Document:-

A/CN.4/L.256 and Add.1

Draft articles on succession of States in respect of matters other than treaties. Texts adopted by the Drafting Committee: articles 17-22 and titles of the corresponding part and sections of the draft - reproduced in A/CN.4/SR.1447 and SR.1449

Topic:

Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-

1977, vol. I

article 2 (*d*),[5] should alleviate the concern expressed by Mr. Ushakov in that regard.

29. From the technical point of view, he was not sure whether it was possible to establish two separate régimes applicable to reservations for the two subcategories of treaties between which Mr. Ushakov had made a distinction—treaties concluded between States with the participation of one or more international organizations and treaties concluded between international organizations with the participation of one or more States—since that distinction was based on purely quantitative data.

30. A problem clearly arose when the number of States and organizations parties to the treaty was the same, since the treaty then fell into both categories. However, even where the number of States and the number of organizations parties to the treaty were different, it might be questioned whether the treaty should be regarded as belonging to one category rather than to the other. For instance, should a public health agreement concluded between five States and four international organizations be regarded as an agreement between States rather than as an agreement between international organizations? Admittedly, it could be said that some treaties were more in the nature of treaties between States, while others were more in the nature of treaties between international organizations. The Drafting Committee had taken account of that distinction in its draft of article 19*bis*, by providing for the case in which the participation of an international organization was not essential to the object and purpose of the treaty. However, that distinction should not be based on a purely arithmetical criterion. In the sphere of technical assistance, for instance, there were treaties between six or seven international organizations and a single State and treaties between six or seven States and a single international organization, for which there was no fundamental reason to establish different régimes.

31. In that connexion, he stressed that the Drafting Committee's text gave great weight to the object and purpose of the treaty. That criterion, which had been adopted in the Vienna Convention, seemed to be the only reasonable one since the Commission could not possibly make a detailed analysis of the structure of treaties, which would involve it in complicated and arbitrary classifications.

32. Mr. FRANCIS said that, in his view, the use of the word "several" in the title and text of article 19 adopted by the Drafting Committee was misleading and perhaps even dangerous. Treaties concluded between international organizations were a very new phenomenon and could not be treated in every respect like treaties between States. An international organization had no basic interest of its own in the sense that, fundamentally, it represented the interests of the States composing it. It was necessary to bear in mind that an international organization did not negotiate as an abstract institution but through accredited representatives, whose powers were limited. When a treaty was negotiated between two international organizations, unless those representatives were able to formulate reservations at the time when the treaty was signed, the negotiations would have to be adjourned to enable the representatives to obtain instructions and authorization from their organizations. He feared that the use of the word "several" would prevent a negotiating agent from formulating a reservation to a treaty being negotiated between two international organizations.

33. Mr. REUTER (Special Rapporteur) said that the question was whether the Commission really wished to exclude reservations to bilateral treaties. That had certainly not been the wish of the United Nations Conference on the Law of Treaties, and the Drafting Committee had followed a course which seemed to preclude such a possibility. If the Commission wished to establish a parallel between the draft articles and the Vienna Convention and not exclude the possibility of making reservations to bilateral treaties, it should revert to the formula "treaties concluded between States and international organizations" and abandon the distinction made, for drafting purposes, between treaties between States and one or more international organizations and treaties between international organizations and one or more States.

34. The CHAIRMAN said that, owing to a meeting of the Planning Group, the Commission would have to break off its discussion of article 19, but members might give some thought to the possibility of simply deleting the word "several" from the title and text of that article. It seemed to him that such a solution would be consistent with article 19 and article 2, paragraph 1 (*a*), of the Vienna Convention.

The meeting rose at 11.30 a.m.

1447th MEETING

Monday, 27 June 1977, at 3.30 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1, A/CN.4/L.256)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to examine the text of articles 17 to 21 as well as the titles of part II of the draft articles and of sections 1 and 2 of part II,

[5] *Ibid.*, foot-note 3.

* Resumed from the 1445th meeting.

as proposed by the Drafting Committee in document A/CN.4/L.256.

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that articles 17 to 20 were contained in section 1 ("General provisions") of part II of the draft (Succession to State debts). Article 21 was the first of the articles in section 2 ("Provisions relating to each type of succession of States"). Article 17 was a new article. Article 18 corresponded to draft article 0, article 19 to draft article R and article 20 to draft articles S, T and U, proposed by the Special Rapporteur in his ninth report,[1] while article 21 corresponded to draft article Z/B, proposed by the Special Rapporteur at the 1427th meeting.[2]

3. The articles proposed by the Drafting Committee read:

Article 17. Scope of the articles in the present Part

The articles in the present Part apply to the effects of succession of States in respect of State debts.

Article 18. State debt

For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.

Article 19. Obligations of the successor State in respect of State debts passing to it

A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.

Article 20. Effects of the passing of State debts with regard to creditors

1. The succession of States does not as such affect the rights of third-party creditors.

2. Where there is a purported passing of State debts made pursuant to an agreement or other arrangement between predecessor and successor States or, as the case may be, between successor States, it shall not be effective unless:

(*a*) that agreement or arrangement has been accepted by the creditor third State or international organization [or by the creditor whom a third State represents]; or

(*b*) the consequences of that agreement or arrangement are in accordance with the other applicable rules contained in Section 2 of Part II of these articles.

Article 21. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.

4. He reminded the Commission that, in his ninth report, the Special Rapporteur had also proposed two articles for inclusion in section 1, relating to the question of "odious debts", namely, articles C and D,[3] which, after a full discussion in the Commission,[4] had likewise been referred to the Drafting Committee for consideration in the light of that discussion.

5. The Drafting Committee had studied the matter and, while recognizing the importance of the issues raised in connexion with the question of "odious debts", had been of the opinion that it would be best first to examine each particular type of succession, because the rules to be formulated for each type might well cover the issues connected with that question and might obviate the need to draft general provisions on it. It had therefore been generally agreed that it would be neither useful nor timely at that stage to draft articles on "odious debts" for inclusion in the section containing general provisions. It had, of course, been understood that the Commission and the Drafting Committee might wish to revert to the question later, when the draft articles on each type of succession had been formulated.

6. Reviewing the articles adopted by the Drafting Committee, he explained that the Committee had deemed it appropriate to include in part II an article 17 entitled "Scope of the articles in the present Part" in order to maintain the parallelism between the provisions concerning succession to State debts and those relating to succession to State property in part I. Article 17 corresponded to article 4[5] and reproduced its wording, with the necessary drafting changes to make it refer to State debts. The article made clear that part II of the draft dealt with only one category of public debts, namely, State debts, as defined in the subsequent article.

7. Article 18, which corresponded to Article 0 proposed by the Special Rapporteur, defined "State debt" for the purposes of the articles in part II of the draft. The use of the expression "articles in the present Part" in the text of article 18, instead of "the present articles" as in the Special Rapporteur's original proposal, conformed to usage throughout the draft and, in particular, to the language of the corresponding provision in part I, namely, article 5. Taking account of the predominant trend which had emerged from the rich debate in the Commission on the question of the definition of a State debt, the Drafting Committee had not retained in its proposed text the expressions "contracted by the central Government of a State" and "chargeable to the treasury of that State", which had qualified the words "financial obligation" in the original text. The text simply referred to any financial obligation chargeable to the State. As in article 5, specific mention was made of the "date of the succession of States", a term defined in article 3, which constituted the necessary point of reference for determining the time factor involved. Finally, the Committee had decided to place the word "international" in square brackets because of the difference of opinion among its members regarding the scope to be given to the provision. Members had agreed that the definition covered financial obligations chargeable to the State vis-à-vis another subject of international law, whether a State or an international organization, but did not extend to such obligations when the third-party creditor was an individual who was a national

[1] A/CN.4/301 and Add.1, paras. 63, 102, 108, 112 and 114, respectively.

[2] 1427th meeting, para. 16.

[3] A/CN.4/301 and Add.1, paras. 140 and 173, respectively.

[4] 1425th to 1427th meetings.

[5] See 1416th meeting, foot-note 2.

of the debtor State, whether a legal or a natural person. With regard to foreign individual creditors, some members of the Committee considered that their position was adequately safeguarded by the provisions of article 20, paragraph 1. In addition, the word "international" (in square brackets) was intended to convey the idea that the financial obligation must arise at the international level.

8. Article 19 corresponded to article R, proposed by the Special Rapporteur. Apart from using the term "the provisions of the articles in the present Part", as in article 18, the only change made by the Drafting Committee to the article had been the deletion of the opening phrase, namely, "In the relations between the predecessor State and the successor State", in order to make the text of article 19 correspond more exactly to that of article 6 (part I of the draft). The purported effect of that phrase was now safeguarded by the provisions of the redrafted article 20.

9. The new text of article 20 corresponded to draft articles S, T and U, originally proposed by the Special Rapporteur, and formed a complement to article 19. Paragraph 1 of the article laid down the basic principle that a succession of States did not, as such, affect the rights of third-party creditors. The term "creditors" included all kinds of creditors, whether States or international organizations. If the Commission decided that the draft articles should cover private individuals, they would be included under the term "creditors" as well. Paragraph 2 covered the situation in which the predecessor and successor States, or two or more successor States, formally agreed on a passing of State debts. The word "purported", however, indicated that such passing did not occur as a result of that agreement or other arrangement alone. In subparagraph (*a*), the words "or by the creditor whom a third State represents" had been placed in square brackets because of the different positions taken by the members of the Drafting Committee in regard to the scope of the draft. The Drafting Committee did not wish the inclusion of those words to be understood as referring to the consent of a foreign private creditor given independently of his representation by a third State. The meaning of those words was that, if the private creditor had given his agreement, the third State could not act on behalf of the creditor outside the agreement. In subparagraph (*b*), the word "consequences" had been used to make it clear that, in that case, the Commission was not dealing with the effect of an inter-State agreement itself, which would be governed by the Vienna Convention.[6]

10. Article 21 corresponded to article Z/B proposed by the Special Rapporteur at the 1427th meeting of the Commission. In the light of the debate in the Commission, the Drafting Committee had opted, with regard to paragraph 2, for the alternative proposed by the Special Rapporteur. Some changes had also been made to that text. First, in both paragraphs, the word "State" had been added before "debt" for the sake of precision. Second, in paragraph 2, the words "*inter alia*" had been added because it might be necessary to take account of factors other than those enumerated in the article in order to arrive at a determination of what constituted "an equitable proportion" of the State debts concerned. Third, the Committee had slightly revised the last part of paragraph 2 to improve the drafting. It should also be noted that, since a succession of States might not always involve the passing of a State debt, the wording of paragraph 1 could be somewhat ambiguous. The Drafting Committee had decided, however, to recommend to the Commission that that point be dealt with in the commentary, leaving unchanged the original expression "the passing of the State debt", which was in conformity with the corresponding article of part I, namely, article 12.

