

Document:-
A/CN.4/L.272

Draft articles on succession of States in respect of matters other than treaties. Texts adopted by the Drafting Committee: articles 23-25 - reproduced in A/CN.4/SR.1514 and SR.1515

Topic:
Succession of States in respect of matters other than treaties

Extract from the Yearbook of the International Law Commission:-
1978, vol. I

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formity the words “se inicie” should be replaced by the word “comience”.

35. Sir Francis VALLAT suggested that, in review of the amendment proposed to the title of the article, the word “time”, in the second sentence should be replaced by the word “duration”.

36. Mr. USHAKOV thought that only the title of the article should be so amended.

37. Mr. AGO (Special Rapporteur) said that the word “time” in the body of the article was to be read in the context of the expression “time of commission”, which appeared repeatedly throughout the draft articles. It would therefore be better not to alter it.

38. Mr. YANKOV also considered that the word “time” should be retained. In any case, the idea of duration was conveyed by the phrase “extends over the entire period”.

39. Sir Francis VALLAT said that the title and content of an article could normally be expected to correspond. He could accept the amendment to the title for the time being, but thought that the matter should receive closer consideration on the second reading.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to adopt the title and text of article 26 referred to it by the Drafting Committee, subject to the amendment proposed by the Special Rapporteur to the title of the article and by Mr. Calle y Calle to the Spanish version of the text.

It was so agreed.

The meeting rose at 11 a.m.

1514th MEETING

Monday, 10 July 1978, at 3.10 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1,¹ A/CN.4/313, A/CN.4/L.272)

[Item 3 of the agenda]

* Resumed from the 1505th meeting.

¹ *Yearbook... 1977*, vol. II (Part One), p. 45.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 23, 24 AND 25

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the texts adopted by the Drafting Committee for articles 23, 24 and 25 (A/CN.4/L.272).

2. Mr. SCHWEBEL (Chairman of the Drafting Committee) said that articles 23, 24 and 25 proposed by the Drafting Committee were intended to complete part II, section 2, of the draft articles. In working on the articles, the Drafting Committee had borne in mind the main trend of opinion expressed during the Commission's discussion of the texts submitted by the Special Rapporteur, and had attempted, in particular, to preserve as much parallelism as practicable with the corresponding articles adopted by the Commission on the passing of State property (articles 14, 15 and 16).²

3. Article 23 was based on article W, proposed by the Special Rapporteur in his ninth report (A/CN.4/301 and Add.1, para. 456), although the Drafting Committee had reverted to the form used in article 14 by dividing the text into two paragraphs. The first of those paragraphs stated the basic rule in positive form and in wording closely resembling that employed in article 14. It placed the emphasis on the passing of the State debt. With regard to paragraph 2 of the article, the Committee had decided, in the light of the Commission's discussion, not to retain the two cases set out in paragraphs (a) and (b) of article W, but to include a second paragraph on the lines of paragraph 2 of article 14. In drafting that paragraph, it had borne in mind the doubts expressed in the Commission concerning the appropriateness of referring to the internal law of a State, as in article 14, paragraph 2. In discussing article 14, the Commission had been unable to reach agreement on a reference to internal law, and had therefore left the article in square brackets.³ The Committee believed that the wording it had proposed for article 23, paragraph 2, was a more appropriate solution to the problem of such a reference. Unlike article 14, where the rule stated in paragraph 1 was made “subject to paragraph 2”, article 23 provided that the rule stated in paragraph 1 was “without prejudice” to the provisions of paragraph 2. In addition, the reference in article 14, paragraph 2, to the “allocation of the State property... as belonging to the successor State or, as the case may be, to its component parts” had been amended to read, in the context of State debt, “the attribution... of the State debt... to the component parts of the successor State”. And whereas article 14 provided that the allocation of State property “shall

² For the text of the articles adopted so far by the Commission, see *Yearbook... 1977*, vol. II (Part Two), pp. 56 *et seq.*, doc. A/32/10, chap. III, sect. B, 1.

³ See *Yearbook... 1976*, vol. I, pp. 217 *et seq.*, 1398th meeting, and pp. 265 and 266, 1405th meeting, paras. 43-53.

be governed" by the internal law of the successor State, article 23 provided only that "paragraph 1 is without prejudice to the attribution... of the State debt... in accordance with" the internal law of the successor State. Finally, paragraph 2 of article 23 referred, for the sake of clarity, to the attributing "of the whole or any part" of the State debt. That paragraph, as proposed, had received wide support in the Drafting Committee and was therefore presented without square brackets.

4. The Committee suggested that, if the Commission found the wording of paragraph 2 of article 23 acceptable, it should take time, before completing its first reading of the draft as a whole, or during the second reading, to re-examine the text of article 14 with a view to deleting the square brackets.

5. The text of article 24 proposed by the Drafting Committee was essentially the same as that submitted by the Special Rapporteur (A/CN.4/313, para. 26) and referred to the Committee. There was, however, an important difference, in that the Committee's text referred, at the end of paragraph 1, to "all relevant factors", whereas the Special Rapporteur's text had spoken of "the property, rights and interests which pass". The Committee proposed the same change in article 25. Only after a long debate on article 25 had the Committee decided to adopt the new phrase, as a compromise between the differing opinions of its members as to whether express mention should be made, as one of the factors to be taken into account, of what the Special Rapporteur had termed the "capacité contributive" of the successor States. Some members of the Committee had thought that, if the term "tax-paying capacity"—or some other, perhaps better, translation of the French expression—were used in article 25, it should also be used in article 24, since the capacity in question was undeniably one of the most important factors to be considered when dealing with the passing of State debt. Other members had taken the view that such capacity should not be mentioned anywhere, because once one factor had been singled out, others, which might not be so easily identifiable, would also have to be mentioned. It had also been said that the phrase was too vague to be uniformly interpreted, and that the "tax-paying" or "contributing" capacity might vary with time.

6. The phrase now proposed by the Drafting Committee was intended to encompass all the factors that might be relevant to an equitable distribution of the State debt in a particular case of succession, including the "contributing capacity", the debt-servicing capacity and the like, and the property, rights and interests that passed to the successor State in connexion with the State debt in question. The members of the Drafting Committee had accepted the phrase on the understanding that, if it were also approved by the Commission, its meaning would be explained in the commentary. The adoption of the phrase in articles 24 and 25 might necessitate the revision, on second reading, of other articles that had already been approved.

7. The first part of article 25 reproduced the wording of the introductory part of article 16, paragraph 1, except that the word "concerned" no longer appeared after the words "successor States". That change, which implied that article 25 referred to all the successor States, was justified because the article concerned the passing of State debt, rather than of State property. There must be no possibility of responsibility for State debt being transferred to one successor State by agreement between the other successor States alone. The Committee suggested that the opportunity be taken, on second reading, to amend the phrase "two or more States", in the introductory part of both article 16, paragraph 1, and article 25, to read "two or more successor States". The wording of the second part of article 25 followed exactly that of the second part of paragraph 1 of article 24, except for the obviously necessary addition of the word "each" before the words "successor State".

ARTICLE 23⁴ (Uniting of States)

8. The CHAIRMAN invited the members of the Commission to comment on article 23 as proposed by the Drafting Committee, which read:

Article 23. Uniting of States

1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

2. Paragraph 1 is without prejudice to the attribution of the whole or any part of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State.

