

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

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**A/CONF.117/C.1/SR.36**

**36th meeting of the Committee of the Whole**

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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 Rights<sup>3</sup> 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.*

<sup>3</sup> 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

would be one based on the criterion of the extent to which a loan might have been of utility or of evident benefit to the formerly dependent territory. More important, such a rule would be sensible, fair and reasonable.

6. It was, in addition, difficult to understand why the Commission had drawn a distinction between article 35, which provided for the passing of "an equitable proportion" of State debt to the successor State, and article 36, which provided in effect that no State debt should pass at all.

7. The International Law Commission's commentary on article 36 considered at some length the financial situation of newly independent States; he wondered, however, whether the Commission was really competent to deal with such matters. He also drew attention to the fact that some of the States whose financial situation was described in the commentary (in a section supposed to be concerned with newly independent States) had been independent for well over a century; indeed, in one case the State in question had probably been independent since medieval times.

8. With regard to paragraph 2, his delegation wished to refer to its statements in connection with article 14, paragraph 4 (13th meeting); article 26, paragraph 7 (28th meeting); article 28, paragraph 3 (29th meeting), and article 29, paragraph 4 (30th meeting). In addition, it could not accept the phrase "the fundamental economic equilibria of the newly independent State", which it considered vague and imprecise.

9. The Italian amendment would provide an important exception to the rule of the non-passing of State debts proposed by the International Law Commission, while the amendment proposed by Greece was a useful compromise text. While his delegation would have preferred to see paragraph 2 deleted, it was prepared to support the Greek amendment.

10. Mr. KIRSCH (Canada) said that his delegation had difficulties of both a legal and a more general nature with article 36 as proposed by the International Law Commission.

11. From the legal standpoint, his delegation supported the concept of the permanent sovereignty of every people over its wealth and natural resources, as a general principle designed to promote national development. In the absence, however, of the necessary consensus on the content and scope of that concept, it could not be adduced as a general rule of law. In his delegation's view, the amendment submitted by Greece improved the International Law Commission's text.

12. His delegation had difficulty in understanding the exact meaning and legal implications of the requirement that an agreement concluded between a predecessor State and the newly independent State should not endanger the fundamental economic equilibrium of the newly independent State. The statements made in explanation of the general scope of that concept were not sufficient. The difficulties of interpreting that concept appeared to have been largely by-passed in the discussion. The reference to "public works" in the Italian amendment had, on the other hand, been criticized as too vague.

13. His delegation also had reservations concerning other terms used in article 36, which it had already expressed during the discussion of earlier provisions.

14. Another problem was the approach adopted in article 36. His delegation had no objection to special treatment being accorded to newly independent States, but questioned whether article 36, which created serious problems for some delegations, provided the solution. Other delegations had expressed the view that article 36 was well balanced. The question of balance was fundamental to the future convention: indeed, its viability would depend largely on the extent to which it was able to strike a balance between the often divergent concerns and interests of States. Although reference had been made to the compromise nature of article 36, the element of compromise was difficult to discern. The International Law Commission had evidently sought to take a practical approach: indeed, it could scarcely be faulted for confining itself to narrow legal considerations. The question that arose, however, was where the International Law Commission saw the incentive for a predecessor State to become a party to the convention. It might well be asked what would be the relevance of article 36 if no predecessor State became a party to the convention.

15. His delegation supported the suggestion made by the representative of Austria at the previous meeting, that the Committee should adopt, instead of the draft article proposed by the International Law Commission, the text referred to in paragraph (67) of the Commission's commentary and reproduced in footnote 468. That text was more equitable and flexible and its intent was clearer.

