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Summary record of the 1421st meeting

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

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mined whether what was involved was a customary rule of law relating to State succession, an agreement concluded by the successor State and the predecessor State, or a unilateral decision by the successor State to accept the obligation to assume the debt. In principle, the Commission did not have to deal with the source of the debt since the predecessor State had a financial obligation, whatever its origin might be. He nevertheless agreed with Mr. Castañeda that in general, obligations resulting from something other than voluntarily concluded legal instruments should not be excluded. That did not mean that there was any need to deal with the problem of sources, their nature, their variety and their lawful character. Mr. Castañeda had proposed that the words "financial obligation contracted by the central Government of the State" be replaced by the words "financial obligation chargeable to ...": that wording would suffice to cover all kinds of financial obligations, whatever their origin, assuming that that origin was of a lawful character.

The meeting rose at 5.50 p.m.

1421st MEETING

Tuesday, 17 May 1977, 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. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

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

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE O (Definition of State debt) [1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur), continuing his statement, said he wished to address himself to the question of the status of the subjects concerned, in one way or another, in a succession to State debts, He had identified the debtor State with the help of elements contained in the definition of State debt. Most members of the Commission had expressed their agreement with him, although some had wished to go further and others not so far. For instance, Mr. Ushakov,[2] anticipating chapter II of the report, relating to the creditor third State, would like to make it a requirement that not only the debtor but also the creditor should be a subject of international law. In Mr. Ushakov's view, succession to State debts should be governed by public international law, not by private international law; he saw State debt as an international obligation governed by international law and establishing a relationship solely between subjects of public international law. In a spirit of co-operation, Mr. Ushakov had made a number of ingenious suggestions for improving the definition set forth in article O. Those suggestions were not only extremely interesting but would be most useful to the Drafting Committee. In particular, Mr. Ushakov had suggested that State debt should be defined as a financial obligation of the State vis-à-vis one or more other States or one or more other subjects of international law, or as a financial obligation of the predecessor State vis-à-vis one or more third States. In making that suggestion, Mr. Ushakov had wished to specify that both the debtor and the creditor must be subjects of international law.

2. The status of subject of international law had also been invoked by Mr. Sucharitkul,[3] but in a contrary sense. Mr. Sucharitkul wished to stipulate that State debt could be contracted not only to a creditor third State but also to a private creditor. For the time being, he (the Special Rapporteur) had addressed himself only to the question of the status of the debtor, which must be that of a State, leaving the status of the creditor to a later stage. Mr. Calle y Calle, who shared his view, had considered that the creditor did not necessarily have to be a State, but had added that, in matters of succession of States, it was important first to establish who was the debtor.[4]

3. Mr. Ago [5] had agreed that the debtor must be a State, but had felt that the concept of the State adopted by the Special Rapporteur was a concept of internal rather than international law. Mr. Ago would have preferred a concept of the State similar to that which had been adopted for the subject of State responsibility. Externally, the State would be perceived as a single and indivisible entity, although, internally, it might be made up of a number of separate entities. Just as the wrongful act of a territorial authority was held to be a State responsibility, so would the debts of territorial authorities and public enterprises be regarded, for the purposes of State succession, as State debts. Of course, as he (the Special Rapporteur) had indicated in stressing the limited reliance that could be placed on the criterion of financial autonomy, it was sometimes difficult to state positively that certain local debts or debts of public enterprises were not State debts. However, it was hardly conceivable that every kind of local or public-enterprise debt could be regarded as a State debt at the international level. Problems of State responsibility differed in many respects from those of State succession, especially succession to debts.

4. Mr. Ago's reasoning was based solely on the case of a debt of delictual origin. But practically all debts which

[1] For text, see 1416th meeting, para. 1.

[2] See 1417th meeting, paras. 7 *et seq.*

[3] *Ibid.*, para. 3.

[4] *Ibid.*, para. 5.