9. Mr. DÍAZ GONZÁLES said that he had no difficulty in accepting the English and Spanish versions of paragraph 1 and the English version of paragraph 2 of article 23, as proposed by the Drafting Committee. The Spanish text of paragraph 2, however, was unacceptable because it employed the words "sin perjuicio de" to translate the English expression "without prejudice to". There had clearly been confusion—inadmissible in legal Spanish, which was very precise—between the words "perjudicar" and "prejuzar". The English phrase could be accurately rendered only by the use of the latter word, and he therefore proposed that the Spanish text of article 23, paragraph 2, be amended to read:

"Las disposiciones del párrafo 1 no prejuzgarán de la atribución que pueda hacerse de la totalidad o de parte de la deuda de Estado de los Estados predecesores a las partes componentes del Estado sucesor de conformidad con el derecho interno de dicho Estado."

10. Mr. NJENGA said that the text proposed by the Drafting Committee was a substantial improvement on that originally submitted by the Special Rapporteur in article W, in that it provided balanced protec-

⁴ For consideration of the text initially submitted by the Special Rapporteur, see 1500th meeting, paras. 21-47, and 1501st meeting, paras. 1-32.

tion for the interests of successor States and creditors alike. Creditors would no longer be dependent on agreement by the component parts of the successor State to assume the debts of the predecessor State. Paragraph 2 of the article took account of the reality in such apparently unitary States as the United Republic of Tanzania, where the central government had not in fact had competence in all fields in respect of the component parts of the country during the transitional period.

11. It might be preferable to replace the words “internal law”, in paragraph 2, by the words “constitutional elements”, or to explain in the commentary that “internal law” meant not only the written law, if any, of the successor State, but also its constitution and the practice of the component parts of that State. That would take care of cases such as that of the United Arab Republic, where there had been no written provision in a constitution or elsewhere concerning succession to State debt. Subject to that remark, he found the text of the article proposed by the Drafting Committee generally acceptable.

12. Mr. USHAKOV pointed out that, in cases of uniting of States, the position in regard to State debts was entirely different from that in regard to State property, referred to in article 14. For whereas the successor State was entirely free to divide up among its component parts, as it wished, the State property that had passed to it, as provided in article 14, paragraph 2, it was not, contrary to what was provided in article 23, paragraph 2, free to attribute to its component parts the whole or any part of the State debt of the predecessor States, for it was the interests of the creditor States that were at stake.

13. Article 23 stated two contradictory rules: according to paragraph 1, the successor State was responsible for the State debts of the predecessor States, but according to paragraph 2, that responsibility fell on the component parts of the successor State. Hence it was not clear whether a creditor State should apply to the successor State, under paragraph 1, or to the component parts of the successor State, under paragraph 2. The successor State could refer the creditor State to its component parts by invoking paragraph 2, and the component parts could refer the creditor State to the successor State on the basis of paragraph 1.

14. He considered that the successor State was solely responsible for the debts of the predecessor States and that it could not attribute the whole or any part of those debts to its component parts unless the creditor State so agreed.

15. Mr. VEROSTA did not think that the situation was as confused as Mr. Ushakov thought. The fundamental rule that the successor State was responsible for the debts of the predecessor States was set out in paragraph 1; the rule stated in paragraph 2 was only a residual rule. Hence the creditor State could apply only to the successor State.

16. Mr. CALLE Y CALLE found the article proposed by the Drafting Committee clear and well

drafted, and a considerable improvement on article W, as originally submitted by the Special Rapporteur. A drafting change was required in the Spanish and French texts of paragraph 2, however, since it was illogical to refer to the “provisions” of paragraph 1 when that paragraph contained only one rule.

17. As for the phrase “sin perjuicio” (without prejudice), to which Mr. Díaz González had objected, it was used in the same way in articles 15 and 16 and, indeed, in the Vienna Convention on the Law of Treaties. There seemed to be no need to replace it, for there was no question in paragraph 2 of any “prejudgement” of the decision of the successor State, as Mr. Díaz González had suggested. All that the paragraph meant was that the rule that the State debt of the predecessor States passed to the successor State would apply irrespective of any proportional distribution of that debt among the component parts of the successor State, which was a matter solely within the purview of the internal law of that State.

18. Mr. TSURUOKA was not sure whether article 23 really took account of the legitimate interests of creditor States. Paragraph 2 allowed the successor State to attribute the whole or any part of its debts to its component parts without the consent of the creditor State, and a change of debtor made in that way, without the consent of the creditor, was not permissible in civil law.

19. Mr. YANKOV had been unable to tell from the Special Rapporteur’s article W how the interests of a creditor State would be protected in the event of succession, whereas the Drafting Committee’s article 23 clearly provided protection for the creditor State in all situations. Paragraph 1 established a simple relationship between the successor State and the creditor State, while paragraph 2 elaborated on the relationship between the predecessor States and the successor State, but made it clear that, however the debt was apportioned among the component parts of the successor State, the interests of the creditors would be protected. He appreciated Mr. Ushakov’s point that the reference in paragraph 2 to the “internal law” of the successor State might cause problems in practice, but found the article worthy of support if its paragraphs were read in conjunction.

20. Mr. CASTAÑEDA said that the Drafting Committee’s article was a significant improvement on article W. In particular, the fact that it stated positively the general rule that the State debt would pass to the successor State provided better guarantees for creditors and was preferable from the point of view of legal technique. He agreed with Mr. Verosta that the rule stated in paragraph 1 of article 23 was fundamental; it was only natural that the debts of the component parts of the successor State should pass to that State, for it was the only subject of international law that remained after the component parts lost their individual identity.

21. He also agreed with Mr. Ushakov that paragraph 2 of the article might cause confusion, but believed that difficulty could be avoided if it were made

clearer that the paragraph referred solely to measures that might be taken for the internal purposes of the successor State and that would in no way affect its responsibility, as a subject of international law, towards a creditor. To that end, he suggested the insertion in paragraph 2, after the words "component parts of the successor State", of some such phrase as "as an internal arrangement" ("en el orden interno").

22. Mr. TABIBI said that, although the Drafting Committee's text was a great improvement on the text originally submitted by the Special Rapporteur, he was concerned that, by reason of its reference to the "internal law of the successor State", it might expose both creditors and the weaker component parts of a successor State to danger. For example, creditors might find themselves faced with an arrangement for the reimbursement of a loan which, although in conformity with the internal law of the successor State, did not correspond to the arrangement they had had with the original debtor. A poor and sparsely populated region that became part of a successor State might find itself saddled with responsibility, under the internal law of that State, for the reimbursement of an inequitable portion of a debt incurred by a more populous and advanced region that had also become part of that State.

23. Those risks could be avoided by the inclusion in paragraph 2 of article 23 of the phrase "taking into account all relevant factors", which the Drafting Committee had already inserted in articles 24 and 25.

24. Mr. USHAKOV proposed that, in paragraph 2, the words "paragraph 1 is without prejudice to the attribution of the whole or any part" should be replaced by the words "subject to paragraph 1, the successor State is entitled to attribute the whole or any part", in order to show clearly that the fundamental rule was the one stated in paragraph 1.

25. Mr. DADZIE said that the general rule stated in paragraph 1 of article 23, that State debts of the component parts of a successor State would all pass to that State, was a wise one. It provided proper protection for creditors, who would always know that, even if their particular claim was apportioned, under the internal law of the successor State, to a component part of that State that proved unable to pay, primary responsibility for reimbursement would lie with the State itself. He had no difficulty in accepting the article as proposed by the Drafting Committee.

26. Mr. TSURUOKA thought Mr. Ushakov's proposal improved the text submitted by the Drafting Committee. As it stood, paragraph 2 seemed to mean that, despite paragraph 1, the successor State could do what it liked with the State debts of the predecessor States.