16. Mr. TSYBOUKOV (Union of Soviet Socialist Republics) said that his delegation fully endorsed the International Law Commission's text of article 36. Like earlier articles relating to newly independent States, article 36 took the vital needs and interests of those States as its point of departure. Newly independent States could not start out saddled with debts with which they had no direct connection. The debts of former metropolitan colonial Powers should not be transferred to newly independent States even in those cases where the funds in question had been used in the interest of the former dependent territory, since clearly the metropolitan power would have derived greater benefit from its exploitation of the dependent territory than it had spent on that territory's development. His delegation would therefore have been able to support a provision that was limited to the general rule that no State debts should pass to newly independent States. The fact that derogations from that rule were foreseen, subject to certain conditions, was a compromise. It was essential therefore that those conditions should be clearly specified, as they were in article 36 as it stood. His delegation considered those conditions to be fully warranted, particularly the requirement that any agreement should respect permanent sovereignty over wealth and natural resources and should not endanger the basic economic equilibrium of newly independent States.

17. Consequently, his delegation was unable to accept the Italian amendment, which would place newly independent States under an obligation to conclude

an agreement with the predecessor State. With regard to the Greek amendment, his delegation preferred the original text, which set forth more cogently generally recognized norms of contemporary international law.

18. Mr. PIRIS (France) said that the statements made by his delegation during the consideration of articles 14 (13th meeting) and 26 (28th meeting), as well as in explanation of its vote on those articles, should be taken as reflecting its position on article 36.

19. Article 36 as a whole was unacceptable to his delegation. The general principle stated in paragraph 1 that State debts should not pass to newly independent States was not in accordance with State practice. Indeed, in paragraph (13) of its commentary the International Law Commission admitted there were precedents in favour of the passing of State debts and precedents against. The Commission appeared to have relied exclusively on extralegal considerations and such premises as that, in the future, predecessor States would always be wealthier than newly independent States and that advantage should be taken of State succession to rectify those imbalances. In his delegation's view, that was a matter for settlement by bilateral agreement. He associated himself with the United Kingdom representative's remarks concerning paragraph 1 of the draft article.

20. Paragraph 2 gave rise to concerns similar to those his delegation had expressed in connection with article 14, paragraph 4; article 26, paragraph 7; article 28, paragraph 3 (29th meeting); and article 29, paragraph 4 (30th meeting). The provision should be completely reworded.

21. The International Law Commission's text of article 36 was not codification of international law: it represented an attempt by the Commission to develop international law. It could not therefore be imposed on States which did not accede to the future convention.

22. He expressed regret at and disagreement with certain statements in the International Law Commission's commentary, particularly regarding the concept of "equitable proportion", which was appropriate in other kinds of State succession, but raised problems in connection with article 36, as indicated in paragraph 63 of the commentary.

23. The Committee of the Whole should bear in mind that article 36 had been the subject of some disagreement among the members of the International Law Commission, as was noted in paragraph (67) of the latter's commentary where reference was made to an alternative text.

24. His delegation viewed the Italian amendment to article 36 as an effort to produce a more reasonable provision. However, since the amendment left much of the original text intact, it did not solve most of his delegation's problems with the article.

25. The Greek amendment was acceptable to his delegation, which favoured a similar type of compromise in respect of article 14, paragraph 4.

26. Mr. SKIBSTED (Denmark) said that his delegation could understand the motivation underlying the International Law Commission's text of article 36: the severe debt burden of a number of newly independent

States was a problem that had to be recognized. From the legal point of view, however, article 36 created problems for his delegation, which had objections similar to those expressed by previous speakers. By stipulating that no State debts should pass to newly independent States unless agreed otherwise, the text offered no real encouragement for the successor State to have recourse to settlement by agreement. In fact, the freedom of the parties concerned to conclude such an agreement was so severely restricted as to be virtually non-existent.

27. As in the case of articles 14 and 26, a number of the criteria set forth in article 36, particularly paragraph 2, were too vague and imprecise to be applied as legal criteria. Consequently his delegation would be unable to accept article 36 as proposed by the International Law Commission. The Greek amendment, which removed some of the basic drawbacks of the Commission's text, would be a useful compromise.

