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Draft articles on succession of States in respect of matters other than treaties: memorandum submitted by Mr. Tsuruoka regarding article 23, paragraph 2, adopted by the Commission

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Draft articles on succession of States in respect of matters other than treaties: memorandum submitted by Mr. Tsuruoka regarding article 23, paragraph 2, adopted by the Commission

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1. At its 1515th meeting on 11 July 1978, the Commission adopted article 23 as proposed by the Chairman of the Drafting Committee, Mr. Schwebel. The text adopted finally by the Commission reads as follows:

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.

2. Paragraph 1 contains no drafting change from draft article 23, paragraph 1, as adopted by the Drafting Committee (A/CN.4/L.272). It was the general view of the Commission that paragraph 1 was well drafted by the Drafting Committee and therefore raises no serious problem in substance as well as in form. I share this general view.

3. Paragraph 2, however, gives rise to a number of difficulties. The paragraph provides in essence that the successor State, in the case of the uniting of States, can unilaterally attribute to its component parts the State debt it has succeeded to from the predecessor States. This provision appears contrary to the generally accepted principle of law with regard to financial transaction, in particular that of a transnational character. The generally accepted principle with regard to financial transaction tells us that a debtor must not, without the consent of the creditor modify the terms and conditions of the financial obligation it has undertaken. This is a corollary of the well-known principle *pacta sunt servanda.* Attribution of the debt to another entity is a most notable kind of modification to the terms and conditions of the debt, and accordingly should be permitted only with the consent of the creditors concerned. For this reason, I had proposed (1515th meeting, para. 7) to insert a phrase "with the consent of the creditors concerned" in the text of article 23, paragraph 2, proposed by the Drafting Committee.

4. In the debate of the Commission, one member opposed the insertion of such a phrase on the ground that to require the debtor State to obtain the consent of the creditors (who may well be private persons) in attributing its debt to its component parts is a case which involves serious infringement of the State sovereignty of the debtor State, because the attribution of its debt to its component parts is a purely domestic matter of the debtor State. It is hard for me to go along with this argument. When a State borrows money from an entity (presumably a foreign entity in this case, i.e. a foreign State or a foreign private person or an international organization) that State, just like any debtor, is obliged to abide by the terms and conditions of such a financial transaction. It is a well-established principle in the community of nations that subjecting the debtor State to such terms and conditions for a particular financial transaction does not involve any infringement of the sovereignty of the debtor State. This is true whoever the creditor may be because sovereignty of the debtor State may be infringed by a State as well as by any other entity.

5. Furthermore, in many transnational financial transactions, the terms and conditions include a provision which states that the debtor State may modify such terms and conditions (for instance, the schedule of repayment) if the creditor so consents. To require the consent of the creditor in such a case has never been regarded as an infringement of the sovereignty of the debtor State. It simply means that a debtor State cannot unilaterally modify the terms and conditions of the debt it has undertaken. I see no reason why the same principle should not be applied to the requirement of the consent of the creditors when the successor States wishes to attribute to its component parts the State debt of the predecessor States in the case of the uniting of States.

6. Several members also expressed concern that the words "with the consent of the creditors concerned" might entail interference in the domestic affairs of the successor State because they believed that all that the creditors are interested in is the securing of the repayment of the debt and that the creditors are not concerned about how the money would be collected by the successor State to meet the debt servicing, which is purely a domestic matter. I completely agree

* Incorporating document A/CN.4/L.282/Corr.1.

that how the successor State arranges to meet the debt servicing is a purely domestic matter. I further agree that to require the consent of the creditors for such an arrangement is not necessary. However, this was not my intention when I proposed the insertion of the words "with the consent of the creditors concerned." My proposal is based on the understanding that paragraph 2 as proposed by the Drafting Committee does not provide for the freedom of the successor State to arrange whatever way it likes to collect money to repay the State debt it has succeeded to, but provides for *the freedom of the successor State to attribute* in accordance with its internal law such State debt to its component parts. Attribution of the debt to the component parts of the successor State means, for me, the transfer from the successor State to its component parts of the obligation to repay the debt. I do not think it is justified to permit the successor State to transfer the obligation to repay its debt to its component parts unilaterally without the consent of the creditors concerned. To require the consent of the creditors in such a case has nothing to do with the sovereignty of the successor State.

7. Speaking of sovereignty, I would rather argue that not to require the consent of the creditors might entail the infringement of the sovereignty of the creditors when the creditors concerned are States. Paragraph 2 as worded permits the successor State to attribute its international debt to its component parts in accordance with its internal law, even if the creditors are States. It means that the character of the State debt can be changed unilaterally by the successor State. Is not this the infringement of the sovereign equality of the creditor States, because the debtor State and the creditor States are not treated on equal footing? I think it is. By attributing the State debt from the successor State to its component parts, the State debt becomes the debt of the component parts concerned. This means either that the State debt which has been regulated under international law will no more be regulated by it or that the component parts have now become subjects of international law. Whichever position one takes, it is clear that there is a substantial change in the character of the State debt in question. Such change should not be allowed by a unilateral action of the successor State because the creditor States should also be permitted to participate on an equal basis in introducing changes in the character of the State debt.