27. If the Drafting Committee had in fact intended to make the successor State responsible for the reimbursement of the debts of the predecessor States, did not paragraph 2 mean that paragraph 1 did not rule out the possibility of attributing the whole or any part of the State debts of the predecessor States to

the component parts of the successor State under an agreement between it and the creditor State? He thought that point should be clarified before a final decision was taken on the text of article 23.

28. Mr. FRANCIS was sure that the intention behind article 23 was to protect the interests of creditors no less than those of the component parts of successor States. He hoped that the richer parts of such States would show generosity in the application of paragraph 2 of the article, and would allow a poor country that had incurred large debts before merging with them to bear responsibility for only a part of its liabilities after the date of succession. He believed that the solution to the problem raised by the first part of paragraph 2—if, indeed, there were a problem—lay in the suggestion made by Mr. Ushakov. What Mr. Ushakov had said was, in effect, that the fundamental rule laid down in paragraph 1 of the article stood, and that, subject to that, the component parts of a successor State might make private arrangements for the allocation of the State debt among themselves.

29. Sir Francis VALLAT drew the Commission's attention to the fact that, unlike article 14, article 23 had not been placed in square brackets, which indicated that the Drafting Committee had accepted the text. The main purpose of the article, which was accomplished in paragraph 1, was to lay down as a general rule of international law that, on the uniting of States, the State debt of the predecessor States would pass to the successor State. To have left paragraph 1 in isolation, however, would have been to exclude the possibility of apportionment of the debt among the component parts of the successor State—a situation which, although of no importance in the case of the formation of a unitary State, would not be acceptable in the case of a federation. That explained the presence of paragraph 2, which simply said that it was left to the internal law of the successor State to determine which of its component parts should continue to bear the burden of the debt of the predecessor States. To make the operation of paragraph 2 "subject to paragraph 1", as suggested by Mr. Ushakov, would produce an article that was self-contradictory, for the rule in paragraph 1 was that everything went to the new State. While the drafting of paragraph 2 could no doubt be improved, he was utterly opposed to any amendment such as that proposed by Mr. Ushakov, which went directly against what had been agreed upon by the Drafting Committee.

30. Situations that were quite likely to arise in practice, and for which the Commission must therefore make provision in its articles, included that in which an existing State asked to join a federation while keeping its own State property, and whose request was granted on condition that it retained responsibility for its own State debt. He could see no problem for the creditor in having, in accordance with the internal law of the enlarged federation, to look first for reimbursement to the new member of that entity. Allowance must also be made for arrangements concerning the apportionment of powers, such as those

under which taxing powers were shared between the federal and provincial governments in Canada. The purpose of paragraph 2 was to show that such arrangements were not prohibited by paragraph 1. To turn the article round would be to suggest that they were prohibited, and that was something he was completely unable to accept.

31. Mr. SUCHARITKUL said that paragraph 1 of article 23 laid down the fundamental principle of international law that the debts of the predecessor State passed to the successor State. Paragraph 2, however, dealt with the practical question of the modalities of debt collection. It had little to do with the protection of the creditor, which was already assured by articles 18, 19 and 20. The reference to internal law was paralleled in article 14, paragraph 2, which provided that the allocation of State property should be governed by the internal law of the successor State. There were several instances in which, on the separation of a part or parts of the territory of a State, the allocation of State property and the apportionment of State debts had been governed by the internal law of the successor State. The separation of Singapore from Malaysia was a case in point. In his view, paragraph 2 was clearly drafted, and he had no objection to the phrase "without prejudice to". He believed, however, that an amendment on the lines proposed by Mr. Tsuruoka might meet the point raised by Mr. Ushakov.

32. Mr. ŠAHOVIĆ considered that Mr. Ushakov had been right to contrast the situations dealt with in article 14, concerning State property, and article 23, concerning State debts in cases of uniting of States. It was true that the Commission had expressed the wish that the Drafting Committee should align article 23 with article 14, as far as possible, but the similarity between those two provisions could be only limited. The reasons in favour of the wording of article 14, paragraph 2, were more convincing than those justifying the text of article 23, paragraph 2. In the first case, the Commission had merely stated the principle that the allocation of State property to the successor State or to its component parts was governed by the internal law of the successor State. The rule stated in article 23, paragraph 2, went further. Accordingly, it might be asked what importance should be given to paragraph 2 in relation to paragraph 1. In his opinion, the general rule of international law was stated in paragraph 1; paragraph 2 referred only to the possible allocation of debts among the component parts of the successor State, in accordance with the latter's internal law. It was obvious that the rule of international law must take precedence over the solutions adopted in the internal legal order of the successor State.

33. He would not go so far as to propose that paragraph 2 of the article under consideration should be deleted or placed in square brackets—for it did not appear indispensable from the standpoint of international law; he would suggest, however, that the article should be so drafted as to show clearly that the general rule was stated in paragraph 1. To that end,

paragraph 2 might begin with the words "subject to the provisions of paragraph 1". But a full account should also be given, in the commentary to article 23, of the opinions and doubts expressed during the discussion.

34. Mr. SCHWEBEL said that the inclusion of paragraph 2 was necessary if article 23 were to be a realistic reflection of State practice on the passing of State debts. Paragraph 2 did not derogate from the rule laid down in paragraph 1, but simply provided that paragraph 1 did not disallow the attribution of the State debt to the component parts of the successor State. If the component parts were unable to meet the debt, however, the successor State would remain responsible for it. The Drafting Committee had considered that the article was clear, but the meaning of the article could, of course, be further clarified in the commentary. In his view, the existing draft struck the right balance between two extremes: the original article W and the wording proposed by Mr. Ushakov.

35. Mr. USHAKOV pointed out that the provision in article 20, to the effect that agreements between predecessor and successor States, or between successor States, concerning State debts could not be invoked against a creditor third State, made no mention of internal law. Article 23, paragraph 2, also did not indicate whether the creditor State was bound to accept the internal law of the successor State and, if necessary, apply to the component parts of the successor State for reimbursement. If Liechtenstein and Switzerland united to form a new State in which the former lost all financial autonomy, would the new State be able to decide that Liechtenstein's creditors must apply to Liechtenstein for payment? Moreover, paragraph 2 did not apply only to cases of uniting of States, but also to cases of merging that gave rise to a unitary State. It followed that a unitary State would be free to attribute debts to any municipality, however insolvent, to which creditors would have to apply for payment.

36. It should be made clear that the rule stated in paragraph 1 of article 23 remained valid in all cases. That result could be achieved if paragraph 2 began with the words "subject to paragraph 1" or "without prejudice to paragraph 1". It would also be possible to make the rule in paragraph 2 subject to the consent of the creditor—which would meet the wishes of Mr. Tsuruoka. But that would be a strange solution, since it would be tantamount to requiring creditors to consent to the internal law of the successor State, and it was hard to see how they could object.

37. The rule stated in paragraph 1 should therefore take precedence in all cases: the creditor State should be able to apply to the successor State. Consequently, he had serious reservations about paragraph 2.

38. Mr. FRANCIS understood the intention of the Drafting Committee to have been to provide in paragraph 2 that the component parts of a united State could come to an internal arrangement regarding the allocation of the State debt among themselves. That

rule was not meant to be on the same level as the rule in paragraph 1, but subsidiary to it. If that was indeed the intention, the wording proposed by Mr. Ushakov was to be preferred to the existing drafting.

39. Mr. DÍAZ GONZÁLEZ pointed out that paragraph 1 provided that the State debt of the predecessor State should pass "to the successor State". Thus the successor State was the subject of international law, not its component parts. The articles did not have to regulate the manner in which the debt was attributed to the component parts of the successor State; that was a matter for the internal law of the successor State, and was of no concern to the creditor. In those circumstances, paragraph 2 was pointless and should be deleted.