28. Mr. BRAVO (Angola) said that, as the International Law Commission had recognized, the emergence of newly independent States was the most widespread feature of State succession in the last 25 years. As had already been noted, the economic situation of those States posed a dramatic problem. His delegation believed that the future convention should reflect the economic interests and realities of newly independent States. It therefore fully supported the draft article as proposed by the International Law Commission. For reasons of principle, it was unable to support the amendments submitted by the delegations of Italy and Greece, which did not serve the interests of newly independent States or promote the progressive development of international law.

29. Mr. DJORDJEVIĆ (Yugoslavia) said that, like similar provisions in Parts II and III of the draft convention, article 36 had been drafted by the International Law Commission as a response to the effects of the decolonization process.

30. Recognizing the highly controversial and sensitive nature of the subject, particularly for newly independent States, the Commission had decided to adopt as a basic rule the non-passing of the State debt of the predecessor State to the successor State. At the same time, the Commission had not denied the possibility of agreements providing for the passing of such debt, because it was aware of the need of newly independent States for capital investment and assistance. Accordingly, provision was made for the conclusion of such agreements, certain conditions being laid down to ensure that they were based on considerations of equity. Such safeguard provisions were particularly important in relations between a former metropolitan Power and a former dependent territory.

31. His delegation therefore supported article 36 as proposed by the International Law Commission; it also fully endorsed the analysis offered at the 35th meeting by the representative of India in the light of the conclusions of the recent Conference of Heads of State or Government of the Non-Aligned Countries.

32. The Italian amendment left aside the basic principle contained in the International Law Commission's text, although there was no need to do so, because State

debts relating to public works could always be regulated by agreement between States. The Greek amendment was intended to reduce the scope and importance of paragraph 2. Both amendments would result in a substantial departure from the original purpose of the International Law Commission's text. His delegation was therefore unable to support them.

33. Mr. KOREF (Panama) considered that the International Law Commission's text of article 36 should be approved in its current form, since it covered all the likely possibilities of the States involved reaching an equitable agreement on the succession of State debts, while protecting the rights of newly independent States.

34. His delegation was unable to accept either of the two written amendments which had been submitted, nor the oral suggestions made for its revision, including the proposal by the Austrian delegation that the text should be replaced by the alternative text referred to in paragraph (67) of the International Law Commission's commentary. That alternative text, which had been supported by only "certain" members of the Commission, raised problems inasmuch as its paragraph 1 did not include the second part of paragraph 2 of the Commission's text—an element to which his delegation attached great importance.

35. Mr. OESTERHELT (Federal Republic of Germany) said that in principle his delegation supported the idea that newly independent States should have a privileged position in respect of the debts of the predecessor State. It shared many of the opinions expressed in the International Law Commission's commentary and agreed that article 36 involved to some extent the progressive development of international law, since State practice was not conclusive. As his delegation had stated in the Sixth Committee of the General Assembly, it would have welcomed a greater degree of flexibility, which it hoped would still evolve on the basis of the various proposals submitted.

36. In its commentary, the International Law Commission had raised the question whether article 36 did not come too late, since the decolonization process was virtually complete. Indeed, the impact of a rule designed for future application might be more limited than the discussion seemed to suggest. His own country had in the past demonstrated its concern for the situation of the developing countries in many ways, among others by granting debt relief totalling 3.6 billion DM to least developed countries on a voluntary basis.

37. Turning to the specific formulation of article 36, he noted that the legal implications of the expression "in view of the link"—an element referred to by the Commission in paragraph (64) of its commentary as a necessary condition—were not clear. If an agreement was not concluded in accordance with that criterion or if one of the parties involved thus asserted, what would the legal consequences be? Was that link a prerequisite for the validity of the agreement or merely a reference to the most likely motive for the conclusion of an agreement? The problem became even more complicated if one examined the various elements of the formula "in view of". It was not clear what would happen if a debt was considered as part of the "link" but was not connected with the predecessor State's activity in the territory or if it was argued that it was not con-

nected. It was difficult to determine whether the agreement would nevertheless be valid.

38. His delegation therefore considered it preferable either to delete the phrase "in view of the link" or to replace it by a less ambiguous formula.