ARTICLE 17 (Scope of the articles in the present Part) [7]

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 17 proposed by the Drafting Committee.

It was so agreed.

ARTICLE 18 [8] (State debt) [9]

12. Mr. USHAKOV observed that international law was concerned only with international relations; therefore, the term "State debt" should certainly be understood to mean any "international" financial obligation. The reason why the Drafting Committee had placed the word "international" in square brackets was to elicit reactions from Governments.

13. The CHAIRMAN said his understanding was that the Drafting Committee wished the word "international" to remain in the article submitted to the General Assembly, but in square brackets, because it believed that the question whether that word should appear or not required further study. Naturally, the reasons for that situation, including the comments made at the present meeting by the Chairman of the Drafting Committee, would have to be fully reflected in the Commission's report, in accordance with its usual practice in such matters.

14. Mr. USHAKOV said he would like it made clear in the commentary that, in the opinion of one member of the Commission, if the financial obligation chargeable to the State was not qualified as an "international" obligation, it might be an obligation contracted towards any natural or legal person; in particular, it might be a financial obligation contracted by a State towards its own nationals. If the draft articles were to cover the latter category of financial obligations, that would constitute a flagrant interference in the internal affairs of States. He therefore wished his interpretation of the term "any financial obligation", unqualified by the word "international", to be included in the commentary to the article under consideration.

15. Mr. SCHWEBEL said his impression was that the Drafting Committee was not making a recommendation to, but seeking the opinion of, the Commission on the

[6] See 1417th meeting, foot-note 4.

[7] For text, see para. 3 above.

[8] For the consideration of the text originally submitted by the Special Rapporteur, see 1416th to 1418th and 1420th and 1421st meetings.

[9] For text, see para. 3 above.

use of the word "international". It seemed to him that, since only one member of the Drafting Committee had expressed support for the use of that word, the most appropriate course would be for the Commission to submit to the General Assembly a text in which the word did not appear, and to explain the views of the member concerned in the commentary.

16. Article 0, as proposed by the Special Rapporteur, spoke simply of a "financial obligation", not of an "international financial obligation". The use of the latter phrase in an article would be absolutely contrary to State practice, in which there were thousands of examples of State succession to State debts which had not been debts on an international plane. So far as he was aware, no arguments had been adduced in either the Commission or the Drafting Committee for overturning that vast body of practice. Retention of the phrase would also have the effect of limiting sources of credit to States and international organizations, a restriction which would be contrary to the interests of the international community, and particularly those of the developing countries, which needed to borrow from other institutions. It would suggest to banks and similar bodies that they should not lend to any State likely to be involved in an occurrence of succession, and would therefore be contrary to the aims of the North-South dialogue, which included the widening of access to private capital markets.

17. Mr. SETTE CÂMARA said that, if it was true, as Mr. Schwebel had suggested, that the Drafting Committee was seeking a decision from the Commission on the use of the word "international", that decision would be facilitated if, in accordance with its previous practice, the Commission forwarded the text proposed by the Drafting Committee to Governments so as to obtain their views in time for its second reading of the draft articles. Not being a member of the Drafting Committee, he would be very reluctant to delete the word "international" at the present stage, without having heard the discussion in the Committee.

18. Mr. ŠAHOVIĆ said that the Drafting Committee had placed the word "international" in square brackets to show that there had been different opinions on it in the Commission and in the Drafting Committee. As Mr. Sette Câmara had said, the wording should be retained as it stood so that members of the Sixth Committee of the General Assembly would have an opportunity of stating their views.

19. Mr. QUENTIN-BAXTER observed that the function of article 18 was to provide a definition, and the Commission commonly had problems in deciding whether it should settle definitions before dealing with substance or vice versa. In his view, the article would serve well enough, without the word "international", for dealing with the various types of succession. It was his belief and hope that the definition of a State debt ultimately adopted by the Commission would follow more closely that of State property contained in article 5, for there were very strong technical and commonsense reasons for keeping those definitions in alignment.

20. There was clearly a fundamental difference of opinion among members of the Commission concerning the use of the word "international" in article 18, and it was a difference which must be resolved if the draft articles as a whole were to be successful. Even disregarding his personal preference, which was that the word should not be used, he would have great difficulty in knowing what legal value should be given to the phrase "international financial obligation" if it was ultimately adopted. The first possibility would be that the phrase was intended to make clear that the Commission was not suggesting in the article that States owed international obligations to their own nationals, but that was an intention which could be reflected in other ways in a manner which would be acceptable to the Commission as a whole. The second possibility would be that the phrase was intended as a reference to cases in which the creditor happened to have international personality, but that would introduce quite a bizarre element into the text, since the application of the articles in cases where a State had issued bonds, for example, would depend entirely on whether the buyer of those bonds was a State or international organization, or merely a private individual. The third and perhaps the most likely possibility would be that the phrase was intended to refer to obligations arising at the level of international law or, in other words, from dealings, such as treaties, between subjects of international law. That would make the text very restrictive indeed by limiting it to borrowing between Governments or between Governments and international organizations, and excluding entirely the equally important aspect of borrowing on free markets. That, he supposed, would make Governments very uncertain whether the scope of the articles was sufficiently broad to justify their adoption.

21. Mr. AGO said be believed that the question of State succession in respect of debts included debts that were not international. He also considered, however, that it would be advisable to leave the word "international" in square brackets, not only because that was the Commission's usual practice but also because there had been differences of opinion in the Commission. In addition, it was necessary to explain why article 20 purported to restrict the notion of a State debt to international debts. For in paragraph 2 (*a*) of that article, the Drafting Committee had placed the phrase relating to diplomatic protection in square brackets. The more usual case of a debt owed to a creditor not represented by a third State was not considered.

22. Moreover, the commentary to articles 18 and 20 should be drafted with particular care. The differences of opinion that had led the Commission to leave certain words in square brackets should be explained. If Governments did not favour a restrictive definition of a State debt, several provisions in the draft would have to be amended.

23. Mr. BEDJAOUI (Special Rapporteur) endorsed the reasons advanced by the Chairman, Mr. Sette Câmara, Mr. Šahović and Mr. Ago for leaving the word "international" in square brackets. He reminded the Commission that, when summing up the discussion on the text which had become article 18, he had pointed out that it could not conceal the disagreements that had arisen among its members. It would now be advisable to give the Commission time to reflect and to afford Govern-

ments an opportunity of expressing their views on the problem. For his part, he would make sure that the commentary duly reflected the discussions that had taken place in the Commission and in the Drafting Committee.

24. Mr. SCHWEBEL said that, since the majority of the members of the Commission seemed to be in favour of leaving the word "international" in square brackets, he would not press for its deletion. He could see virtue in the Commission's practice, provided that it was consistently and impartially applied, and he wished to endorse Mr. Ago's point that all the opinions expressed during the current debate should be clearly stated in the commentary.

25. The CHAIRMAN observed that, when any member of the Commission believed that a point should be brought to the attention of Governments, the Commission traditionally followed what it considered to be the balanced procedure of recording in its commentary the views of that member as well as the majority opinion.

26. If there was no objection, he would take it that the Commission agreed to approve the title and text of article 18 in the form proposed by the Drafting Committee, on the understanding that the commentary would refer to the present discussion and fully explain why the word "international" had been placed in square brackets.

It was so agreed.

ARTICLE 19 [10] (Obligations of the successor State in respect of State debts passing to it) [11]

27. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt draft article 19 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 20 [12] (Effects of the passing of State debts with regard to creditors) [13]

28. Mr. USHAKOV said he interpreted article 20, paragraph 2, to mean that the agreement concluded between the predecessor State and the successor State on the passing of State debts would be effective only if it was accepted by the creditor third State or the creditor international organization, or even by a third-party private creditor. According to that interpretation, which seemed to him the only one possible, an agreement concluded between two sovereign States would not be valid without the consent of a third State. He was still convinced that such a rule would be entirely contrary to State practice and contemporary international law, in particular the law of treaties as codified by the Vienna Convention. If the Commission adopted paragraph 2 of article 20, he would like his position to be recorded in the commentary to that article.

29. Mr. TABIBI said he had no objection to article 20. Nevertheless, in view of the importance of private creditors for developing countries, he thought the commentary should contain a full explanation of the meaning of the words in square brackets in paragraph 2 (*a*). Such an explanation would certainly be very helpful to Governments, for which the question of private creditors might be a source of concern.

30. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Ushakov had been right in emphasizing the difficulty of the situation dealt with in article 20, paragraph 2, and in referring, in that connexion, to the law of treaties. However, that paragraph was not intended to prevent the predecessor State and the successor State from agreeing on whatever they wished in regard to the passing of a debt. It was only intended to impose certain limits on what they could decide by agreement where a third party was involved, which might be a State, an international organization or sometimes even a private creditor represented by a third State. For it should not be forgotten, when invoking the law of treaties, that, in the case of a debt contracted by the predecessor State under a bilateral agreement, there was already an international agreement, governed by the law of treaties, which bound the predecessor State to the third State. It might therefore be asked what became of that agreement—to which the Vienna Convention applied—when the predecessor State and the successor State in their turn agreed, by treaty, on the fate of the agreement concluded by the predecessor State with the third State. In that case, as in the succession of States in respect of treaties, there was a triangular relationship between the predecessor State, the successor State and the third State, which the Drafting Committee had taken into account in paragraph 2. That paragraph did not, in fact, provide that the predecessor State and the successor State could not agree on anything whatsoever in regard to the debt, but simply that what they agreed would only be effective with respect to the third State in so far as that State gave its consent.

31. In his opinion, however, the Drafting Committee had gone too far in referring to "the creditor whom a third State represents", since a private creditor should not be able to oppose the will of two sovereign States. It would be better to refer to a "third State representing a creditor".

32. Mr. CALLE Y CALLE said that article 20 combined draft articles S, T and U concerning the problem of third States and, by extension, international organizations and possibly private creditors. He thought the rule laid down in article 20, paragraph 2, was logical and necessary, but in paragraph 2 (*a*) the words in square brackets should be amended to read "or by a third State representing a private creditor", so that it would be clear that they referred to debts owed to private individuals by States and that only a third State representing a private creditor could consent or object to an agreement between the predecessor and the successor State. That wording would also make it clear that States sometimes provided a kind of "anticipated" diplomatic protection in cases where private creditors were not able to obtain payment of their debts, either by the predecessor State or by the successor State. In no circumstances, however, should a

[10] For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

[11] For text, see para. 3 above.

[12] For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

[13] For text, see para. 3 above.

private creditor be involved in acceptance of a debt agreement because in some cases he might be a national of the predecessor State and then become a national of the successor State, whereas in others he might really be a third party in the sense that he was a national neither of the predecessor State nor of the successor State.

33. Mr. QUENTIN-BAXTER said that, with regard to the use of the word "effective" in paragraph 2, he agreed with the Special Rapporteur that the text of article 20 would not interfere with the law of treaties. What article 20 stated was that a debt was a matter of concern not only to the predecessor State and to the successor State but also to third-party creditors, which must therefore have something to say about the way in which the debt was transmitted. The solution offered in article 20 was simply that, if the passing of a debt between the predecessor State and the successor State was in accordance with the residuary rules contained in the draft articles, the creditor must be content; but, if it was not, the creditor would not be bound by an agreement between the predecessor State and the successor State and would be entitled to protection of his rights and interests. Article 20 was thus an attempt to state that important triangular relationship.

34. Although he agreed with Mr. Calle y Calle's analysis of the problem posed by article 20, he thought that the words in square brackets in paragraph 2 (*a*) covered only the case in which a private creditor, acting in internal law, accepted the agreement between the predecessor and successor States. In such a case, the State of which the private creditor was a national would have nothing to say on his behalf. Where the creditor did not accept the agreement between the predecessor and successor States, it would be for the State of which he was a national to decide whether or not to take up his case. If that State subsequently accepted the agreement between the predecessor and successor States, then the creditor, as a private individual, would have nothing more to say because the draft articles operated only at the level of international personality.

35. The text of article 20 or the commentary thereto should indicate that, if a private creditor accepted the agreement between the predecessor and successor States, the State of which he was a national could do nothing more for him; for the effect of the words in square brackets was merely to limit the rights of private creditors, not to give them a status equivalent to that of the State which represented them.

36. Mr. DADZIE said that article 20 did not resolve the difficulties he had encountered when the Commission had discussed articles S, T and U since in paragraph 2 the words "shall not be effective unless" still subjected the debt agreement concluded between the predecessor and successor States to the will or consent of a third party, whether it was a State or a private individual. When a third party was involved in the passing of State debts, its interests should certainly be protected, but problems would arise if an agreement between the predecessor and successor States was subject to the consent of that third party. The Commission should therefore find a solution which would protect the interests of third parties and, at the same time, make the meaning of paragraph 2 clear; as it stood, it could be invoked by a third party to prevent a succession of States from taking place.

37. Mr. AGO said that, on first reading article 20, paragraph 2, he had had the same doubts as Mr. Ushakov about the words "shall not be effective unless". He had thought, however, that the intention might have been to make a distinction between the validity of an agreement and its effectiveness. Thus, an agreement concluded between the predecessor State and the successor State on the passing of State debts would be valid but not effective, since it would contain a suspensive condition, which was the consent of the third State.

38. However, his doubts had increased on the second reading of the paragraph, for he had then perceived that it was the Commission itself which, in the case of an agreement between the predecessor State and the successor State, added a suspensive condition to that agreement. If the predecessor State and the successor State provided that the agreement would become effective only when the creditor third State had given its consent, no problem arose and the rule stated in paragraph 2 was superfluous. If, however, the two States provided that the agreement would be effective from the time of its conclusion, was the Commission entitled to say that it would not be effective so long as the third State had not accepted it? It could give directives on the subject to the predecessor State and the successor State, advising them to take the interests of the third State into account and to include a clause to the desired effect in the agreement they concluded, but it could not restrict the freedom of two States which concluded an agreement.

39. It was to be hoped that the predecessor State and the successor State would take the interests of the creditor third State into account in the agreement they concluded; but if they did not, was not the agreement still valid for all that? And if it was valid, how could it be said that it was not effective?

40. Mr. SCHWEBEL said it was reassuring to see that so many members of the Commission supported article 20, paragraph 1. That provision was of fundamental importance because there was no reason why the rights of third-party creditors should be affected by a succession of States.

41. With regard to paragraph 2, in principle, he had no difficulty with the point made by Mr. Ago concerning the drafting of a rule of international law which would restrict the ability of two States to dispose of the property of a third State. Such a rule was a basic principle of municipal law and he did not see why the Commission could not reproduce it, in substance, in international law. He did not think, however, that paragraph 2 was intended to go so far as to invalidate an agreement between two States. The point it made was, rather, that such an agreement would not be effective against interested third parties. In order to make that point clear, it might be advisable to replace the words "it shall not be effective unless" by the words "it shall not be effective against third parties unless".

42. With regard to the words in square brackets in paragraph 2 (*a*), his strong view was that any agreement relating to a succession of States in respect of matters

other than treaties must comprehensively embrace actual debt relations, including those in which the creditor was not a State or an international organization. As Mr. Quentin-Baxter had rightly pointed out, however, that was by no means the same thing as saying that a third -party creditor other than a State or an international organization was an international person and could be regarded as an entity operating on the plane of international law. Referring to the examples which Mr. Quentin-Baxter had given of the primacy of the State over its nationals who were creditors, he urged that account should also be taken of the case in which a private creditor's Government rejected a debt settlement before the private creditor had been able to accept it. In such a case, the private creditor would not be entitled to accept the settlement even if he wished to do so.

43. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no basic objection to the substance of article 20, he thought that, even with the inclusion of the words in square brackets in paragraph 2 (*a*), its meaning was not clear.

44. In referring to paragraph 1, Mr. Schwebel had stressed the importance of protecting the interests of "third-party creditors" but the fact was that those words had not been defined for the purpose of the draft articles. The commentary should explain what the words "third-party creditor" meant in the context of article 20.

45. In paragraph 2, he was not at all satisfied with the word "purported", a word which the Commission had usually tried to avoid. He noted that the words "an agreement providing" had been used in article 8 of the draft articles on succession of States in respect of treaties.[14] That formulation would be better than "purported" because the word "purport" was rather nebulous; he was not even sure that it was a proper juridical term.

46. He also had some difficulties with the words "or other arrangement" in the second line of paragraph 2. Either an agreement existed or it did not. Moreover, the words "or other arrangement" would give rise to problems in the interpretation of article 21, paragraph 2, which began with the words "In the absence of an agreement".

47. He thought that the words "predecessor and successor States" in paragraph 2 should be in the singular because, when a debt passed from one State to another, the relation in question was essentially bilateral, not multilateral. Similarly, the words "State debts" should be amended to read "any State debt" so that the objection of a particular creditor to an agreement would make the agreement ineffective only in relation to the particular debt for which he was a creditor. He therefore proposed that the introductory phrase of paragraph 2 should be amended to read:

> Where an agreement between a predecessor State and a successor State or between successor States provides for the passing of any State debt, it shall not be effective for that purpose unless:

48. He had no objection to the substance of paragraph 2 (*a*) but he thought that, unlike article 3 of the Vienna Convention, the present wording of that subparagraph would exclude such subjects of international law as the Holy See, which might be a creditor. He therefore suggested that the words "or other subject of international law" should be inserted between the words "international organization" and the words in square brackets. Although he normally found the use of square brackets very unsatisfactory, he thought that in the present case they were justified. If the last words of paragraph 2 (*a*) were retained in square brackets, their meaning should be made clearer and they should be fully explained in the Commission's commentary.

49. Speaking as Chairman, he suggested that, in view of all the comments which had been made about article 20, the Drafting Committee should take another look at that article and try to improve its wording.

50. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, in the light of the discussion and subject to the agreement of the Special Rapporteur, he accepted the Chairman's suggestion that article 20 should be reconsidered by the Drafting Committee.[15]

51. Mr. BEDJAOUI (Special Rapporteur) said he thought the discussion on article 20, paragraph 2, had been based on a misunderstanding. That paragraph was certainly not intended to deny the freedom of the predecessor State and the successor State to conclude an agreement or to make their agreement void in the event of non-acceptance by a third State, but to uphold the existing agreement between the predecessor State and the third State.

The meeting rose at 6.10 p.m.

[14] See 1416th meeting, foot-note 1.

[15] For the consideration of the revised text proposed by the Drafting Committee, see 1450th meeting, paras. 7-47.

1448th MEETING

Tuesday, 28 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

* Resumed from the 1446th meeting.