40. Mr. TSURUOKA thought it was the Commission's task to improve, if need be, the texts of the articles proposed by the Drafting Committee, whether they had been placed in square brackets or not. Article 23 could be improved in two respects. The words "paragraph 1 is without prejudice to" could be interpreted to mean that that provision did not have the legal effect of preventing the attribution referred to in the rest of the sentence, whereas most of the members of the Commission took it to mean that the internal law of the successor State must be in conformity with the principle set out in paragraph 1. It was therefore important to make the meaning clear, for example by beginning paragraph 2 with the words "subject to the provisions of paragraph 1".

41. On reading article 23, paragraph 2, it might also be wondered whether the consent of the creditor State was necessary. If paragraphs 1 and 2 of article 23 were to be considered as being on the same level, it would be necessary to refer to the link that must exist between the provision of the internal law of the successor State and the consent of the creditor State to that provision.

42. Mr. DADZIE said he was quite clear in his own mind that the Drafting Committee had intended to lay down only one rule, namely, the rule set out in paragraph 1. The purpose of paragraph 2 was simply to enable the component parts of the successor State to enter into a domestic arrangement for the attribution of the State debt. However, since that paragraph seemed to raise difficulties, and did not add much to paragraph 1, he supported the proposal to delete it.

43. Mr. CASTAÑEDA said his first impression had been that the intention was to lay down in paragraph 1 a single rule having international legal effect, and to include in paragraph 2 a provision dealing with a purely internal matter. If that were so, the intention should have been made quite clear, possibly by the inclusion, as he had already suggested, of a reference to the internal arrangements of the successor State. If that suggestion was not acceptable, the best solution might perhaps be to delete paragraph 2, since it added nothing to the article, had no legal effect and raised difficulties of interpretation.

44. From some of the comments made, however, it

now appeared that some members believed that the rule in paragraph 2 ought to have some measure of international legal effect. It had been suggested that the creditor State could apply first to the former legal entity and then, if it failed to recover its debt, to the successor State. He was not at all certain whether that was in fact possible, but if it were indeed the intention, then, again, it should be stated clearly in the rule. He therefore suggested the addition of a provision to the effect that the rule could operate only with the consent of the creditor State, since otherwise it would involve a breach of the general principle of law that the subrogation of the debtor necessarily required the consent of the creditor.

45. He also suggested that the opening words of paragraph 2 should be amended to read "nothing in paragraph 1 excludes the possibility of". With those amendments, paragraph 2 would express clearly what most members had in mind.

46. Sir FRANCIS VALLAT thought that the underlying difficulty stemmed from article 18 and from the fact that the word "international", in that article, remained in square brackets. The majority of members believed that the articles should apply not only to a debt owed by one State to another State, but also to a debt of a State to a private creditor. That being so, the addition in paragraph 2 of a reference to agreement between the successor State and the creditor State would be quite inappropriate, since a variety of debts would be involved. If the articles dealt with creditor States only, the situation might be different.

47. While he recognized that paragraph 2 could be improved, he thought it would be unwise to leave paragraph 1 to stand alone. Very often, a component part of a successor State continued to be responsible for servicing a debt of the former State. If that possibility were not provided for in paragraph 2, it would place the private creditor in a very difficult position, for he would not know where to go to collect his debt. Consequently, something on the lines of paragraph 2 was absolutely essential for private creditors, although it did not matter so much in the case of inter-State debts, which virtually fell within the realm of the law of treaties.

48. Article 23, as drafted, showed that the problem was to be approached at two levels, paragraph 1 laying down an international rule, and paragraph 2 recognizing that a different legal situation might obtain under the internal law of the successor State and was not precluded by the terms of paragraph 1.

49. He therefore suggested that paragraph 2 should be retained, with the amendment to the opening phrase proposed by Mr. Tsuruoka, and that a full account of the discussion should be given in the commentary, bearing in mind that the Commission would undoubtedly have to revert to the matter at the second reading.

50. Mr. RIPHAGEN agreed that article 23 sought to make it clear that the problem was to be approached at two levels. Indeed, he had had occasion, at the

previous session,⁵ to observe that articles 19 and 20 failed to take account of those two levels. The same remark could be made of article 18.

51. He suggested that article 23 should be approved, with Mr. Tsuruoka's amendment to the opening phrase of paragraph 2; that a full account of the discussion should be given in the commentary; and that the Commission should reconsider the article on second reading in conjunction with articles 18, 19 and 20.

52. Mr. USHAKOV, referring to the comments made by Sir Francis Vallat, wondered whether the Commission intended to allow the successor State to require creditor States to apply not to that State, but to one or other of its component parts, in accordance with its internal law. If, after contracting a loan from a foreign private bank, the Soviet Union united with Poland and the successor State thus formed decided that that bank must henceforth apply to Poland for repayment, that decision would be in accordance with article 23, paragraph 2. Did the Commission really intend to permit such a situation?

The meeting rose at 6.05 p.m.

⁵ *Yearbook... 1977*, vol. I, p. 287, 1471st meeting, paras. 1 and 2.

1515th MEETING

Tuesday, 11 July 1978, at 10.10 a.m.

Chairman : Mr. José SETTE CÂMARA

Members present : Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (continued) (A/CN.4/301 and Add.1,¹ A/CN.4/313, A/CN.4/L.272)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLES 23, 24 AND 25 (continued)

ARTICLE 23 (Uniting of States)² (concluded)

1. Mr. QUENTIN-BAXTER agreed that the difficulties with article 23, as indeed with other articles,

stemmed from the basic definition of "State debt" given in article 18.³ He also agreed that paragraph 2 was important, particularly if deemed to cover both private and State debts. He would not, however, go so far as to suggest that the exclusion of private debts would remove the difficulty and that paragraph 2 could therefore be deleted.

2. At the previous meeting, Sir Francis Vallat had very rightly stressed that the more the Commission endeavoured to divorce the articles from internal law, the closer it came to entering the sphere of the law of succession to treaties. In the event of a succession of States, for example, a bilateral treaty by which one government contracted with another for a loan would lapse unless both parties chose to keep it alive. Thus, if the subject-matter of the articles were anchored in the law of treaties, the rule would be exactly the opposite of that now stated in paragraph 1: the debt would not be repaid, since the treaty securing it would have disappeared. That was a conclusion that he was quite unable to accept. Again, an important exception was made in the law of treaties for dispositive or localized treaties. If the article treated State debts as though they were divorced from internal law, was that to be taken as a tacit assumption that a new kind of localized or dispositive treaty could be created? If so, it was unknown to customary international law, and would conflict with the rules the Commission had drawn up in regard to succession to treaties.

3. Those considerations led him to the conclusion that, in order to secure the rights of predecessor, successor and creditor States, it was necessary to return to the point of departure and to anchor the provisions in internal law. After all, it was taken for granted that State property existed only because its existence was recognized within the ambit of a particular internal law. If there were no private rights or interests in land under the law of a State, it was clearly impossible for aliens or others to have such rights or interests, for there was nothing to which the international duty of State responsibility could attach. The same applied to the law of copyright, for example. The law of succession attached only to property that existed and the basic rule was that a succession of States did not of itself disturb the continuation of the internal law. Thus the new sovereign, like the old, was accountable to aliens, under the law of State responsibility, for the rights that the law of the area gave them.

4. Consequently, debts could not be viewed in a context separate from that of property. Indeed, in a complicated case of succession, debts in the hands of one successor State might well be property in the hands of another, and the notion that one transaction was firmly anchored in internal law and the other divorced from that law was, in his view, entirely erroneous. The main purpose of the articles was to provide that an event that gave rise to a succession of

¹ *Yearbook... 1977*, vol. II (Part One), p. 45.