39. Turning to paragraph 2, he reiterated his delegation's position that the principle of permanent sovereignty of every people over its wealth and natural resources was part of international law and that its exercise was subject to international law. In that connection, he drew attention to his delegation's statement at the 15th meeting. However, as his delegation had pointed out at the 28th meeting, serious legal consequences could arise as the result of a violation of a rather general principle. His delegation would therefore greatly prefer the formulation proposed by the delegation of Greece in its amendment.

40. Nullity *ab initio* was the most drastic means of remedying the deficiencies of an agreement; it should thus be employed only in the most exceptional cases. In the case of not only article 36, paragraph 2 but also article 14, paragraph 4; article 26, paragraph 7; article 28, paragraph 3 and article 29, paragraph 4, his delegation was quite unable to accept any notion of a nullity derived from a source other than the sovereign will of States which were parties to the future convention and to the relevant devolution agreement. More specifically, it did not consider those principles to be *jus cogens*.

41. Assuming that the use of the word "shall" in paragraph 2 implied nullity *ab initio*, an additional problem arose in connection with the rule that devolution agreements should not "endanger the fundamental economic equilibria" of the newly independent State. Long after the conclusion of the agreement, it might transpire—or it might be claimed by one of the parties—that its implementation endangered such economic equilibria. The fate of the agreement in the interim period was then in question. Was it void from the outset, together with all acts performed under it, or did it become void only as soon as its implementation endangered fundamental economic equilibria? If nullity *ex tunc* was implied, his delegation would see that as an additional factor militating against paragraph 2.

42. More than any other provision, article 36 convincingly demonstrated the need for the binding third-party settlement of disputes. In the absence of such settlement, there was a risk that article 36 and similar provisions could not be implemented and could even contribute to legal insecurity. The aim of the future convention should be to contribute to security in the application of the rule of law in international relations.

43. Mrs. ULYANOVA (Ukrainian Soviet Socialist Republic) said that her delegation supported article 36 as proposed by the International Law Commission. It did not share the view of those who considered that the article lacked balance since the basic principle that debts should not pass to a newly independent State—to which her delegation adhered—was given some flexibility by the provision for agreement on the passing of debts in certain circumstances. The provision for such agreement offered the compromise solution that was needed.

44. Moreover, arguments similar to those adduced during the discussion of article 14 lacked validity. The proponents of such arguments had stated that the decolonization process was finished; but the effects of colonization remained. Her delegation therefore agreed with the International Law Commission's commentary on the article. The question of the indebtedness of ex-colonies would not be solved easily and the norms being developed at the present Conference would therefore be of importance for the international community. Norms could not, however, be developed in a vacuum: the world situation and the debt burden of the developing countries must be taken into account. Many international forums, representing the opinion of the majority of States, had expressed concern about the need to settle the problem of the indebtedness of the young developing countries and the present Conference should therefore seek to develop norms which would facilitate the normal development of those countries.

45. Article 36 as drafted was, in her delegation's view, logical and equitable. It adequately reflected the goals to be achieved. The Italian amendment would only weaken it.

46. Mr. MONNIER (Switzerland) said that his delegation was prepared to adopt a more favourable position towards draft article 36 than towards certain other provisions. In its present form, however, it gave rise to a number of legal problems. The article stated that debts should not pass to a newly independent State unless an agreement provided otherwise. The conditions for such agreements were then set out and the article established a requirement for their validity in international law.

47. In the first place, that validity rested on the principle that the agreement should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources, wording which was similar to that used in article 14, paragraph 4; article 26, paragraph 7, and article 29, paragraph 4. In view of the opposition to such wording which had been expressed, his delegation regarded the Greek amendment as offering a compromise solution and could support it.

48. As far as the content of the agreement was concerned, the second part of paragraph 1 of article 36 provided that there must be a link between the predecessor State's debt and the property, rights and interests passing to the successor State. That provision was more stringent than the one in article 35, paragraph 2. To have used similar wording to that of the latter article would have allowed the conditions in the present case to be more precisely stated.