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 19 (Formulation of reservations in the case of treaties between several international organizations),

ARTICLE 19*bis* (Formulation of reservations by States and international organizations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) *and*

ARTICLE 19*ter* (Objection to reservations) [3] (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of the texts of articles 19, 19*bis* and 19*ter* proposed by the Drafting Committee and the text of article 19 proposed by Mr. Ushakov (A/CN.4/L.253).

2. Mr. FRANCIS, referring to article 19*bis*, said he had the impression that, when reservations were formulated by international organizations to treaties concluded with States, there were circumstances in which an international organization could be said to be contracting on equal terms with States. If that impression was correct, those circumstances should be taken into account in the article.

3. Where an international organization was contracting with a body of States which was equivalent to its total membership, with a view to doing something that was not provided for in its constituent instrument, the organization could not truly be said to be contracting on terms of equality with those States because they were its masters. But there was an entirely different situation that also had to be taken into account. For instance, the Caribbean Community might be instructed by its executive organ to negotiate a treaty with States which were not members of the Community. In that case, the Community could be said to be contracting on equal terms with those non-member States and it should have the right to formulate reservations to the resultant treaty, even if that right was not expressly provided for in its constituent instrument. That example was particularly important because it related to an organization which was composed of sovereign States and which therefore expressed the sovereign will of those States when it contracted with other States. Under article 19*bis*, paragraph 2, however, such an organization could not formulate reservations unless the treaty so provided. He thought the Commission should give further consideration to that question. The Commission should also consider whether the provisions of article 19*bis*, paragraph 2, were fully consistent with those of article 20*bis*, paragraph 2.

4. In article 19*ter*, paragraph 3 (*a*), he had some difficulty with the words "the possibility of objecting is expressly granted to it by the treaty". If those words meant that an international organization could not object to a reservation unless the treaty so provided, the organization would be relegated to the status of a nonentity. Indeed, if an organization could formulate a reservation to a treaty, it followed logically that it should also be able to object to a reservation to a treaty. Moreover, an international organization should be able to object to reservations formulated either by States or by another organization, if those reservations were incompatible with the basic aim or purposes of the organization itself. The Commission should therefore give further consideration to article 19*ter*, paragraph 3 (*a*), which, as it stood, was too restrictive.

5. The CHAIRMAN said that the draft articles under consideration were designed to take account of the fact that the Commission had not yet been able to decide whether States and international organizations had equal status in the matter of formulating reservations. The comments made by Mr. Francis would be reflected in the Commission's report, and the Commission would be able to revert to that basic problem during the second reading of the draft articles. By that time, it would have received the views and comments of Governments on that matter.

6. Mr. USHAKOV, referring to article 19*bis*, paragraph 2, asked whether the other international organizations parties to a treaty, whose participation was not essential to its object and purpose, were also allowed to formulate reservations.

7. Mr. REUTER (Special Rapporteur) said that article 19*bis*, paragraph 2, dealt with the case in which the various international organizations parties to a treaty were not necessarily in the same position. For instance, in the case of a treaty concluded between IAEA (which would be responsible under the treaty for specific supervisory functions), on the one hand, and a certain number of States, and two operational international organizations, such as Eurochemic and Euratom, on the other hand, there was only one international organization whose participation was essential to the object and purpose of the treaty, namely, IAEA, which, because of the specific functions it was required to perform under the treaty, was not in the same position as States. Thus, it could only make a reservation if that reservation was expressly authorized by the treaty, in accordance with the rule laid down in paragraph 2. As to the other two organizations, it was not paragraph 2 but paragraph 3 which applied to them, since they were in the same position as States. The words "that organization" made it clear that the rule laid down in paragraph 2 did not apply to all the organizations parties to the treaty.

8. Mr. QUENTIN-BAXTER said that, although he had been one of the members of the Commission who had thought that the rules on the formulation of reservations should be stricter for international organizations than for States, he now found it possible to accept draft articles 19 and 19*bis*, as proposed by the Drafting Committee.

9. In the case of article 19, he had shared the concern of some of the other members that the Commission was showing an inclination to assimilate international organizations to States and not taking due account of the limited contractual capacity of international organizations. His doubts had now been dispelled, however, and he was quite satisfied with the balance established by articles 6 [4] and 27. Moreover, article 19, as proposed by the Drafting Committee, contained residual rules which were not compelling and did not set any parameters that

[3] For texts, see 1446th meeting, para. 4.

[4] See 1429th meeting, foot-note 3.

international organizations would feel obliged to follow. In fact, what that article now offered to international organizations was an opportunity to benefit from State practice, whenever they found it convenient to do so.

10. With regard to the much more difficult case of article 19*bis*, he had shared the opinion of some members of the Commission that, in view of the practical problems involved in conferences in which international organizations might participate, the status of organizations could not be equal to that of States. The solution proposed by the Drafting Committee did, however, take ample account of cases in which there would be no point at all in holding a conference unless the organization that was going to be involved was prepared, in principle, to assume the responsibilities placed upon it. He therefore found that article satisfactory.

11. He agreed with the Chairman that the question of the relative status of States and international organizations, to which Mr. Francis had referred, did not have to be settled just then. Indeed, the draft articles under consideration were full of questions that would require further investigation. For the time being, however, the Commission was being very tentative and merely suggesting hypotheses and inviting reactions.

12. With regard to the alternative proposed by Mr. Ushakov (A/CN.4/L.253), which implied that there were two intersecting worlds, namely, the world of States and the world of international organizations, he found that hypothesis harder to accept than the one proposed by the Drafting Committee, in which it was simply admitted that there were cases in which international organizations took part in dealings with States for particular purposes. Those cases were well known and could be provided for. However, it was very possible that there would be other cases in which it would be necessary to bring the status of international organizations more closely into line with that of States. In his view, the Commission's task would be to find a way of taking that possibility into account.

13. Mr. USHAKOV said he assumed, from the Special Rapporteur's explanation regarding article 19*bis*, paragraph 2, that only an international organization whose participation was essential to the object and purpose of the treaty could make reservations and that the other organizations could not.

14. Mr. REUTER (Special Rapporteur) said that that was not the meaning of draft article 19*bis*. Under that article, an international organization party to a treaty fell within the scope of either paragraph 2 or paragraph 3. If the participation of the organization was essential to the object and purpose of the treaty, it could only formulate reservations expressly authorized by the treaty; if the contrary was the case, it could formulate the same reservations as States.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the Special Rapporteur that every case involving an international organization was covered either by paragraph 2 or by paragraph 3 of article 19*bis*.

16. Speaking as Chairman, he invited the Commission to consider the suggestion made by Mr. Francis at the 1430th meeting concerning the deletion of the word "several" in the title and the first part of the English version of article 19.

17. Mr. SCHWEBEL said that he supported the suggestion by Mr. Francis.

18. Mr. SETTE CÂMARA said that he also supported the suggestion by Mr. Francis.

19. Mr. TSURUOKA said that, if it deleted the word "several" in article 19 and expressly authorized an international organization to make a reservation to a treaty between only two international organizations, the Commission would be authorizing an anomaly. If an international organization made a reservation to a treaty between two international organizations and the other party did not accept the reservation, the treaty must normally fall. If the two parties decided none the less to conclude a treaty, it would of necessity be another treaty, since the formulation of reservations to a bilateral treaty amounted to a proposal to negotiate another treaty. The Commission was free to allow such a possibility if it so wished, but it should appreciate the anomaly involved.

20. Mr. SETTE CÂMARA, referring to the point made by Mr. Tsuruoka, said the problem whether reservations could be formulated to bilateral treaties was complicated and controversial. The Vienna Convention [5] did not, however, rule out the possibility. The Commission should therefore bear in mind the fact that, if it decided to rule out the possibility of the formulation of reservations to bilateral treaties concluded between two international organizations, it would be going much further than the Vienna Convention.

21. The CHAIRMAN said that he did not think it would make much difference whether or not the Commission decided to delete the word "several", because its discussion of that problem would be reflected in its commentary to article 19.

22. Mr. FRANCIS said that the word "several" had not been used either in article 2, paragraph 1 (*a*) (ii), or in the heading of document A/CN.4/L.255, which contained the texts of the articles adopted by the Drafting Committee.

23. Mr. USHAKOV suggested that the word "several" be placed between square brackets.

24. The CHAIRMAN said be thought it would be better to avoid the use of square brackets in the present case.

25. Mr. QUENTIN-BAXTER said that the problem whether reservations could be formulated to bilateral treaties arose not only in connexion with article 19, where the words "several international organizations" had been used, but also in connexion with article 19*bis*, which spoke of "one or more international organizations".

26. Mr. TSURUOKA, speaking as Chairman of the Drafting Committee, said that the Committee had decided, after a lengthy discussion, to translate the term *un(e) ou plusieurs* by "one or more", except in article 19, where the word "several" had been retained because it was obviously not possible to use the term "one or more".

27. Mr. DADZIE said that he failed to see the significance of Mr. Francis' suggestion that the word "several"

[5] See 1429th meeting, foot-note 4.

be deleted in article 19 because the alternative translation of "one or more", which had been used in article 19*bis*, would pose even greater problems. Since it was clear that article 19 related to cases in which a number of international organizations—obviously more than two—were involved in the conclusion of a treaty, the thrust of the article would be the same whether the word "several" was deleted or not. He therefore suggested that the word "several" be retained.

28. Mr. CALLE Y CALLE said that he too did not think that the use of the word "several" in article 19 could raise any difficulties. Obviously, reservations could not be formulated to treaties concluded between two international organizations only.

29. Mr. ŠAHOVIĆ said that the sensible course would be to approve the Drafting Committee's proposal and take advantage of the commentary to reflect the doubts of some members regarding the use of the word "several".