[5] *Ibid.*, para. 27.

formed the subject of a succession were debts of non-delictual origin. Moreover, in the case of debts of delictual origin, before debts involving the territory of a State could be considered as State debts, a suitable point would have to be found for establishing a parallel between succession to debts and State responsibility. That could not be the stage of the imputation to the State of the violation of an obligation committed by a subordinate entity, but must, rather, be the later stage of reparation, which commenced once responsibility was engaged. At that moment, the violation of the international obligation could entail pecuniary reparation—in other words, a debt. At that stage, it was in fact the subordinate entity which assumed the debt of delictual origin, as a charge to its own budget. Thus, the wrongful act of the subordinate entity engaged the responsibility of the superior entity, which was the State, but at the reparation stage, the focus redescended to the lower level of the subordinate entity to whose own budget the debt was charged. But is was at that point that the succession of States applied. Mr. Ago would like to return to the State level, whereas the debt no longer concerned the State, nor was it covered by the succession of States, as was clear from the remainder of his report.

5. There were also important differences as regards the effects. The violation of an international obligation by a subordinate entity invariably engaged the responsibility of the State, whereas, in State succession, the territorial change might have no effect on debts. That was the case with local debts, as Mr. Quentin-Baxter had noted.[6] Since local debts never concerned the predecessor State, they could not concern the successor State. Consequently, the phenomenon of State succession had no effect on them. For it to be otherwise, those debts would have to be fictitiously imputed to the predecessor State, and then be transferred to the successor State through the effect of the succession of States. However, such a fiction would be pointless, since it would ultimately lead to the *status quo ante* and would not affect the destiny of such local debts in any way.

6. There remained the case of the debt of a major public establishment operating on a nation-wide scale, such as the debt of a national railway company. In such a case, everything depended on the internal law of the predecessor State; it was that law which determined whether or not the debt was a State debt, and that depended on whether the establishment concerned enjoyed real financial autonomy vis-à-vis the State. Mr. Ago's idea that all debts should be regarded as State debts must be either accepted or rejected in its entirety. It was not possible to select one local debt rather than another or one public enterprise debt rather than another and say it was a State debt. Indeed. if there were an applicable criterion in that regard, it would not be a criterion of international law but could only be a criterion of the internal law of the predecessor State. That would mean going into details of internal law, which was precisely what Mr. Ago's proposal was intended to avoid. He (the Special Rapporteur) certainly would not claim that the debt of a major public establishment, such as a national or nationalized company performing a State public service, could never be regarded as a State debt, but that depended on considerations of internal law, which were not the concern of the Commission.

7. As between the subject of State responsibility and that of succession to State debts, there were also differences concerning the law applicable. The violation of an international obligation by a subordinate entity of the State was governed by public international law, namely, the law of State responsibility. On the other hand, debts other than State debts, such as local debts or debts of enterprises of a public character, were governed by private international law or even by the private law of the predecessor State.

8. To treat local debts and debts of public enterprises as State debts would bring into question the Commission's previous decisions, particularly as regards State property. It was not possible to adopt different concepts of the State for property and for debts. Up to the present, State property had been defined in such a way as to exclude completely the property of internal entities subordinate to the State. Mr. Ago himself had in fact collaborated in the definition of State property, which had been defined in terms of the internal law of the predecessor State. As Mr. Quentin-Baxter had observed, it was now important to obtain a minimum of parallelism between the property régime and the debt régime.

9. To treat the debts of subordinate entities of the State as debts of the State itself would inevitably lead to unacceptable solutions and dilemmas. In the area of decolonization, for instance, there would be a choice between two solutions only. To rule that all debts were transferable would mean, for instance, that Libya, as a former Italian colony, ought to have been made responsible for all the debts of metropolitan Italy, even debts contracted for the development of a particular region such as Sicily. To adopt the opposite solution, namely, that debts were non-transferable, would mean that Libya, or Ethiopia, ought not to have assumed the local debts of the colonized territorial entities which they had once been, or those of the public establishments and enterprises belonging to those colonies. Such a solution would be unacceptable to the former administering Power, which would have to continue to accept responsibility for those debts until they were extinguished. It was the intermediate solution, which involved making a distinction between State debts and debts of entities subordinate to the State, which he (the Special Rapporteur) was proposing. That was the solution which had been chosen by the Franco-Italian Conciliation Commission set up under the Treaty of Peace with Italy, of 10 February 1947, to settle at the local level, in a just and equitable manner and without prejudice to financial disputes between the States concerned, the property and debt problems of communes separated, detached, divided or dismembered by the new frontiers.[7]

[6] *Ibid.*, para. 20.