49. Paragraph 2 of the draft article referred to the effects of implementation of the agreement. While sympathizing with the principle underlying the paragraph, his delegation considered that the wording, and particularly the reference to the "fundamental economic equilibria" of the newly independent State, was open to criticism. In that connection, paragraph (65) of the International Law Commission's commentary was somewhat disturbing in that it indicated that the expression was to be interpreted "in a broad sense, covering all kinds of economic, financial (including indebtedness) and other factors". Thus, the limitations and

prohibitions determining the contractual freedom of the newly independent State were stated in terms of its sovereignty. Some speakers had considered that paragraph 2 provided balance but he wondered whether, in the light of those conditions, there was any incentive for the States concerned to conclude any agreement on the passing of debts.

50. His delegation therefore considered that agreement on article 36 would be reached only if a compromise was adopted, either on the lines of the alternative text referred to in paragraph (67) of the International Law Commission's commentary or by accepting the analogous Greek amendment.

51. The Canadian representative had rightly drawn attention to the need to ensure that the future convention was of practical value. The Conference was drawing up, not a General Assembly resolution, but a treaty incorporating rules. Even if the rules were to be taken only as models, they should be applicable. He therefore urged the participants in the Conference to accept a compromise.

52. Mrs. VALDÉS (Cuba) said that her delegation attached particular importance to article 36, as the process of decolonization was not yet complete, the economies of many recently independent countries being still closely linked to those of the former metropolitan Powers. The article was well balanced, took due account of the interests of newly independent States and therefore had her delegation's support.

53. Her delegation gave its full support to paragraph 2, which incorporated a universally accepted principle and provided a safeguard clause. It could not support the amendments which had been submitted, because they restricted the scope of the article.

54. Mr. PHAM GIANG (Viet Nam) said that article 36, like articles 14 and 26, provided indispensable protection for newly independent States. He expressed his delegation's appreciation of the International Law Commission's masterly analysis of past international practice and of its view that the present alarming economic and financial situation of those States necessitated a sympathetic solution if those States were to become viable.

55. In stating the principle that no State debt of the predecessor State should pass to the newly independent State, the International Law Commission had not stated anything new but had merely reflected international practice which had been followed since the time when the United States of America itself had been a newly independent State. In the light of that and many other precedents, including that of his own country, it could not be denied that the intransmissibility of debts formed part, not only of international law, but of the internal law of States. His delegation therefore considered that paragraph 1 of article 36 should be adopted as drafted.

56. Paragraph 2 of the draft article provided an opportunity for newly independent States, which had often been forcibly "married" to the former administrative Power, to proceed to a "divorce" by entering into an agreement freely and on equal terms, each respecting the political sovereignty and economic independence of the other. However, it also provided that such an

agreement must not endanger the fundamental economic equilibrium of the newly independent State. In his delegation's view, those two parts of paragraph 2 were well balanced, being based on equity and justice. They were also based on reason and feeling, and feeling must not be decried. His delegation therefore joined the Union of Soviet Socialist Republics and other socialist countries, as well as the members of the Group of 77, in supporting paragraph 2.

57. The amendments proposed by Greece and Italy went against the general trend of the International Law Commission's text. The Italian amendment introduced extraneous considerations by mentioning public works, whose object might, in fact, have been to repress an indigenous people. The Greek amendment was reminiscent of the amendment to article 14 proposed by the Netherlands delegation (A/CONF.117/C.1/L.18) and appeared to deny the principle on which article 36 was based.

58. In his delegation's view, the process of decolonization must redress the injustices of the past and, as the Indian delegation had suggested at the previous meeting, a humanitarian approach should be adopted to the problem of the debt burden of the newly independent States. A convention concluded on such lines would be of historic importance and would be a contribution towards a new understanding between former administrative Powers and their former colonies.

59. Mr. LAMAMRA (Algeria) said that the points his delegation had made during the discussion of paragraph 4 of article 14 (14th meeting) were applicable also to paragraph 2 of article 36, which his delegation supported, and were the reason why his delegation could not support the Greek amendment.