² For text, see 1514th meeting, para. 8.

³ See 1514th meeting, foot-note 2.

States should not of itself deprive a creditor of any existing right. But it would be wholly artificial to suggest—taking the example cited earlier of a merger between Switzerland and Liechtenstein—that the property or debts in the hands of Liechtenstein became, by virtue of a rule of international law, the debts of the new federation of Switzerland and Liechtenstein. That new federation would be responsible for ensuring that the local law continued and, if the new sovereign changed that law, it would be answerable under the law of State responsibility.

5. For those reasons, he had serious misgivings about allowing paragraph 1 of article 23 to stand alone. Both paragraphs should be retained in order to reflect, on the one hand, the international law element, and on the other, the internal law element. He would have no objection to the change proposed by Mr. Tsuruoka,⁴ but considered that, as drafted, the article provided a reasonable balance, bearing in mind that the Commission had thus far failed to agree on a definition of the subject-matter of the articles.

6. A further point of direct relevance to the subject under discussion concerned the position of creditors, which was particularly important in view of the recognized need for a safe climate of investment throughout the world. Such factors as the doctrine of national sovereignty over natural resources, and the inhibitions felt by many States and international lawyers regarding the existing state of the law of State responsibility towards aliens, reflected the conviction that debt obligations should not be the means of depriving States of their sovereignty. The ultimate aim of international law was not to establish a law of usury. The sovereignty of States, and their exercise of that sovereignty in deciding to unify or separate, should not be made too rigidly subject to a rule governing repayment of debts. The articles could provide the creditor State with greater protection and could lay down that a change of sovereignty was not in itself an excuse for failure to honour debts; but they could not go so far as to say that the duty owed was higher than that owed by States under the ordinary doctrine of State responsibility. It was a different duty—a duty not to affect adversely the creditor under internal law and not to use the power of the sovereign in ways that defeated the legitimate interests of the creditor State.

7. Mr. TSURUOKA proposed that paragraph 2 of article 23 should be replaced by the following text:

“2. Nothing in the provision of paragraph 1 excludes the possibility of attributing, with the consent of the creditors concerned, the whole or any part of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State.”

8. He pointed out that the words “with the consent of the creditors concerned” referred both to creditor States and to other creditors, but without expressly

saying so, because the Commission had not yet settled the question whether creditors other than States should be included within the scope of the articles.

9. Mr. SCHWEBEL (Chairman of the Drafting Committee), summing up the discussion, noted that paragraph 1 was generally acceptable to the Commission. One view expressed in regard to paragraph 2 was that it was subordinate to paragraph 1 and that that fact should be expressly stated in the article; alternatively, since the paragraph was not of fundamental importance, being concerned solely with a matter of internal law, it could be deleted.

10. A contrary view was that paragraph 2 was necessary, and that it should be included in order to take account of international reality and of the position of creditors, broadly construed. To delete that paragraph or reduce its force would only obscure the need to cast the articles in such a way that they covered debts owed by predecessor States to a wide range of creditors. The advocates of that approach believed that, despite certain imperfections, article 23 struck a fair balance between the Special Rapporteur's initial proposal and the views of those who believed that paragraph 2 should be redrafted or deleted.

11. In his view, Mr. Tsuruoka's latest proposal would make it even clearer that paragraph 1 laid down the main rule.

12. Mr. USHAKOV supported Mr. Tsuruoka's proposal. Since the possibility of attributing the whole or any part of the State debts of the predecessor States to the component parts of the successor State was contrary to the rule laid down in paragraph 1, it must be stipulated that there could be no derogation from that rule without the consent of the creditors concerned.

13. Mr. CASTAÑEDA, supporting Mr. Tsuruoka's proposal, said that, for the reasons he had already explained, it was essential to include in paragraph 2 a reference to the consent of the creditors. That would simply be confirming a recognized principle of all civil law, namely, that a debt could not be assigned without the agreement of the creditor.

14. Sir Francis VALLAT said that the reference in Mr. Tsuruoka's proposal to the consent of the creditors would seem to enable them to veto the exercise of the sovereignty of a State in deciding how a debt should be met. In his view, that was wrong in principle. However, to help the Commission out of the impasse it had apparently reached, he was prepared to acquiesce in the proposal, provided that the inappropriateness of the reference to the consent of the creditors were made absolutely clear in the Commission's report.

15. Mr. VEROSTA accepted Mr. Tsuruoka's proposal.

16. Mr. ŠAHOVIĆ agreed with Sir Francis Vallat that, by stressing the consent of the creditors, Mr. Tsuruoka's proposal radically changed the sense of article 23 and departed from the principle laid down

⁴ *Ibid.*, paras. 40 and 41.

in paragraph 2 of article 14. He was therefore opposed to the words “with the consent of the creditors concerned”, although he found the remainder of the amendment acceptable.

17. In his opinion, article 20 was not as far removed from article 23 as some members of the Commission thought. Admittedly, article 20 did not deal directly with the question covered by article 23, but it was placed in section 1, containing general provisions, and he saw it as a general safeguard clause intended to guarantee the creditor's basic rights. Reference could therefore be made to article 20 to resolve the problem raised by article 23.

18. Mr. NJENGA, endorsing Sir Francis Vallat's remarks, said that a creditor State was interested only in being paid and was in no way concerned with the modalities of payment, which were a matter for the successor State alone. He therefore saw no useful purpose in introducing the requirement of consent of the creditor State in a matter that came under the internal law of the successor State. To do so would lead to direct interference in the domestic affairs of that State. In the circumstances, he could agree to the inclusion of such a reference in the article only if it were placed in square brackets.

19. Mr. FRANCIS was prepared to accept Mr. Tsuruoka's proposal in order to resolve the Commission's difficulty, although he shared the doubts expressed about the phrase “with the consent of the creditors concerned”. At the same time, he wondered whether, in the specific case in which two predecessor States disappeared and a new State was formed, the creditor in fact had any choice in the matter. His own view was that the creditor's consent would not affect the discretion of the component parts to regulate the situation under the internal law of the successor State.

20. Mr. QUENTIN-BAXTER associated himself with the remarks made by Sir Francis Vallat and subsequent speakers.

21. Mr. RIPHAGEN agreed entirely that it would be wrong to include in the article a reference to the consent of the creditors. The protection of creditors was in any event a general consideration that applied not only to article 23, but to the articles as a whole. There was also the problem of the practical impossibility of obtaining the consent of all the creditors, particularly if private creditors were to be included.

22. He continued to think that the two levels at which the problem of succession to State debts should be regulated, and the relationship between those levels, was not made sufficiently clear in the draft articles as a whole, and in articles 18, 19 and 20 in particular.

23. Since it was impossible at that stage to resolve the problem by laying down a special rule that was in fact based on an idea applying to the draft as a whole, he thought the best solution for the time being would be to place the article in square brackets.

24. Mr. SUCHARITKUL, endorsing the remarks made by Mr. Njenga, Mr. Quentin Baxter, Mr. Riphagen and Sir Francis Vallat, expressed the view that it would only add to the burden on the debtor State, and particularly on the successor State, if further protection were provided for creditors.

25. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, found Mr. Tsuruoka's proposal constructive, but shared the doubts expressed about the reference to the consent of the creditors, especially as it was possible to envisage circumstances in which it would be practically impossible to envisage circumstances in which it would be practically impossible to obtain the consent of all the creditors or even to notify them. He was prepared to accept the proposal, however, if it were thought that wider agreement could be reached on that basis, but he considered that the reference in question should be placed in square brackets.