30. With regard to bilateral treaties, in its commentary to future articles 16 and 17 of the Vienna Convention, the Commission had stated:

> A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty.[6]

31. Mr. FRANCIS suggested that the Commission adopt Mr. Ushakov's suggestion to place the word "several" in square brackets, thus leaving the issue open for further discussion and avoiding the need to vote on a matter on which opinions differed.

32. Mr. REUTER (Special Rapporteur) said that there had been no difficulties with the Vienna Convention regarding bilateral treaties because it offered drafting possibilities which had obviated the need to decide the point. The same drafting possibility was open to the Commission in the case of article 19, since it could refer there to a treaty "between international organizations". The problem lay not with article 19 but with article 19*bis*, since the expression "treaty between one or more States and one or more international organizations" would imply that the Commission allowed reservations to a treaty between a State and an international organization—and that was unacceptable to some members of the Commission. He had been unable to find a formula that would retain the required ambiguity in article 19*bis* and was prepared to support Mr. Šahović's proposal if the Commission could not reach a satisfactory solution.

33. The CHAIRMAN said he thought that, in the present case, the use of square brackets was to be avoided. If there was no objection, he would take it that the Commission approved the title and the text of article 19 as proposed by the Drafting Committee, on the clear understanding that the problems involved in the use of the words "several international organizations" would be fully reflected in the commentary.

It was so agreed.

34. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the title and the text of article 19*bis* as proposed by the Drafting Committee.

It was so agreed.

35. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed that the discussion to which the alternative text of article 19 proposed by Mr. Ushakov had given rise would be fully reflected in the commentary to article 19, and that the alternative text of that article would be reproduced in a foot-note to the commentary.

It was so agreed.

36. Mr. USHAKOV proposed that draft article 19*ter* (Objection to reservations) be reworded to read:

> "1. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between several international organizations, may object to a reservation formulated by another international organization unless the reservation is authorized by the treaty.
>
> "2. A State, when signing, ratifying, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may object to a reservation formulated by another State or international organization unless the reservation is authorized by the treaty.
>
> "3. An international organization, when signing, formally confirming, accepting, approving or acceding to a treaty between States and one or more international organizations or between international organizations and one or more States, may object to a reservation formulated by a State or another international organization, unless the reservation is authorized by the treaty, if:"

and be followed by paragraphs 3 (*a*) and (*b*) of article 19*ter*, as proposed by the Drafting Committee.

37. His proposal, which was designed to promote agreement among members of the Commission, did not affect the substance of the article.

38. The CHAIRMAN said he noted, with regard to the amendment proposed by Mr. Ushakov, that in each paragraph the phrase beginning "when signing, ..." seemed to restrict the making of objections to a particular point in time. That was perhaps not Mr. Ushakov's intention, but the limitation was one which did not appear in article 19*ter* as proposed by the Drafting Committee, and therefore seemed to be a matter of substance rather than of drafting.

39. Mr. REUTER (Special Rapporteur) said that Mr. Ushakov's proposal related only to the form of article 19*ter*. It dealt first with treaties between several international organizations and then with treaties between States and one or more international organizations or between international organizations and one or more States, making a distinction between the position of States and that of international organizations.

40. In his view, the proposal looked very like providing the answer to a question on which the Vienna Convention had remained silent: what happened when a State formulated a reservation which, it claimed, was authorized

[6] *Yearbook ... 1966*, vol. II, p. 203, document A/6309/Rev.1, part II, chap. II, sect. C, draft articles on the law of treaties with commentaries, articles 16 and 17, para. 1 of the commentary.

by the treaty, but which another State considered was not so authorized? The other State certainly had the right to formulate an objection to the reservation and, while the Vienna Convention did not expressly recognize such a right, it did not exclude it. Such cases could, moreover, be expected to occur frequently. For each of the cases covered in Mr. Ushakov's proposal, it was provided that an objection could not be formulated to a reservation authorized by the treaty. If the Commission accepted that proposal, it should at least be made clear in the commentary that the right to object applied not only to reservations which had not been authorized but also to reservations which had been authorized by the treaty; in the latter case, the right to object was confined to the question whether a given reservation fell within the category of authorized reservations. So long as there was any uncertainty as to whether Mr. Ushakov's proposal did or did not exclude the second aspect of that right, his own preference would be for the text proposed by the Drafting Committee since it afforded the possibility of objecting to a reservation which, in the opinion of the objecting party, was not a reservation authorized by the treaty.

41. Mr. USHAKOV said that article 19*ter*, paragraph 1, as proposed by the Drafting Committee, did not specify at which point an objection to a reservation could be formulated. Article 19 of the Vienna Convention provided that a State could formulate a reservation "when signing, ratifying, accepting, approving or acceding to a treaty". While that Convention did not state expressly when an objection to a reservation could be formulated, it must be at the same time. The point at which a State or international organization could formulate an objection to a reservation should therefore be indicated.

42. Unlike the Special Rapporteur, he did not think that the Vienna Convention allowed a State to object to a reservation expressly authorized by the treaty. A reservation authorized by a treaty was one which the parties to the treaty accepted in advance, as was clear from paragraph 1 of article 20 as proposed by the Drafting Committee, under which "a reservation expressly authorized by a treaty ... does not require any subsequent acceptance". Although there was no stipulation in the Vienna Convention precluding objections to reservations that were expressly authorized, the point should be decided in the draft. If, in the Commission's view, objections to reservations authorized by the treaty were not allowable, the article should be amended accordingly.

43. The CHAIRMAN, with regard to the statement by Mr. Ushakov, said that the Commission should also bear in mind article 20, paragraph 5, of the Vienna Convention, from which it was quite clear that objections could be made at points subsequent to those mentioned in the amendment proposed by Mr. Ushakov.

44. Mr. CALLE Y CALLE said that paragraphs 1 and 2 of article 19*ter* referred to the making of objections to reservations formulated pursuant to article 19 and article 19*bis*, paragraph 3. Articles 19 and 19*bis* made it clear when such reservations could be formulated but, as the Chairman had said, objections did not have to be made at the same fixed time. The possibility of making an objection was dependent on the prior formulation of a reservation; to limit it to the occasions proposed by Mr. Ushakov would greatly reduce the freedom of parties to a treaty to make objections at all.

45. Mr. REUTER (Special Rapporteur) said that the question of the point at which an objection to a reservation could be formulated was linked with article 20, paragraph 4, which precluded the clarification proposed by Mr. Ushakov.

46. The wording of reservations authorized by the treaty was not normally indicated in the treaty. If a treaty included models of reservations which a State could simply copy when formulating a reservation, the question whether the reservation was authorized by the treaty would not arise. If, however, a treaty simply stated that reservations could be formulated to specific articles, it might happen that a State submitted a reservation which not only related to one of those articles but also affected another provision; in that case, there was a risk of a difference of opinion between the State formulating the reservation and the State raising the objection to it, the former claiming that it was authorized and the latter that it was not. That problem could not be overlooked. The Drafting Committee had taken account of it in article 19*ter*: Mr. Ushakov's proposed article, however, was based on the premise that objections could not be formulated to reservations authorized by a treaty.

47. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 19*ter*, as proposed by the Drafting Committee.

It was so agreed.

48. Mr. USHAKOV said that, in his opinion, there would be no point in authorizing reservations to certain articles in a treaty if it was then possible to object to those reservations. For instance, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character [7] provided for the possibility of formulating reservations to the article on the settlement of disputes by arbitration; in his view, no State could object to the reservation formulated by the Soviet Union with regard to that article.

ARTICLES 20 (Acceptance of reservations in the case of treaties between several international organizations) *and*

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) [8] (*continued*)

49. The CHAIRMAN invited the Commission to consider articles 20 and 20*bis* as proposed by the Drafting Committee and the alternative text for article 20 proposed by Mr. Ushakov (A/CN.4/L.253).

50. Mr. USHAKOV said that the word "treaty", as used in article 20, paragraphs 2 and 3, referred to a treaty between several international organizations. Consequently, it did not answer the general definition of that word given in article 2, paragraph 1 (*a*), which covered not only treaties between international organizations but also

[7] See 1435th meeting, foot-note 10.

[8] For texts, see 1446th meeting, para. 4.

treaties between one or more States and one or more international organizations. It should therefore be made clear to what kind of treaty paragraphs 2 and 3 referred.

51. In his opinion, the wording of the last part of article 20*bis*, paragraph 1, which read "does not ... require subsequent acceptance by, as the case may be, the other contracting State or States or the other contracting organization or organizations", was not very satisfactory. If a treaty concluded between States and one or more international organizations was the subject of a reservation formulated by a State, that reservation could be accepted either by another contracting State or by the organization or organizations, but on no account by "the other contracting organization". If the reservation was formulated by an organization, it could be accepted by a State and not by "the other contracting State". Either each category of treaty should be dealt with separately, as in his own draft article 20, or the passage in question should be replaced by the words "does not ... require subsequent acceptance by the contracting State or States or by the contracting international organization or international organizations".

52. The same comment applied to article 20*bis*, paragraphs 2 and 3, as he had made regarding the drafting of the corresponding paragraphs of article 20.

53. Article 20*bis*, paragraph 3 (*a*), was based on the corresponding provision in article 20, and the words "if ... the treaty is in force" applied to the case where a treaty had entered into force generally and not only for the reserving and accepting parties. In that subparagraph, therefore, the words "for the reserving and for the accepting State or organization" should be replaced by the words "between the reserving State and the accepting organization, between the reserving organization and the accepting State or between the reserving organization and the accepting organization".

54. In the French version of paragraph 3 (*b*), he said it should be made clear that the opening words, *l'objection faite à une réserve*, referred to an objection by a State or international organization, in the same way as article 20, paragraph 4 (*b*), of the Vienna Convention specified that its provisions referred to an objection to a reservation "by another contracting State".

55. His comments related only to form and were designed to make the Commission's task easier. He would not press them and would not be opposed to the adoption of articles 20 and 20*bis* as proposed by the Drafting Committee.