60. His delegation had serious misgivings concerning the Italian amendment. The expression "public works in the process of execution" was ambiguous and such works might, moreover, be considered unnecessary by the newly independent State. Such a broad formulation could even be construed as allowing the passing of certain debts contracted by the predecessor State either in the context of an economic policy tending to perpetuate its control over the territory concerned or in connection with its military or police activities directed against resistance by the people of that territory. That did not mean, of course, that debts of the type referred to might not usefully be passed by means of an agreement such as was referred to in paragraph 1 of article 36. His delegation was unable to support the Italian amendment, however, since it presented another difficulty in that it appeared to give a predetermined direction to the content of any agreement.

61. Article 36, as proposed by the International Law Commission, appeared to his delegation to provide a reasonable balance between the interests of the newly independent State and the predecessor State. Moreover, the precedents mentioned in the Commission's commentary proved that intransmissibility of debts had not in the past been an obstacle to just solutions being agreed between such countries. Article 36 in fact represented the shared wish of States to turn over the page of past history and introduce a new era of co-operation. For its part, during the decolonization process, Algeria had insisted on the question of debts being fairly nego-

tiated and it could not be less demanding for other newly independent States and for the development of international law.

62. Mr. KOLOMA (Mozambique) said that, while his delegation appreciated the concern underlying the Italian amendment to article 36, it felt that the question of debts relating to public works was not a matter to be dealt with in an agreement such as was referred to in paragraph 1 of article 36. It also objected to the implication in the Italian amendment that public works in the territory of the newly independent State which were at the time of independence in the process of execution should necessarily be continued after independence. In his delegation's view, their continuation was a matter for the newly independent State to decide. Furthermore, the Italian amendment appeared to impose the duty of passing certain "other debts" to the newly independent State while at the same time subordinating such action to the hypothetical agreement. The amendment appeared therefore to introduce a contradiction into the article. The International Law Commission's draft, on the other hand, was quite clear and should be retained.

63. His delegation could not support the Greek amendment for the reasons it had given during the discussion of a similar provision in connection with article 14, paragraph 4 (16th meeting), and article 26, paragraph 7 (27th meeting).

64. Mr. MURAKAMI (Japan) found paragraph 1 of article 36 somewhat ambiguous as to the exact relationship between the agreement to which it referred and the link between the State debt and the property, rights and interests which passed to the newly independent State.

65. His delegation reiterated its view that agreement between the parties concerned should be given the primary role. As to the vague and ambiguous phrase "the link between the State debt", in so far as it involved any element of restriction upon such agreement, his delegation was opposed to it, as it believed that the freedom of the predecessor State and the successor State should not be curtailed in that respect.

66. With regard to paragraph 2, his delegation had the same views and reservations which it had already expressed in respect of similar provisions in earlier articles.

67. His delegation supported the Greek amendment, but opposed the Italian amendment because it amended only paragraph 1, leaving paragraph 2 as it stood.

68. Mr. BRISTOL (Nigeria) said that his delegation supported article 36 as proposed by the International Law Commission, which was similar to articles 14 and 26 already adopted by the Committee, and it was a well-balanced text. The article was predicated on the twin principles of equity and viability. The International Law Commission had sought to protect the viability of the newly independent State by declaring invalid any agreement which violated the universally recognized principle of the permanent sovereignty of every people over its wealth and natural resources. The interest of the predecessor State was protected in paragraph 1, which, as an exception, provided for the possibility of an agreement between the predecessor



State and the newly independent State. In that connection, he referred to the observations he had made at the 14th meeting during the discussion of article 14.

69. Like the representative of Kenya, he opposed the Greek amendment, because it sought to delete the last portion of paragraph 2 of the draft article.

70. He also opposed the Italian amendment, agreeing with those representatives who had felt that the phrase "except those relating to public works in the process of execution" would introduce an exception to the general rule which would be susceptible of very wide interpretation.