[7] Franco-Italian Conciliation Commission, "Dispute concerning the apportionment of the property of local authorities whose territory was divided by the frontier established under article 2 of the Treaty of Peace: decisions Nos. 145 and 163, rendered on 20 January and 9 October 1953 respectively" (United Nations, *Reports of International Arbitral Awards*, vol. XIII (United Nations publication, Sales No. 64.V.3), pp. 501-549.

10. The definition of State debt set forth in draft article O had led Mr. Francis to wonder [8] whether such debt was chargeable to the resources of a public body or establishment or to the resources of the State as a whole. In his view, a debt of that kind was chargeable to the State's budget as a whole, since the body concerned had its own financial existence and economic activity. Mr. Quentin-Baxter had expressed a similar concern when he had questioned whether State debt should be so narrowly defined as to imply that it was chargeable only to the treasury of the State.[9]

11. Mr. Sette Câmara had placed particular emphasis on that part of the definition which provided that the debt was chargeable to the State. In connexion with State guarantees, Mr. Sette Câmara had advocated [10] the adoption of a definition which encompassed both State debt and State guarantees for a non-State debt, and had accordingly suggested that the conjunction "and" which appeared in the proposed definition before the words "chargeable to the treasury of that State" be replaced by the word "or". While sharing Mr. Sette Câmara's concern, he did not consider that that suggestion would solve the problem. It was certainly possible to envisage similar solutions for State debts and for State guarantees, but, from a legal point of view, the two cases could not be treated in a definition as identical. It might solve many problems right away to say that State debts—but not State guarantees—could be defined in terms of two alternative, non-concurrent elements, namely, debt contracted by the State or debt chargeable to the treasury of the State. As was clear from chapter V, of the report, relating to newly independent States, the debt which imposed the heaviest burden on new States was not the State debt contracted by the metropolitan Power on behalf of the colony, but the debt of the colony itself which had been contracted by its organs. Accordingly, Mr. Sette Câmara's suggestion might lead to more just and more equitable solutions, since it would enable the administering Power to be made responsible for debts which otherwise would simply be regarded as debts of the colony itself.

12. The question of parallelism between the articles relating to State property and those relating to State debts had been raised at the 1417th meeting by Mr. Quentin-Baxter and Mr. El-Erian. Some degree of parallelism was clearly necessary, since property and debts represented, respectively, assets and liabilities which were correlated. Mr. Quentin-Baxter therefore proposed that the articles on property should be taken as a basis for drafting the articles on debts. That was what he had tried to do, but there were limits to what was possible in that regard, since, as far as property was concerned, the predecessor State and the successor State were the only parties concerned, whereas, in the case of debts, a creditor third State might also be involved. The existence of that creditor third party often made it impossible to follow the model established for property. The situation with regard to succession to debts was to be compared, rather, with the situation with regard to succession to multilateral treaties, and it was with the latter type of succession that a certain parallelism should be established, as he had done in chapter II, relating to third States.

13. To return to the problem of localized State debts, he wished first to reply to Mr. Verosta, who had observed [11] that certain special debts were not necessarily localized. He agreed, with Mr. Verosta on that point; "special debt" was not his own expression but that of the Soviet jurist Alexandre Sack, who contrasted that type of debt with the general debt of the State. It was because, for the reason given by Mr. Verosta, the expression "special debt" was not wholly satisfactory that he had preferred the expression "localized State debt".

14. There were two categories of localized State debts, namely, debts implying a deliberate act of the State and, as Mr. Castañeda had put it,[12] debts chargeable to the State under a rule of international law. First, there were localized State debts where the proceeds had been applied in one portion only of the territory but which benefited the inhabitants of the entire State; that was the case, cited by several members, of a dam which supplied electricity to the entire territory of a State, or of national defence works, or a commercial port. Secondly, there were localized State debts which were characterized not only by the fact that the proceeds had been applied in the part of the territory transferred but also by the fact that such proceeds had benefited that part of the territory exclusively; that was the case when a State invested the proceeds of a loan in a region to meet the specific requirements of that region, such as the construction of a purely local railway or the building of health or education establishments.