56. Mr. VEROSTA said that Mr. Ushakov's comments merited consideration. He would, however, point out that the titles of articles 20 and 20*bis* indicated clearly the kind of treaty to which they applied: article 20 was concerned with the treaties referred to in article 2, paragraph 1 (*a*)(ii), and article 20*bis* with those referred to in paragraph 1 (*a*) (i) of the same article. In the circumstances, it was perhaps unnecessary to repeat, in articles 20 and 20*bis*, the descriptive formula which appeared in their respective titles. The Commission might also indicate in article 2 that, when it was quite clear from their title, certain articles of the draft related to only one or the other category of treaty.

57. The CHAIRMAN said that the Commission's usual practice was to make the title of a draft article fit the text. It was generally agreed by both the Commission and codification conferences that articles must be sufficiently clear in themselves for there to be no need to rely on their titles for their interpretation.

58. Mr. USHAKOV said he agreed with the Chairman that articles should not be interpreted by reference to their title.

59. Mr. REUTER (Special Rapporteur) said he shared that view and would point out that the Drafting Committee had agreed that the word "treaty", as used in paragraphs 2 and 3 of articles 20 and 20*bis*, should be understood in the sense given to it in paragraph 1 of those articles. It would be inadvisable to get out of the difficulty by using the demonstrative "this" since it would not be appropriate in article 20*bis*. It would be better to explain in the commentary that the indications given in paragraph 1 also applied to paragraphs 2 and 3.

60. He agreed with Mr. Ushakov that the last part of article 20*bis*, paragraph 1, starting with the words "by, as the case may be", was not very satisfactory. He would suggest instead the following wording: "by the other contracting parties, State or States, organization or organizations".

61. The CHAIRMAN suggested that the problem of the identity of the treaty referred to in article 20, paragraph 2, first line, could be resolved if the phrase "of the treaty" were replaced by the phrase "of such a treaty". The present wording of the first line of paragraph 3, however, once again made the identity of the treaty in question uncertain, for the phrase "In cases not falling under the preceding paragraphs" seemed to exclude the type of treaty referred to in paragraphs 1 and 2.

62. Mr. TSURUOKA, speaking as Chairman of the Drafting Committee, said that a very meticulous legal mind might indeed feel some doubt but a little ordinary common sense, he thought, should dispel it. He was, however, prepared to try to improve the wording, in agreement with the Special Rapporteur and the members of the Drafting Committee.

63. Mr. CALLE Y CALLE said that the first paragraph of both article 20 and article 20*bis* made it perfectly clear to what type of treaty the article referred.

64. Since the phrase "When it appears from the object and purpose of the treaty" was long established and had an accepted meaning, he would prefer to see the amendment to article 20, paragraph 2, suggested by the Chairman introduced at a later stage in that paragraph, so that the beginning would read "When it appears from the object and purpose of the treaty that the application of such a treaty ...".

65. The CHAIRMAN said he supported the amendment suggested by Mr. Calle y Calle.

66. Mr. REUTER (Special Rapporteur) said that, to meet the Chairman's concern, the last part of the introductory phrase of article 20, paragraph 3, might be redrafted to read "and unless the treaty between international organizations otherwise provides".

The meeting rose at 1.05 p.m.

1449th MEETING

Wednesday, 29 June 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1, A/CN.4/L.254, A/CN.4/L.256 and Add.1, A/CN.4/L.257)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 21 [1] (Transfer of part of the territory of a State) [2]

1. Mr. REUTER said that article 21 was acceptable. The arrangements for the passing of the State debt, referred to in paragraph 2, would be dealt with in the final clauses.

2. The CHAIRMAN said that the point raised by Mr. Reuter would be mentioned in the commentary.

3. If there was no objection, he would take it that the Commission approved the title and text of article 21 as proposed by the Drafting Committee.

It was so agreed.

ARTICLE 22 [3] (Newly independent States)

4. Mr. TSURUOKA (Chairman of the Drafting Committee) said that the Drafting Committee proposed for article 22 the text contained in document A/CN.4/L.256/Add.1, which read:

Article 22. Newly independent States

When the successor State is a newly independent State:

1. No State debt of the predecessor State shall pass to the newly independent State, unless an agreement between the newly independent State and the predecessor State provides otherwise in view of the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State.

2. The provisions of the agreement referred to in the preceding paragraph 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 equilibria of the newly independent State.

5. In his ninth report, the Special Rapporteur had proposed three articles concerning newly independent States.[4] The Commission had, however, considered that subject on the basis of a new article which the Special Rapporteur had introduced to replace the original three articles.[5] The Drafting Committee had based its work on that consolidated article and on proposals put forward during its discussions by the Special Rapporteur and the members of the Committee, reflecting their various points of view. After a long and detailed debate, the Drafting Committee had decided by seven votes to three to propose the text which was now before the Commission.

6. That text comprised two paragraphs, which, the Committee felt, embodied the basic principles set out in the article proposed by the Special Rapporteur. The Committee had agreed with what had appeared to be the general trend of thought within the Commission, that the article should not be too detailed but should reflect the essential elements, in particular those contained in paragraphs 2, 3 and 6 of the Special Rapporteur's consolidated text.

7. Paragraph 1 stated the basic rule: "No State debt of the predecessor State shall pass to the newly independent State". But it also provided that the predecessor State and the newly independent State might agree otherwise, in view of the link between the State debt of the predecessor State, which was connected with its activity in the territory to which the succession of States related, and the property, rights and interests which passed to the newly independent State. The Commission would note that, in speaking of the predecessor State's activities, the paragraph employed the phrase "connected with its activity in the territory", which was also to be found in article 11 in part I, relating to the passing of debts owed to the State.[6] In other articles of part I, the Commission had used the phrase "connected with the activity of the predecessor State in respect of the territory".

8. Paragraph 2 was a safeguarding clause establishing the criteria with which the provisions of the agreement between the predecessor State and the newly independent State, referred to in paragraph 1, and their implementation must comply. In some respects, the paragraph had drawn inspiration from article 13, paragraph 6, relating to succession by newly independent States to State property.

9. While the French and Spanish versions of paragraph 2 employed the same tense as had been used in article 13, paragraph 6, the English version used the auxiliary "should", in order better to convey in English the intention behind paragraph 2, which was to provide guidelines in relation to the agreements referred to in paragraph 1. The paragraph did not speak of the agreement itself but rather of its provisions and their implementation.

10. The use of the expression "not infringe the principle of the permanent sovereignty of every people over its

* Resumed from the 1447th meeting.

[1] For the consideration of the text originally submitted by the Special Rapporteur, see 1427th and 1428th meetings.

[2] For text, see 1447th meeting, para. 3.

[3] For the consideration of the text originally submitted by the Special Rapporteur, see 1443rd to 1445th meetings.

[4] A/CN.4/301 and Add.1, paras. 364, 374 and 388.

[5] 1443rd meeting, para. 1.

[6] See 1416th meeting, foot-note 2.

wealth and natural resources" reproduced language which already appeared in article 13, paragraph 6, and was consistent with United Nations usage in regard to that very important principle. The expression "endanger the fundamental economic equilibria of the newly independent State" had been used in place of the expressions "gravely compromising the economy" of that State or "retarding its progress", which had been suggested in the consolidated article proposed by the Special Rapporteur, because it was felt that it reflected more fully the idea that was intended.

11. Mr. SCHWEBEL said that the alternative version of the article which he had introduced in the Drafting Committee the previous day and which was now before the Commission in document A/CN.4/L.257, drew heavily both on the consolidated article which had been proposed by the Special Rapporteur, particularly its second and third paragraphs, and on terminology which had been suggested by other members of the Commission in the Drafting Committee.

12. The main difference between paragraph 1 of his text and that of the Drafting Committee was that his proposal did not absolutely exclude the passing of a State debt from a predecessor State to a newly independent State otherwise than by agreement between them. While in practice a State debt might pass between such States only by agreement, it seemed to him preferable, as a matter of principle, to admit the possibility that it could be transferred in some other way, although it should be noted that his article very severely limited such transfer to the type of debt and the proportion mentioned in the second half of paragraph 1. There was in that respect much common ground between his proposal and that of the Drafting Committee.

13. Paragraph 2 of his proposal differed only slightly from the corresponding paragraph of the Drafting Committee's text. One difference between the two provisions lay in the way they referred to permanent sovereignty over natural wealth and resources. The terminology of his proposal (sovereignty over its natural wealth and resources) was in line with that of two international treaties, namely, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,[7] the wide support for which was still increasing, and of General Assembly resolution 1803 (XVII); the terminology of the Drafting Committee's proposal (sovereignty over its wealth and natural resources) was in line with that of more recent resolutions, such as the Charter of Economic Rights and Duties of States.[8] While the Commission had already decided, with regard to article 13, to follow the latest formulations of the General Assembly, he felt it worthwhile to raise anew the question of an alternative wording, not only because he felt that treaties in force should be given their full weight by comparison with texts, such as the Charter of Economic Rights and Duties of States, which did not enjoy universal support, but also because it did not make sense to him to speak of the "permanent sovereignty" of a people over its "wealth", for that wealth would include, for example, manufactures which the people produced for export.

14. For those reasons, and because the Drafting Committee's text could have the effect of discouraging loans to the remaining colonial territories, he preferred his own version of the article. The impression he had gained from the Drafting Committee's discussions the previous day was that some members shared in whole or in part his doubts concerning certain aspects of the Drafting Committee's text, and thus his preference. He hoped those points and his text would be appropriately recorded in the Commission's report.

15. Mr. ŠAHOVIĆ said that he had not participated in the discussion on the draft article submitted by the Special Rapporteur on newly independent States because his impression had been that the Commission as a whole agreed with the Special Rapporteur's views and conclusions, which were based on a detailed analysis of succession to State debts within the context of the decolonization process. But the fact that Mr. Schwebel had now proposed an article, in addition to the article proposed by the Drafting Committee, indicated that there was now a considerable divergence of views.