26. An alternative solution was that suggested by Mr. Riphagen, namely, to place the whole article in square brackets, although he himself would be more inclined to place only paragraph 2 in square brackets, since there had been no difference of opinion on paragraph 1.

27. As a further possible solution, the Commission might wish to consider retaining paragraph 1 as it stood and drafting paragraph 2 in the following terms:

“Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to the component parts of the successor State.”

That proposal, which he was not submitting formally at that stage, would make it clear that paragraph 2 could not weaken the force of the rule laid down in paragraph 1.

28. Mr. DADZIE, agreeing with Sir Francis Vallat, was unable to accept the part of Mr. Tsuruoka's proposal which, in his view, would cause the creditor State to interfere in the internal affairs of the successor State. The creditor State was interested only in being paid, and was not concerned with the arrangements made by the successor State in that connexion. It should, however, have knowledge of those arrangements, and he would therefore propose that the phrase “with the consent of the creditors concerned” might be amended to read “with the knowledge of the creditors concerned”.

29. Mr. USHAKOV accepted the amendment proposed by Mr. Schwebel, which was very close to the amendment he had himself submitted at the previous meeting,⁵ but he was still opposed to the Drafting Committee's text, because he did not agree that the successor State could evade its international obligations by invoking its internal law.

⁵ *Ibid.*, para. 24.

30. Mr. CALLE y CALLE pointed out that article 23 dealt with a uniting of States following the disappearance of the predecessor States, leaving a single subject of international law. A third creditor State was in no way involved in that process, but was merely confronted with the fact that the former debtor State had been replaced by a single successor State. Furthermore, the effect of paragraph 2, if read without the opening phrase, was that the attribution of the State debt to the component parts of the successor State—like the allocation of State property under paragraph 2 of article 14—would be governed by the internal law of the successor State. Paragraph 2 was not concerned with the protection of a third creditor State or of a private creditor, but with the protection of the successor State. To that end, it provided that the manner in which the successor State attributed the burden of its debts lay exclusively within its own competence. He therefore agreed entirely that a creditor State had no say whatsoever in the matter, and that the successor State, being a single subject of international law, could make its own internal administrative arrangements. Nor, for the same reason, could there be any question of an agreement between the predecessor States and the successor State.

31. He would suggest, however, that the deletion of the opening words of paragraph 2 might make it clear that the attribution of the State debt to the component parts of the successor State was to be governed by the internal law of that State.

32. Mr. CASTEÑEDA said that, to illustrate his view that the consent of creditors to the assignment of a debt was essential, he would take as an example the case of a debt contracted, say, by Switzerland to the United Kingdom, the latter being the creditor State. Assuming that Switzerland and Liechtenstein then merged to form a single State, Liechtenstein becoming a Swiss canton, and the two predecessor States reached agreement that the Swiss debt should pass, under the internal law of the successor State, to the new canton of Liechtenstein, he did not think that the interests of the United Kingdom would be sufficiently protected, or, indeed, that it could be legally obliged to accept that its debtor was no longer Switzerland, but the canton of Liechtenstein. It had been said that the main point was that the debt should be paid, not who paid it. He could not agree with that view, since the financial capacity of the canton of Liechtenstein could hardly be equated with that of Switzerland.

33. That was why he maintained, in accordance with the recognized principle of law in the matter, that a debt could not be assigned without the consent of the creditor, and why he considered that a reference to the requirement of consent should be included in article 23 to clarify the intention, failing which the article would be inoperative. If the intention of paragraph 1 was that the successor State should in any event be responsible for the debt, the paragraph would be acceptable to him, but that intention was not clear from the text. He was quite unable to agree that, if a debt passed by virtue of the inter-

nal law of the new State, that would *ipso jure* impose an obligation on the creditor State. Nor could he agree that the requirement of consent by the creditor State was tantamount to interference in the domestic affairs of the new State or to a right of veto by the creditor.

34. Consequently, of the various formulae proposed, he would prefer Mr. Tsuruoka's. Alternatively, he was prepared to accept Mr. Schwebel's proposal, which provided a closer link between the two paragraphs and established the primacy of paragraph 1.

35. Mr. TSURUOKA said he had proposed an amendment to paragraph 2 because some members of the Commission thought that that paragraph did not take sufficient account of the legitimate interests of State or other creditors. Other members of the Commission held that the interests of creditors were already adequately protected by the rule in article 20. But article 20 laid down a general rule, whereas article 23 dealt with a special case, and in practice the special rule prevailed over the general rule. The rule laid down in article 23, paragraph 2, might thus be misinterpreted, for it might be thought that, from the standpoint of international law, the successor State was free, as a sovereign State, to deal with the debts of the predecessor States as it saw fit.

36. The phrase "with the consent of the creditors concerned" was very vague, because the Commission had not yet decided whether creditors other than States should be included within the sphere of application of the articles. Sir Francis Vallat and Mr. Ripphagen had said that the reference to consent was tantamount to giving a right of veto to creditors. But creditors would have their say only in regard to loans they had granted themselves; they would have no right of veto in regard to loans contracted with other creditors.

37. He believed it was preferable, at that stage, not to deal with the question of the definition of State debt. As Mr. Njenga had suggested, therefore, the Commission could place the words "with the consent of the creditors concerned", or only the words "creditors concerned", in square brackets, as it had in the case of the word "international" in article 18.

38. Mr. REUTER observed that the Commission was seeking a tolerable ambiguity, which was already created by article 18, in which the word "international" had been placed in square brackets, as Mr. Tsuruoka had noted, and by article 23, paragraph 1, in which the words "pass to" could be interpreted in several ways.

39. From the point of view of the interests at stake, it was not always easy to determine where those interests lay. For example, although a creditor having an international claim against a State might, in some cases, think that its claims would no longer have the same value if it became a claim against a province, in other cases it might consider that to be an advantage, since its courts would no longer be bound by the rule of immunity of the foreign State and, if the province concerned was a prosperous one that valued

its international credit, it would pay more easily than a State. It was therefore impossible to know who would benefit from the rule stated in article 23, paragraph 2. He was, however, prepared to accept the ambiguity proposed by Mr. Tsuruoka.

40. Article 23 seemed to him to present a further ambiguity, to which Mr. Calle y Calle had drawn attention by referring to “the burden” of the debt. For a clear distinction must be drawn between the obligation itself and the ultimate burden of the debt. It might be considered that the words “pass to”, in paragraph 1, referred to the obligation, and that paragraph 2 referred only to the ultimate burden of the debt. But if that were so there was no problem, for it would be enough to say

“Paragraph 1 is without prejudice to the attribution of the whole or any part of the *ultimate burden* of the State debt of the predecessor States to the component parts of the successor State in accordance with the internal law of the successor State”.

That would amount to saying that the financial arrangement between the successor State and its component parts was a purely internal matter and that, as to the obligation, the rule stated in paragraph 1 remained unchanged. If that was really what the Commission meant, he would willingly accept the amendment proposed by Mr. Tsuruoka. But he was not sure that article 23 applied only to international debts, since the Commission had placed the word “international” in square brackets in article 18, nor was he sure where the interests of the creditors lay, since it was not always to their advantage to maintain an international claim by one State against another.

41. Mr. YANKOV noted that article 23 had given rise to different opinions not only as to interpretation, but also as to substance, and he did not think that its defects could be remedied even by a drastic alteration of the text. His first impression had been that paragraph 1 laid down a general rule concerning the international responsibility of the successor State to meet the obligations that had previously existed with respect to the creditor State, whereas paragraph 2 provided, through an option available under the internal law of the successor State, for the recovery of debts that had passed from the predecessor States to the successor State. He wished to ask Mr. Schwebel to elaborate further on his proposal, since that might provide a way out of the Commission's difficulties regarding the nature of the debt and the subject of law involved.