71. Mr. KADIRI (Morocco) said that his delegation wholeheartedly supported the text of article 36, which was a masterpiece of balance and precision. Its inclusion in the future convention was fully justified, not only because—contrary to what some delegations had stated—the decolonization process was not yet completed, but also because the problem of succession to State debts was one which invariably subsisted for a long time after political independence was attained.

72. Very rightly, the International Law Commission had adopted the principle of non-transmissibility of State debts. To burden the newly independent State with such debts would mean prolonging its dependence and even denying its sovereign rights. That *tabula rasa* principle was, however, mitigated by the proviso "unless an agreement" which allowed the States concerned to enter into an agreement on the matter. That type of agreement was likely to promote investment and to facilitate the provision of financial assistance by developed countries and by international financial organizations.

73. When entering into such an agreement, a predecessor State must not take advantage of the weakness of the newly independent State. Many of the current problems of newly independent States arose from the debt burden imposed on them by such agreements, often concluded before the attainment of independence.

74. It was, moreover, necessary to expose the myth of the "sovereign equality of States". To be complete, sovereignty needed to be accompanied by economic independence. Agreements which ran counter to that independence did not satisfy the requirements which the existence of the proviso concerning an agreement implied. Hence the necessity of taking into account the financial capacity of the newly independent State. To ignore that reality would not only be prejudicial to the debtor, it would be of no benefit to the creditor either.

75. The article contained in its paragraph 2 a clause safeguarding the principle of permanent sovereignty over natural resources. That safeguard clause was particularly necessary in the case of an agreement between a metropolitan Power and one of its former dependent territories. By introducing it, the International Law Commission had taken the encouraging step of incorporating into its codification and progressive development of international law a principle whose character of *lex lata* was beyond dispute. Any agreement which violated the principle referred to in paragraph 2 should in fact be deemed null and void *ab initio*, if the principle was recognized as a rule of *jus cogens*.

76. His delegation had reservations regarding the Greek amendment because it would have the effect of deleting an essential portion of paragraph 2. Moreover, his delegation felt that it was contemporary international law which must not be incompatible with the principle of permanent sovereignty over an inalienable right to natural resources.

77. His delegation also had doubts regarding the Italian amendment which would introduce an exception likely to weaken the vital rule set forth in paragraph 1. By passing to a newly independent State debts incurred for public works in the process of execution, that amendment ran the risk of prejudicing the legitimate interest of that State, which was unjust.

78. In conclusion, his delegation—like those of India and Kenya—favoured article 36 as it stood.

79. Mr. CONSTANTIN (Romania) said that article 36 was especially important because of its emphasis on the fact that political independence needed to be accompanied by economic independence. The two paragraphs of the article were entirely consistent with that principle since they specified that there was no automatic passing of debts from the predecessor State to the successor State and they safeguarded the principle of permanent sovereignty over natural resources.

80. The International Law Commission's text thus constituted a well-balanced compromise which suitably reflected the body of custom embodied in the General Assembly resolutions and other decisions of the United Nations. His delegation was unable to accept either of the amendments which had been submitted.

81. Mr. RASSOL'KO (Byelorussian Soviet Socialist Republic) said that the rule of non-transmissibility of State debts embodied in paragraph 1 of article 36 and the important safeguard clause in paragraph 2 of the article would serve to protect the fundamental interests of newly independent States. In the light of the decolonization process, it would be totally illegitimate and inadmissible to burden a newly independent State with debts contracted by the former metropolitan Power.

82. Paragraph 2 of the article gave recognition to the all-important principle of the permanent sovereignty of every people over its wealth and natural resources. It strengthened the protection afforded to the newly independent State and must be retained as it stood. Hence his delegation's opposition to the Greek amendment, which would weaken the expression of that principle, in particular by replacing the words "shall not infringe" by the formula "shall pay regard" and by introducing the ambiguous proviso "in accordance with international law". That amendment would also have the effect of eliminating the important reference to agreements whose implementation endangered the fundamental economic equilibria of the newly independent State.

83. His delegation also strongly opposed the Italian amendment which sought to make a whole range of debts automatically transmissible in defiance of the basic rule laid down in paragraph 1 of the article.