16. For his part, he fully supported the text adopted by the Drafting Committee in the light of the explanations provided by its Chairman. It not only accorded with the Special Rapporteur's views, but was also in keeping with both past and existing practice in regard to State debts. It was incumbent on the Commission to draw up rules that would reflect existing law and contribute to the solution of future problems.

17. The rule laid down in paragraph 1 summarized general practice and took due account of the existing needs of newly independent States. The principle of the non-transferability of the State debts of the predecessor State to the newly independent State had rightly been taken as the starting point. By underlining the part played by an agreement between the newly independent State and the predecessor State in the settlement of questions relating to State debts, the Drafting Committee had opted for the solution which should constitute the basis for the settlement of all social, economic and political problems between newly independent States and predecessor States. In so doing, the Drafting Committee had affirmed the sovereign right of newly independent States to contribute to the solution of those problems.

18. For that reason, he preferred article 22 as proposed by the Drafting Committee. Article 22 as proposed by Mr. Schwebel he found unacceptable because, unlike the Drafting Committee's text, it did not rest on the principles of the non-transferability of debts and agreement between the States concerned. The basis of paragraph 1 of Mr. Schwebel's text seemed to be somewhat mechanical in that it did not take account of the vital interests of the successor State.

19. The Drafting Committee's wording could probably be improved but, for first reading, it was only required to prepare a text that was generally acceptable.

20. Mr. REUTER said that article 22 as proposed by the Drafting Committee was quite unacceptable. Its main defect was perhaps that it was an amalgam of the

[7] General Assembly resolution 2200 A (XXI), annex.

[8] General Assembly resolution 3281 (XXIX).

provisions originally proposed by the Special Rapporteur. In the Drafting Committee, he had asked a question to which he had still not received a satisfactory answer: why should a newly independent State be asked to sign an agreement with the predecessor State? In his opinion, there were only two possible answers: either there was a total misunderstanding of its interests on the part of the State or it was not entirely its own master and had to be protected against pressure. In his view, the question was whether there was the slightest legal ground for signing an agreement, the slightest obligation. The Drafting Committee seemed to have denied the existence of any such obligation. It followed that the article 22 which it now proposed was much stricter than one which simply provided that no State debt of the predecessor State should pass to the newly independent State. In paragraph 2 of the article, a provision had been added which was designed to limit the scope of the agreement which the predecessor State might sign.

21. He would have liked to see an article that stated a number of genuine legal rules. There seemed to be general agreement on the need to lay down, first, the principle that no State debt of a predecessor State passed to the newly independent State. But equity required that, in certain cases, an exception, no matter how limited, should be made to that principle. In those cases, the passing of the State debt was effected in accordance with the procedure normally adopted when two States were faced with a difficulty, namely, by agreement. From that standpoint, the two conditions laid down in paragraph 2 of the article were justified; the agreement must not infringe the principle of permanent sovereignty, and the implementation of the agreement must not endanger the fundamental economic equilibria of the newly independent State. An article drafted on those lines he could accept, even if the exception was couched in extremely restrictive terms. But the Drafting Committee's text did not allow for even the smallest exception and, what was more, it mixed questions of principle with questions relating to the settlement of disputes, and gave pride of place to the latter.

22. Mr. SUCHARITKUL said the Drafting Committee had produced a text which represented a happy compromise between differing views. Paragraph 1 began by endorsing a principle which had been put forward by the Special Rapporteur and Mr. Ushakov, namely, that there should be no passage of the State debt of the predecessor State to the successor State if the latter was newly independent. That principle was, he felt, generally acceptable and was, moreover, subject to the higher principle of the sovereign freedom of States to contract as they saw fit. The "agreement" to which the paragraph referred was an agreement concluded not before but after the emergence of the newly independent State as a sovereign entity. The requirement that account be taken of "the link between the State debt of the predecessor State connected with its activity in the territory to which the succession of States relates and the property, rights and interests which pass to the newly independent State" would protect the newly independent State by ensuring that the debt only passed in the "equitable proportion" which was directly mentioned in paragraph 1 of Mr. Schwebel's alternative text. As to the question what happened to the debt if there was no agreement between the newly independent State and the predecessor State, he had no doubt that the debt would remain with the latter, which was, after all, the entity which had contracted it.

23. Paragraph 2 of the Drafting Committee's text provided further safeguards which, although they would presumably be applicable to all newly independent States, were in all probability designed to protect the least developed countries in particular. Those safeguards were couched in terms which were less absolute than those employed in the Special Rapporteur's consolidated article, but were none the less very persuasive. No one could quarrel with the statement that the provisions of the type of agreement referred to in paragraph 1 of the article "should not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources" or that the implementation of such an agreement should not "endanger the fundamental economic equilibria of the newly independent State". He was very satisfied with those safeguards, which met contemporary requirements. In fact, not only must the developing countries, which had very different opinions about their economic needs and priorities, be allowed to determine themselves what constituted their "fundamental economic equilibria", but there was also an essential need in general to promote their economic development and maintain their creditworthiness, which could not be divorced from their capacity to repay their debts.

24. The text proposed by Mr. Schwebel was a very encouraging effort. Its first paragraph differed very little from paragraph 1 of the Drafting Committee's article, except for the absence of any allusion to the freedom of States to contract according to their sovereign will. The incorporation of such an allusion in the Drafting Committee's article represented a better means of expressing the principle of self-determination than the direct reference thereto, which had been made in paragraph 6 of the Special Rapporteur's consolidated text. Paragraph 2 of the Drafting Committee's article was preferable to the corresponding provision of Mr. Schwebel's draft in that it retained from the Special Rapporteur's proposal both the notion of sovereignty over natural resources and the caveat concerning the effects of an agreement between the predecessor and successor States. He would accept the text proposed by the Drafting Committee.

25. Mr. FRANCIS said that, although he was grateful for the Drafting Committee's efforts and recognized that members of the Commission must accept the harmonization of their views, he was disturbed by the fact that the article proposed by the Committee failed to contain certain fundamental principles which were of importance to metropolitan countries and even more so to developing countries, including those yet to become independent. The Drafting Committee's text should be viewed against the background of, on the one hand, the fact that current practice was for a successor State to assume the localized State debt of the predecessor State which related to its own territory and, on the other hand, the fact that there was now in progress, both within and outside the United Nations system, a continuous dialogue

between the developed and developing countries, with the latter calling for the liquidation of debts with which they were overburdened, including those whose fate the Commission was now trying to settle. It could thus be seen what the proposed article lacked: an explicit statement of the principle of equity; an explicit reference to the capacity of the newly independent State to pay any debts transferred to it; and a reference to the guarantee given by the predecessor State, all of which were essential elements and had appeared in the consolidated article proposed by the Special Rapporteur.

26. The extent to which that made the article defective could be judged from the fact that, even when the passage of State debt from the predecessor to the successor State was governed by an agreement between them, the content, if not the form, of that agreement would have been settled prior to the independence of the successor State so that the parties would not have contracted on equal terms. Furthermore, while paragraph 2 of the text stated that the implementation of such an agreement should not "endanger the fundamental economic equilibria of the newly independent State", it contained no such requirement with regard to the content of the agreement. Consequently, while the manner in which the agreement was implemented might be equitable, the agreement itself would not necessarily be so. The paragraph ought to state that any agreement of the type referred to in paragraph 1 should conform to equitable principles, taking into account, *inter alia*, the capacity of the newly independent State to pay the debt in question.

27. His point was well illustrated by the situation of certain countries in his own region which were associate States of the United Kingdom but which already required subsidies from that country in order to remain viable. Some of those States were shortly to become independent; would the Commission, through a rigid application of the principle of derived benefit, wish to transfer to them certain debts of the predecessor State, even though it was already perfectly clear that they would be unable to pay?

28. With regard to the text proposed by Mr. Schwebel (A/CN.4/L.257), he noticed that paragraph 1 lacked any reference to the essential element of the existence of an agreement between the newly independent State and the predecessor State. His misgivings in that respect had not been dispelled either by Mr. Schwebel's oral introduction of the article or by the presence in paragraph 2 of a reference to "any agreement" between those States, for that left open the possibility that there might not be such an agreement. Mr. Schwebel's text also lacked a reference to equitable considerations in relation to the newly independent State's capacity to pay, although it was less deficient in that respect than the article proposed by the Drafting Committee.

29. Since the Commission was now only at the stage of the first reading of the draft articles, he would be prepared to vote, if necessary, for the Drafting Committee's text. He would, however, spare no effort to ensure that the omissions to which he had referred were remedied in the provision finally adopted.

30. Mr. DADZIE said that, if Mr. Schwebel's article had simply stated that "No debt contracted by the predecessor State on behalf or for the account of a territory which has become a newly independent State shall pass to the newly independent State", or the article proposed by the Drafting Committee had read only "When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State", he would have been able to accept either.

31. As matters stood, it would seem that Mr. Schwebel did not appreciate that their debt burden led to the economic strangulation of present-day newly independent States and deprived their political independence of part or all of its meaning. He subscribed entirely to the reasons for rejecting Mr. Schwebel's article, advanced by Mr. Šahović. In addition, it might be asked who was to determine the alleged benefits to the newly independent State to which reference was made in paragraph 1 of the article. In his opinion, the activities of a metropolitan Power in a colonial territory could not be considered as having been exercised in any interests other than its own, and he therefore rejected the notion of any possible benefit to the entity which became the successor State. It might also be asked who would determine the "equitable proportion" mentioned in paragraph 1. He had already pointed out that property left by a predecessor to a successor State was often of more academic than real benefit to the latter, which found itself with something it could not use or, in some cases, even afford to maintain.