42. Sir Francis VALLAT, referring to Mr. Castañeda's remarks, said that if a State debt were created between the United Kingdom and Liechtenstein, the terms and conditions of that debt would undoubtedly be included in a treaty, so that the matter would be governed by the law of succession in respect of treaties. Hence he did not think that that example applied to the case in point. The loan, however, would probably be made by a bank or by private bond holders. If the latter, it was likely that they would arrange for the Liechtenstein authorities to pay the interest

and instalments of capital into bank accounts in Liechtenstein. It was precisely for that reason that paragraph 2 was so important: the chances were that the bond holders would infinitely prefer to continue with the existing arrangements rather than be compelled to make a fresh application to the Swiss Government, which would be the effect of paragraph 1.

43. One thing was clear from the discussion, namely, the need for paragraph 2. The drafting could, of course, be improved, but the paragraph pointed in the right direction. It mattered little which formulation was finally adopted, provided that the Commission's discussion was adequately reflected in the report.

44. Mr. ŠAHOVIĆ agreed with Mr. Tankov that Mr. Schwebel's proposal expressed the view of the majority of the members of the Commission, namely, that paragraph 1 stated the basic rule. If that proposal were made formally, it would certainly be approved by the Commission. If it were not, he could nevertheless accept article 23 without square brackets, as submitted by the Drafting Committee, provided that the situation were explained in the commentary and the proposed amendments were cited therein.

45. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, in response to the comments of various members of the Commission, he wished formally to introduce his proposal for article 23, which read:

“Article 23. *Uniting of States*

“1. When two or more States unite and thus form a successor State, the State debt of the predecessor States shall pass to the successor State.

“2. Without prejudice to the foregoing provision, the successor State may, in accordance with its internal law, attribute the whole or any part of the State debt of the predecessor States to the component parts of the successor State.”

Paragraph 1 was identical with the corresponding paragraph of the Drafting Committee's article and stated what was intended to be the paramount rule. Paragraph 2 reproduced the essence of the corresponding paragraph of the Drafting Committee's article. It did not suggest that the action it mentioned was subject to the paramount rule, but showed that such action could not prejudice the application of that rule.

46. If the Commission found the text he proposed unacceptable, he would suggest that it adopt the Drafting Committee's text in square brackets and include in the commentary the amendments proposed by Mr. Tsuruoka, Mr. Dadzie and himself, together with an account of the discussion thereon.

47. Mr. TSURUOKA was prepared to accept the text proposed by Mr. Schwebel, but would like the words “without prejudice” to be replaced by the word “subject”. The text nevertheless called for clarification in two respects. First, once the debts had been attributed, in whole or in part, to the component parts of the successor State, must the creditor

State consider that the ultimate burden of the debt rested on the successor State, or on its component parts? Secondly, was not the successor State free to attribute the debts not only to its component parts but also to municipalities, banks or other institutions?

48. Mr. SCHWEBEL (Chairman of the Drafting Committee), speaking as a member of the Commission, replied that he would prefer to retain the phrase "Without prejudice to", which showed that the application of paragraph 2 would leave the paramount rule stated in paragraph 1 unaffected. With regard to the operation of the article as a whole, he presumed that, if a successor State arranged for one or more of its component parts to service a debt, it would naturally be to that part or parts that a creditor—be it a State, an international organization or a private bond holder—would look first for repayment. But a creditor, of whatever kind, would most definitely be entitled to look to the successor State as the ultimate obliged party, should the component part concerned fail at any juncture to meet its obligation.

49. He did not feel competent to answer definitively Mr. Tsuruoka's second question, concerning the operation of paragraph 2 of his proposal, but he thought it unlikely that a successor State would actually attribute its debt to a bank; it would be more likely to appoint a bank as an agent to handle reimbursement. The type of debts with which the article was concerned were those contracted by territories that had once been States. He presumed that, in the event of succession, such debts would, in the first instance, either continue to be the responsibility of the territories that had contracted them, or be assumed by the successor State.

50. Mr. VEROSTA pointed out that, according to article 19, a succession of States entailed 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 passed to the successor State; thus there was novation of those obligations. In his opinion, article 23, paragraph 1, must be interpreted in accordance with article 19, and he would therefore like to know whether paragraph 2 of article 23 constituted an exception to paragraph 1, and also to article 19. Legally, the situation could be seen in two ways. It could be held, contrary to article 19, that Liechtenstein's obligation would continue to exist if it united with Switzerland; but it could also be considered that, after the novation of the obligation, the new State would decide to reassign the debt to Liechtenstein or to make it chargeable to a Swiss canton.

51. Mr. SCHWEBEL (Chairman of the Drafting Committee) was not at all sure that he, rather than the Special Rapporteur, could give the explanations Mr. Verosta had requested. In his estimation, however, article 19 and article 23, paragraph 1, were entirely compatible. Although article 19 was perhaps more broadly cast, both provisions set out the principle that the successor State was responsible for the debts of the predecessor States. The text he proposed

for article 23, paragraph 2, merely reflected existing practice in regard to State debt: when a federal State succeeded two or more independent States, it was not uncommon for the debt of the component parts of the new State to continue, at least initially, to be the responsibility of those component parts. None the less, the paramount responsibility for such debt lay with the successor State, and Mr. Verosta had therefore been right to draw attention to article 19, which emphasized that fact.

52. Mr. USHAKOV suggested that, since the opening part of the text proposed by Mr. Schwebel for article 23, paragraph 2, contained the words "the successor State", the last eight words of that paragraph might be replaced by the words "to its component parts".

53. Sir Francis VALLAT said that, inasmuch as it emphasized the extinction of the debt of the component parts of the successor State, article 19 clearly showed the need for a provision such as that proposed for article 23, paragraph 2.

54. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 23 as proposed by Mr. Schwebel and amended by Mr. Ushakov.

It was so agreed.

ARTICLE 24⁶ (Separation of part or parts of the territory of a State)

55. The CHAIRMAN read out article 24 as adopted by the Drafting Committee:

Article 24. Separation of part or parts of the territory of a State

1. When a part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor State otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account all relevant factors.

2. The provisions of paragraph 1 apply when a part of the territory of a State separates from that State and unites with another State.

56. Mr. DÍAZ GONZÁLEZ suggested that, at the end of paragraph 1, the word "factors" should be replaced by the word "circumstances", so as to adhere as closely as possible to the wording used by the International Court of Justice in setting out, in its judgment in the *North Sea Continental Shelf Cases*,⁷ the equitable considerations applicable to the delimitation.

57. Mr. USHAKOV could accept article 24 and was in favour of the drafting amendment proposed by Mr. Díaz González.

58. The links between that article and article 20 should, however, be explained in the commentary. There were two salient elements in paragraph 1 of ar-

⁶ For consideration of the text initially submitted by the Special Rapporteur, see 1501st meeting, paras. 33-44, and 1502nd meeting, paras. 10-43.

⁷ *I.C.J. Reports 1969*, p. 53.

article 24: “an equitable proportion” of the State debt of the predecessor State passed to the successor State unless the predecessor State and the successor State “otherwise agree”. If the debt passed in an equitable proportion, it would seem that all the creditors were required to agree to the way in which it had been allocated. But if the predecessor State and the successor State agreed otherwise, the creditors could oppose the arrangement, in accordance with article 20, paragraph 2, which provided that an agreement between predecessor and successor States concerning the passing of the debts could not, in principle, be invoked against a third creditor. By virtue of that provision, a perfectly valid international agreement by which the predecessor and successor States derogated from the principle of equitable distribution could thus be rejected by the creditor.