84. Mr. BARRERO-STAHN (Mexico) strongly supported article 36 as proposed by the International Law



Commission, paragraph 1 of which laid down the fundamental rule of non-transmissibility of State debts to a newly independent State. His delegation was convinced that, in the absence of such a rule, the burden placed upon that State would be unbearable.

85. With regard to paragraph 2, his delegation believed that every State had the right to develop and make full use of its resources. He drew attention, in that connection, to the Charter of Economic Rights and Duties of States,<sup>1</sup> which stressed the need to base international economic relations on the principle of reparation for the injustices which deprived a nation of the national resources necessary for its normal development.

86. Mr. BEN SOLTANE (Tunisia) said that the non-transmissibility rule embodied in paragraph 1 of article 36 took account of the State practice which had led to the adoption of the Programme of Action on the Establishment of a New International Economic Order.<sup>2</sup>

87. Paragraph 2 of the article merely reaffirmed a safeguard clause already contained in Parts II and III of the draft convention. It acknowledged the well-known principle of permanent sovereignty over wealth and natural resources and added an additional safeguard concerning the fundamental economic equilibria of the newly independent State. Both of the safeguards were essential, for without them certain agreements might jeopardize the economic future and even the viability of the newly independent State.

88. The Italian amendment would introduce a very broad exception to the non-transmissibility rule contained in paragraph 1. The concept of "public works in the process of execution" was much too extensive in scope; it could cover a broad range of economic activities of the newly independent State and hence hinder its development efforts. Moreover, the public works in question could well be of no interest to the newly independent State, or even be detrimental to its economic development.

89. The Greek amendment expressed more clearly the principle set forth in paragraph 2 but had the shortcoming of eliminating the essential reference to agreements whose implementation endangered the fundamental economic equilibria of the newly independent State. The elimination of that essential corollary to the principle of permanent sovereignty over natural resources would deprive that principle of its substance.

90. For those reasons, his delegation opposed both of the amendments and supported article 36 as it stood.

91. Mr. BEDJAoui (Expert Consultant) explained that the International Law Commission's reasons for adopting article 36 were similar to those which had led to its adoption of articles 14 and 26.

92. It was true that the Commission had adopted a special approach in dealing with the question of newly independent States, but he would not say that it constituted a more favourable treatment. It certainly was not exceptional treatment.

93. History was there to show that, even outside the realm of State succession, there had been many cases where State debts had been the subject of special treatment (moratoria, renegotiation of a debt, cancellation of part of a debt, etc.). In providing for such treatment, the parties concerned had taken into account problems such as those dealt with in article 36.

94. There was thus nothing new in taking into account a State's capacity to pay. The concept of "fundamental economic equilibria" had not originated in the work of the International Law Commission, which had taken it from a number of international treaties concluded between the two World Wars. Far from being vague, as had been suggested, it was drawn from international practice.

95. The Italian amendment had the drawback of providing for the burdening of the newly independent State with an unduly large volume of debts which might well have been contracted in connection with works serving interests (military or strategic in some cases) of the predecessor State. Such a solution would be contrary to all equity, since it would ignore the newly independent State's interests and its very sovereignty.

96. The suggestion to introduce the words "in particular" between the words "in view" and the phrase "of the link between the State . . ." would alter fundamentally the effect of the article by broadening the scope of the debts that would become transmissible, so that they might include some bearing no relation to the newly independent State.

97. It had been feared by some delegations that the non-transmissibility rule in paragraph 1 would have the effect of discouraging newly independent States from concluding agreements on the subject of State debts. In fact, international life provided many examples to allay such fear. There were numerous reasons why a newly independent State might wish to settle by agreement the problems arising from State debts and other legacies of past relations with the predecessor State. Article 36 as it stood did not rule out that type of agreement; it merely stated the rule of non-transmissibility where no agreement was voluntarily reached.

<sup>1</sup> General Assembly resolution 3281 (XXIX).

<sup>2</sup> General Assembly resolution 3202 (S-VI).

*The meeting rose at 1 p.m.*