32. The Drafting Committee's text showed the results of the careful analysis which the Commission had made of the Special Rapporteur's consolidated article and which had led to the establishment of general rules supported by the majority of its members. With regard to the fact that the article permitted the passing of State debt from the predecessor to the successor State if those States agreed to such passage, he recalled that he had always been opposed to the conclusion of any agreement between the predecessor State and a successor State for any purpose whatsoever; more often than not the successor State was in a position of disadvantage when negotiating such an agreement and was therefore likely to find itself compelled to accept even unfavourable terms. However, after careful study of the provision and in a spirit of compromise, he was willing to accept the article proposed by the Drafting Committee, provided the agreement to which it referred was freely concluded.

33. He had been concerned for some time at the fact that the Drafting Committee submitted to the Commission proposals containing ideas which the Commission had not discussed. It seemed to him that the Committee should confine itself to couching in acceptable language the views arrived at after deliberation in the Commission, and that any member of the Commission who wished to raise a point at variance with a text which the majority were willing to send to the Drafting Committee should do so in the Commission itself.

34. The CHAIRMAN said that the Drafting Committee had traditionally been given a greater degree of latitude than, for example, the drafting committee of a conference. He was sure that virtually all members of the Commission would deplore any change in that practice. If, rather than

enjoying its present measure of flexibility, the Drafting Committee had had to work only on the basis of precise instructions from the Commission, the whole of the Commission's work would have been stultified and it would have been impossible for the Commission to achieve the results it had to date.

35. Mr. DÍAZ GONZÁLEZ said that the text of article 22 proposed by the Drafting Committee was a compromise solution designed to take account of the two basic trends that had emerged from the Commission's discussion of the question of the passing of the State debts of the predecessor State to a newly independent State. He fully supported that compromise solution because it established a balance between the position of the members of the Commission who had supported the clean-slate principle and the position of those who had maintained that a newly independent State might, in certain circumstances, be obliged to agree to the passing of the debts of the predecessor State. His only real objection to the text proposed by the Drafting Committee related to the use of the word "fundamental" in paragraph 2. That word should be deleted because it added nothing to the concept of the "economic equilibria of the newly independent State".

36. As he had said in the Drafting Committee, he could not support the text of article 22 proposed by Mr. Schwebel. His first difficulty with that text stemmed from the wording of paragraph 1. Indeed, he was of the opinion that no debt contracted by a predecessor State had ever been contracted on behalf or for the account of a territory which had become a newly independent State. Moreover, it would be impossible to know whether a territory had benefited from property, rights and interests created by a debt contracted by the predecessor State until that territory had become a newly independent State and had assumed sovereignty. That was so because agreements could be concluded only by sovereign States.

37. The words "unless that passage of debt is in equitable proportion to the benefits that the newly independent State has derived or derives from the property, rights and interests in question", in paragraph 1 of Mr. Schwebel's text, were equally unsatisfactory because they failed to take account of the fact that, if it was determined that a newly independent State had derived or would derive benefits from a debt contracted by the predecessor State, it also had to be determined whether, as was likely, the predecessor State had derived benefits from that debt. As the Special Rapporteur had pointed out, what had constituted a benefit for the predecessor State often became a liability for the newly independent State and might even be harmful to its economy. So far, international law had taken account only of the benefits derived by one element of the equation, namely, the territory that became a new State. It should, however, also take account of the incalculable benefits derived by the other element of the equation, namely, the predecessor State that had been a colonial Power. In all fairness, it could be said that the colonial Power had a debt to pay to the newly independent State as compensation for what had, at times, amounted to centuries of slavery.

38. Lastly, he noted that paragraph 2 of the article proposed by Mr. Schwebel provided that any agreement concluded between the predecessor State and the newly independent State "shall pay due regard to the newly independent State's permanent sovereignty over its natural wealth and resources in accordance with international law". In fact, the contrary was true, for it was contemporary international law that had to conform with the principle of sovereignty and with the inalienable right of every people to dispose of its natural wealth and resources.

39. Mr. USHAKOV said he could accept article 22 as drafted by the Drafting Committee but would have preferred to see it reduced to a single paragraph, reading: "No State debt of the predecessor State shall pass to the newly independent State". He believed that his point of view came very close to Mr. Reuter's.

40. Mr. SETTE CÂMARA said that, as a compromise, the text of article 22 proposed by the Drafting Committee was acceptable. He was not, however, entirely satisfied with it because it did not give clear expression to some of the important elements contained in the article introduced by the Special Rapporteur at the Commission's 1443rd meeting. One of those elements was the criterion of utility, which offered the advantage of placing the burden of proof on the shoulders of the predecessor State when it claimed payment of a debt. Another of those elements was the principle that a succession of States did not as such affect the guarantee given by the predecessor State for a debt assumed by the formerly dependent territory. Moreover, paragraph 6 of the Special Rapporteur's article was much more explicit than the article of the Drafting Committee in stressing the need to defend the economic situation of newly independent States which inherited the debts of a predecessor State.

41. He shared Mr. Dadzie's doubts concerning the inclusion in paragraph 1 of a reference to the concept of an agreement, because even an agreement concluded after the birth of the successor State would always have some of the characteristics of a devolution agreement. On that point, he agreed with Mr. Schwebel that it was better to avoid any reference to the concept of an agreement. He could, however, not support the text of article 22 proposed by Mr. Schwebel because it lacked the essential elements contained in paragraph 6 of the article proposed by the Special Rapporteur.

42. With regard to the wording of article 22 proposed by the Drafting Committee, he thought that, in paragraph 1, the use of the word "link" and of the word "connected" could easily be avoided by replacing the word "connected" by the word "concerning".

43. The CHAIRMAN said that the drafting comment made by Mr. Sette Câmara would be dealt with by the language services with the help of the Drafting Committee.

44. Mr. TABIBI said that he had originally been in favour of the consolidated article which the Special Rapporteur had introduced.[9] Paragraph 2 of that article had been particularly important because it had laid down the criterion of utility, which made it clear that, although a debt might apparently have been contracted for the benefit of a territory, the people of that territory might

[9] 1443rd meeting, para. 1.

not in fact have derived any benefit at all from it. Paragraph 6 of that article, which had embodied the principle that account should be taken of the newly independent State's capacity to pay, had also been very important, for one of the most serious problems now faced by the countries of the third world was that their financial capacity was severely limited by the weakness of their economies.

45. He was, however, able to support article 22 as proposed by the Drafting Committee because it was a well-balanced compromise which took account of the elements included by the Special Rapporteur in his article and of the proposal made by Mr. Schwebel (A/CN.4/L.257). His only concern with regard to article 22 as proposed by the Drafting Committee related to the use of the word "fundamental" in paragraph 2, and he agreed with Mr. Díaz González that it should be deleted.

46. Mr. QUENTIN-BAXTER said that, although he shared the Chairman's view concerning the role of the Drafting Committee in dealing with problems which had not been solved during the Commission's discussions, he thought it regrettable that a text such as that of article 22 proposed by the Drafting Committee, which was so different from the previous text, should be dealt with only on the morning when it had been made available.

47. The fundamental principles identified by the Special Rapporteur in his original text had survived in the article proposed by the Drafting Committee, even though they had been tested almost to destruction during the Commission's discussions. Article 22 thus embodied the principle that the debts that passed to the newly independent State had to be related to the property that passed to it, as well as the principle that the measure of the indebtedness of a successor State which had recently become independent should be the actual benefit it had derived from the property that passed to it. The Commission's report to the General Assembly should reflect the Commission's unanimous support of those principles.

48. Although he agreed with Mr. Francis that the wording of paragraph 2 was not entirely satisfactory, he thought it did show that the paragraph was intended to embody the principle that account should be taken of the financial capacity of the newly independent State.

49. The majority of the Commission had been right in assuming that, since the application of the clean-slate principle to the case of newly independent States would be regarded as vitally important by the representatives of at least three quarters of the States Members of the United Nations, it would be advisable to draft a text that did not suggest that that rule was being weakened in any way. They had therefore agreed that the position that it was enough to say that there was no passing of State debts without an agreement between the States concerned would not reflect the general spirit of the draft articles, which were intended to provide rules that States might find useful in solving problems of succession. Nor would such a position be in the interests of newly independent States, particularly since nearly all the remaining dependent territories were very small, and their possibility of achieving the self-determination that was their right would depend on provisions enabling them to obtain generous assistance. The Commission had thus considered it important to indicate that it did not think that former colonies should be heavily burdened with debts. In his view, the text of article 22 proposed by the Drafting Committee did give such an indication and he would therefore support it.

50. Mr. VEROSTA said it was regrettable that the Drafting Committee had not paid sufficient attention to paragraphs 2 and 3 of the article proposed by the Special Rapporteur. Mr. Schwebel's proposed text simply reproduced those two paragraphs. They had not given rise to any marked opposition on the Commission's part and he (Mr. Verosta) had in fact proposed that they should be combined in a single paragraph.[10]

51. As a member of the Drafting Committee, he supported the new text proposed by the Committee but maintained his view, which was identical with that of Mr. Schwebel and Mr. Reuter, and endorsed the reservations expressed by the latter.

52. With regard to the drafting, he wondered whether it was correct to speak, in paragraph 2, of "fundamental economic equilibria", and whether it would not be better to use the singular.

53. The CHAIRMAN suggested that the secretariat be asked to decide whether the word "equilibria" should be in the singular or in the plural in paragraph 2. The discussion of that point and of the point raised by Mr. Díaz González and by Mr. Tabibi concerning the use of the word "fundamental" in the same paragraph would, in any case, be reflected in the commentary.

54. If there was no objection, he would take it that the Commission agreed to approve the title and the text of article 22 as proposed by the Drafting Committee,[11] on the understanding that the discussion of the text proposed by Mr. Schwebel (A/CN.4/L.257) would be fully reflected in the commentary and the text reproduced in a foot-note to the commentary.

It was so agreed.

The meeting rose at 1 p.m.

[10] 1444th meeting, para. 56.

[11] See para. 4 above.

1450th MEETING

Thursday, 30 June 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.