15. As Mr. Ushakov had emphasized,[13] the problem of localized State debt was extremely delicate. He (the Special Rapporteur) had started from the financial involvement of the State and had reached the conclusion that there could be two types of localized State debts but that he should combine that category to those debts which had benefited the region in question exclusively. It was certainly easier to secure acceptance for the transfer of that type of debt to the successor State.

16. Mr. Schwebel had made two points.[14] Referring to his (the Special Rapporteur's) statement that annexation and conquest were no longer tolerated by contemporary international law, Mr. Schwebel had drawn attention to cases of annexation and the existence of colonies subsequent to the adoption of the United Nations Charter. To raise that point was to come back to the problem of the origin of the succession of States. Article 2 [15] provided that the draft articles should apply only to the effects of a succession of States occurring in conformity with international law, thus excluding any cases of succession occurring irregularly through annexation or conquest. Mr. Schwebel's second point related to the fact that

[8] 1417th meeting, para. 2.

[9] *Ibid.*, para. 21.

[10] 1416th meeting, para. 38.

[11] *Ibid.*, para. 27.

[12] See 1417th meeting, para. 36.

[13] *Ibid.*, para. 16.

[14] 1418th meeting, para. 21.

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

public international law did not provide for any means of enforcement, a situation which complicated the problem of enunciating its rules. Mr. Schwebel had added, however, that the lack of enforcement machinery did not imply the absence of juridical norms of international law. Generally speaking, he shared Mr. Schwebel's opinion: the development of public international law had been *sui generis* and juridical norms had evolved with greater rapidity and facility than had enforcement machinery. There was no denying that that disparity deprived public international law if not of its credibility, at any rate of some of its impact on international relations.

17. The many suggestions made during the debate should enable the Drafting Committee to work out a satisfactory definition. He accordingly proposed that draft article O be referred to the Drafting Committee.

18. Mr AGO, after thanking the Special Rapporteur for the copious explanations he had provided, said he agreed that succession of States, particularly in respect of matters other than treaties, was a subject that had to be distinguished from State responsibility for internationally wrongful acts. With regard to the definition of the scope of the subject decided upon by the Special Rapporteur, he had emphasized that any definition of that kind was necessarily arbitrary.[16] He had said that it was possible to consider the concept of the State, for the purposes of the matter of succession to State debt, either in a restrictive sense, as the Special Rapporteur had done, or in a broader sense. Some of the Special Rapporteur's comments could be convincing and he recognized that, as far as local authorities were concerned, the problem was more theoretical than practical, since debts of local authorities seldom raised problems of State succession.

19. He was, however, reluctant to subscribe to the Special Rapporteur's approach to debts of public establishments. Supposing, for instance, that the Italian administration for the railways, which belonged to the State, contracted a loan to develop the Italian railway network. If Sicily subsequently separated from the Italian State, the problem of succession to a part of that debt would arise in the same way as if Brittany were to separate from France, after a loan for similar purposes had been contracted by SNCF, which was a separate public establishment of the State. The fact that SNCF was not a direct branch of the State administration would not justify the application of a different rule. If the Special Rapporteur's restrictive approach were adopted, it would probably be necessary to provide for proceeding by analogy in the case of certain debts which were not included in the restrictive concept of State debts. Since, however, the definitions adopted provisionally by the Commission were always subject to subsequent review, he would not press the point.

20. Nevertheless, before article O was referred to the Drafting Committee, it was necessary to remove an ambiguity which perhaps resulted from the fact that frequent reference had been made to obligation with respect to debts, obligation being understood to mean an international obligation. There was thus a tendency to regard State succession as succession to an international debt to a State or to another subject of international law. In fact, however, the idea of State debt covered debts of any kind. While it was true that the debtor was a State and therefore a subject of international law, the same was not true of the creditor. State debt existed whether the State issued Treasury bonds within the country for the development of a particular sector, or whether it contracted a loan for that prupose from a neighbouring State or a foreign bank. State debts meant all debts contracted by the State, whoever the creditors might be. If the subject were so defined as to exclude debts to individuals, and in particular to nationals, the majority of State debts would probably be excluded from it, since they were not contracted to another subject of international law.