59. In his opinion, the provision in article 20, paragraph 2, was not justified, whereas the rule stated in article 24, paragraph 1, was correct. Indeed, it was useless on the one hand to allow the predecessor State and the successor State to conclude an agreement derogating from the principle of equitable proportion, and on the other hand to allow the creditor State to act contrary to that rule of international law. The rule stated in article 24, paragraph 1, should not be made subject to the creditor’s veto. It was in the commentary to article 24 that the relationship between article 20 and article 24 should be explained. Moreover, article 20, which had been adopted on first reading, might subsequently be amended.

60. Mr. REUTER shared the views expressed by Mr. Ushakov. He wished to stress the distinction that should be made between the obligation itself and the ultimate burden of the debt. As far as the obligation was concerned, an equitable proportion of the debt passed to the successor State. Hence the clause “unless the predecessor State and the successor State otherwise agree” was valid only if it applied to the ultimate burden of the debt. The international obligation must be specified in the light of article 19, which clearly defined the notion of the passing of the debt. He saw no other solution than to distinguish between the obligation, which concerned the creditors, and the ultimate burden of the debt, which concerned the personal relations between the predecessor State and the successor State.

61. Mr. SUCHARITKUL said that article 24 was acceptable, but stressed the need expressly to mention capacity to pay, as a relevant factor in the equitable distribution of debts between the predecessor State and the successor State. Tax-paying capacity, or capacity to pay, potential or real, was of primary importance for the protection of the interests of creditor States, for it was possible that the debtors, particularly if they were less developed States, might ask the creditors to cancel their debts or defer servicing.

62. Sir Francis VALLAT, without rejecting article 24, because that would be impracticable at the current stage, had very serious doubts about the article as it stood. To express those doubts in a single

word, the article was unworkable. He had already referred, like Mr. Reuter, to the need to distinguish clearly between the obligation or the servicing of the debt and the ultimate responsibility for the burden. But there was also the fact that it was totally impractical to provide that an “equitable proportion” of the State debt of the predecessor State should pass to the successor State, since that might entail the splitting of certain debts. Who would determine what constituted “an equitable proportion” of the State debt if the predecessor and successor States were unable to agree on that point themselves? Still further problems arose if the article were read in conjunction with article 19: when would the “equitable proportion” pass to the successor State, and how would it be determined? The process of deciding what was equitable might possibly take so long that an elderly private creditor would die before it was completed and never be reimbursed. The Commission ought to take that situation into account and find some solution whereby the servicing of the debt would continue even while the size of the “equitable proportion” remained in dispute.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to approve article 24 as proposed by the Drafting Committee and amended by Mr. Díaz González, the reservations made by members being recorded in the commentary.

It was so agreed.

ARTICLE 25⁸ (Dissolution of a State)

64. The CHAIRMAN read out article 25 as proposed by the Drafting Committee:

Article 25. Dissolution of a State

When a predecessor State dissolves and disappears and the parts of its territory form two or more States, and unless the successor States otherwise agree, an equitable proportion of the State debt of the predecessor State shall pass to each successor State, taking into account all relevant factors.

65. Mr. DÍAZ GONZÁLEZ said that the word “predecessor” should be deleted from the opening part of the article, since a State did not become a predecessor State until after it had dissolved and disappeared. As in article 24, paragraph 1, the words “all relevant factors” should be replaced by the words “all relevant circumstances”.

66. Mr. USHAKOV was quite prepared to accept article 25, but two questions arose. First, he noted that the words “and unless the successor States otherwise agree”, in that article, clearly referred to all the successor States. Those words corresponded to the words “and unless the predecessor State and the successor State otherwise agree” in article 24, paragraph 1. In the latter case, however, several successor States might in fact be involved if several parts of the territory of a State separated from that State and formed

⁸ For consideration of the text initially submitted by the Special Rapporteur, see 1503rd and 1504th meetings, and 1505th meeting, paras. 1-12.

several States, and if those successor States "otherwise agreed" with the predecessor State.

67. If then, under article 25, all the successor States could agree on a certain distribution of debts, could not some of them subsequently agree on a further distribution of debts among themselves? In his opinion, there was no reason why they should not, and article 25 should therefore be supplemented by a new paragraph on the following lines:

"The provisions of paragraph 1 are without prejudice to the redistribution by the successor States concerned of their respective shares of the State debt of the predecessor State."

68. The two questions he had raised should be reflected in the commentary to article 25 and discussed on second reading.

69. Mr. TABIBI had no difficulty in accepting the article as proposed by the Drafting Committee, since it was a great improvement on the text originally submitted by the Special Rapporteur. He was particularly gratified by the reference to "all relevant factors" (or "all relevant circumstances"). It was most important, however, that the Commission should accompany article 25, and also articles 23 and 24, by a carefully written commentary showing how those provisions might be applied in practice. The discussion on article 23 had shown that many points required elaboration, while the difficulties that might be caused by the references in articles 24 and 25 to "an equitable proportion" of the State debt could be judged from the financial problems that had followed the partition of India and, later, the partition of Pakistan, some of which were still unresolved.

70. Mr. REUTER pointed out that he had accepted articles 23 and 24, and could accept article 25, only on condition that their provisions were interpreted in the light of article 20. Agreements between predecessor and successor States could not be invoked against creditors unless the conditions laid down in article 20 were met.

71. In article 25, the words "and unless the successor States otherwise agree" should be replaced by the words "and unless some successor States otherwise agree", since such an agreement could relate only to the ultimate burden of the debt, not to the obligation itself. With regard to the obligation, an equitable proportion of the debt of the predecessor State must pass to each successor State. There might, of course, be disagreement between successor States; although each successor State acknowledged that it was responsible for a certain share of the debt, it would unilaterally determine that share itself, and it could hardly be expected that the sum of all the shares thus determined would be equal to the whole. In general, States did not have a very generous conception of equity and were quick to invoke all manner of relevant circumstances, whereas creditors were usually satisfied with what they could obtain on the basis of the successor States' sense of equity. If the Commission did not lay down the rule of equitable distribution, creditors might receive nothing at all.

As to the settlements that the successor States might arrange among themselves, they could be made by virtue of article 20, if the creditors accepted them, or by virtue of the principle of equitable distribution, if the creditors acknowledged that the successor States had made an equitable distribution. It should therefore be made clear, if not in the text of article 25, at least in the commentary, that article 20 remained applicable.

The meeting rose at 1.10 p.m.

1516th MEETING

Wednesday, 12 July 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (concluded) (A/CN.4/301 and Add.1,¹ A/CN.4/313, A/CN.4/L.272)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

ARTICLES 23, 24 AND 25 (concluded)

ARTICLE 25 (Dissolution of a State)² (concluded)

1. Sir Francis VALLAT expressed agreement with the comments made on the article at the previous meeting by Mr. Tabibi and Mr. Reuter.

2. Mr. FRANCIS believed that the texts of articles 24³ and 25 now before the Commission represented the maximum degree of consensus that could be achieved in the Drafting Committee, and he was therefore prepared to accept them as they stood. Like Mr. Sucharitkul, however, he would have preferred to see references in both articles not merely to equitable considerations, but also, as in article 21,⁴ to the "property, rights and interests" which passed to the successor State. He would also have preferred article 25 to contain a reference to the "contributory capacity" or, failing that, the "debt-servicing capacity" of each successor State.

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission de-

¹ *Yearbook*... 1977, vol. II (Part One), p. 45.

² For text, see 1515th meeting, para. 64.

³ *Ibid.*, para. 55.

⁴ See 1514th meeting, foot-note 2.