8. Furthermore, paragraph 2 implies that the creditor States are compelled to comply with the internal law of the successor State because the attribution of the debt would be done in accordance with the internal law of the successor State. Is not this the infringement of the sovereignty of the creditor States? I think it is. The internal law of the successor State is a unilateral expression of the will of the successor State. No other State should, by virtue of its sovereignty, be made subject to such unilateral expression of the will of the successor State without its express consent. For this reason, the Commission has in the past carefully avoided as much as possible any *renvoi* to the internal law of a State. Thus, only with the *consent* of the creditor States do the provisions of article 23, paragraph 2, become free from criticism from the standpoint of sovereignty.

9. I admit that the amendment proposed by Mr. Schwebel (and adopted by the Commission) is a considerable improvement on the original text proposed by the Drafting Committee. The original text was as follows:

> 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.

Obviously, it is inappropriate to employ the expression "Paragraph 1 is without prejudice to ...", because such expression restricts the application of the principle of international law as stated in paragraph 1 by a unilateral action of the successor State. For this reason, I welcome the amendment proposed by Mr. Schwebel, which acknowledges that, whatever is provided for in paragraph 2, the provision of paragraph 1 always stands. However paragraph 2 of article 23 is not free from criticism.

10. First of all, it is not at all clear who would be the debtors after the attribution, under paragraph 2, of the State debt to the component parts of the successor State. It is natural to assume that after the attribution of such debt, the component parts concerned would become the new debtors. However, the same paragraph says that this provision is *without prejudice to paragraph 1*. Accordingly, by virtue of paragraph 1, the successor State is *also* liable to repay the debt. Then, are the successor State and its component parts to which the State debt is attributed co-debtors (if this is the case, the creditors may at their choice go to either of them to seek prepayment)? Or is the successor State merely a guarantor of the State debt attributed to its component parts which are the new debtors? Or is the successor State still the debtor of the State debt, even under paragraph 2, while its component parts are merely under an obligation to co-operate (under the internal law of the successor State) with the successor State to repay the debt (if this is the case, there is no need to include paragraph 2 in the present draft because the Commission is dealing only with the rules of international law and the principle of international law with respect to succession of State debt in the uniting of States is clearly set forth in paragraph 1)? In short, by the addition of paragraph 2 as it stands, the whole legal relationship between creditors and debtors, or – looked at from a different angle – between creditors, the successor State, and its component parts to which the State debt is attributed becomes unclear and vague. I do not think it is wise for the Commission to adopt such a provision which entails so much ambiguity.

11. The ambiguity of paragraph 2 may however, be removed by the insertion therein of the phrase "with the consent of the creditors concerned". If the con-

* Italics supplied by Mr. Tsuruoka.

sent is given, then, one may say that a new contractual relationship is created between the respective component parts concerned of the successor State and the creditors concerned. By virtue of such new relationship, the component parts concerned become new debtors and the successor State would be relieved of the burden of repayment as a debtor. In such a case, the introductory part of paragraph 2, which reads "without prejudice to the foregoing provision", becomes inadequate since paragraph 2 now provides for a new situation. Thus, that part should be reworded to read "Nothing in paragraph 1 excludes the possibility of attributing ...".

12. The second problem relates to the modality of attribution of the State debt. Paragraph 2 as it stands does not specify which part of the State debt should be attributed to which component parts. It simply provides that the State debt must be attributed *in accordance with the internal law of the successor State.* In this connexion, the example given in the Commission in explaining the meaning of paragraph 2 is quite misleading. The example given was that the State debt concerned would be attributed to the component part which had, before the uniting of States, been the debtor State of the State debt concerned. However, paragraph 2 does not provide so. On the contrary, paragraph 2 as at present worded permits the successor State to attribute the State debt to *any* component part in accordance with its internal law. If the intention of paragraph 2 is to permit this kind of freedom on the part of the successor State, then a question arises as to why the possibility of such attribution is limited to only the component parts of the successor State. Why not a State bank? Why not a government enterprise? In some cases, a State bank or a government enterprise is stronger financially than the component parts of the successor State. In short, paragraph 2 as at present worded is too narrow if its objective is to provide for the freedom of the successor State to attribute the State debt to another entity, and, on the other hand, it is too broad if its objective is to provide for the freedom of the successor State to attribute the State debt to the component part which was the predecessor State responsible for the State debt concerned.

13. For the various reasons stated above, I am not convinced that paragraph 2 of article 23 has any positive meaning in the whole draft articles on succession of States with respect to matters other than treaties. I even fear that it might add to unnecessary confusion in the whole draft. It appears to be wiser therefore if we delete paragraph 2 from article 23 or amend it in the following manner:

2. *Nothing in 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 *or to any other entity* in accordance with the internal law of the successor State.