundamental economic equilibrium of the newly independent State.

2. As his delegation had already pointed out in respect of article 14 (15th meeting), the principle of permanent sovereignty of peoples over their wealth and natural resources was, in its view, a recognized principle of international law. The economic equilibrium of the

newly independent State was an important concept on which there was a consensus in present economic international relations. Accordingly his delegation supported the International Law Commission's text of article 36.

3. On the other hand, it would have difficulty in accepting the amendments to article 36 submitted by Greece (A/CONF.117/C.1/L.51) and Italy (A/CONF.117/C.1/L.52), which could affect the balance of the article.

4. Mr. EDWARDS (United Kingdom) said that his delegation found article 36 as proposed by the International Law Commission quite unacceptable. Paragraph 1 set out a basic rule that, in the case of newly independent States, no State debt should pass to the successor State. An agreement between the predecessor State and the newly independent State could be concluded as an exception to that rule, subject, however, to stringent conditions. Clearly, there would be little incentive for a newly independent State to reach such an agreement since, if it did not do so, no State debt would pass to it. It therefore seemed rather pointless for the text proposed by the Commission even to mention the possibility of such an agreement being concluded. Moreover, the implications of the expression "in view of the link" in paragraph 1 were not at all clear; if no such link existed, was the agreement null and void?

5. His delegation believed that a more appropriate rule which was, moreover, justified by State practice