21. Mr. SCHWEBEL said that he entirely agreed with the view expressed so cogently by Mr. Ago in connexion with the international personality of creditors.

22. As to local debts, which the Special Rapporteur had suggested should be set aside because they were not relevant to the law of succession of States, he could accept the Special Rapporteur's reasonable argument that, since the predecessor State was not responsible for local debts, it followed that the successor State was not responsible for them either. Nevertheless, the Commission might consider the question whether action by the predecessor State which prevented the local authority from servicing a debt engaged the responsibility of the predecessor State. If it did, was not the successor State equally bound to refrain from action that would prevent the local authority from continuing to service the debt?

28. He assumed that, in the case of a localized debt, the goal was to ensure that the debt was apportioned according to the benefit gained, even though that goal might well prove difficult to achieve in practice. He had in mind the example of the construction of a port in a colonial territory, financed through a loan shared by the metropolitan State and the World Bank, and designed to export iron ore for processing in factories situated in the metropolitan State. Such a port was obviously of benefit to the metropolitan State. On the other hand, after its accession to independence, the former colonial territory, or successor State, would be free to use the iron ore for a variety of purposes and to sell it to any buyer. As a fixed asset, the port would, over the long term, clearly benefit the successor State. Considerations of equity, therefore, would suggest that the successor State ought to assume at least a portion of the debt incurred for the construction of the port, even though the port had not been built exclusively for its benefit. There were many examples of that kind—for instance, an electricity plant might produce electric power in excess of the needs of the successor State, which could sell the excess power to neighbouring areas. In that case, the successor State would benefit from the plant and should, presumably, assume an appropriate portion of the debt incurred in order to set up the plant.

24. Mr. SUCHARITKUL said that, although he accepted the Special Rapporteur's arguments in favour of limiting the subject-matter to succession to debts considered only as financial obligations, he still saw two problems.

[16] 1417th meeting, para. 26.

25. First, in the practice of a number of States, the concept of debt was not understood as meaning only a financial obligation. In the Thai civil code, for instance, which had been adopted in 1900, the word "debt" was used as synonymous with "obligation". Under Anglo-Saxon common law, as the practice had developed, the system of "writs" made it possible to initiate proceedings for the recovery not only of financial debts, but also of debts for professional or personal services. Moreover, the Special Rapporteur himself had used the expressions "obligation" and "debt" almost interchangeably, particularly in paragraphs 142 and 143 of his report.

26. The other difficulty arose out of the fact that a loan contracted by a central Government could be subject to various conditions. For example, in the case of an economic development project for a territory, the creditor might impose on the debtor an obligation not to use a certain other country's means of transport. It might also impose a positive condition, such as an obligation to purchase capital goods from a certain country. It was for those reasons that he felt that the definition of State debt should be amended if it was to be limited to purely financial obligations.

27. Mr. USHAKOV said that he was fully satisfied with the Special Rapporteur's explanations and agreed that draft article O could be referred to the Drafting Committee. With regard to Mr. Ago's observation that a State debt was not simply a debt governed by international law, he said that, in the general provisions relating to succession of States in respect of State property and, in particular, in article 5, the Commission had made it clear that State property meant "property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". It should, of course, be noted that other public property, such as the property of territorial authorities, could also be involved. The Commission had, however, limited its definition to State property. With regard to debts, the definition should also be limited to international debts, in other words, debts assumed by a subject of international law to another subject of international law. Later on, the Commission might try to decide whether there were perhaps other debts governed by international law. To avoid interminable complications, it would be better for the time being to speak only, as the Special Rapporteur proposed, of debts contracted by the predecessor State to other subjects of international law.

28. Mr. BEDJAOUI (Special Rapporteur) said he should make it clear, for the benefit of Mr. Sucharitkul, that the Commission was not considering succession of States in respect of obligations in general, but, rather, succession in respect of debts, which were only one form of obligation among others. That was why he had assimilated debts to obligations, it being understood that the obligations in question were financial ones. Obligations of a non-financial nature which might be attached to certain loans should be dealt with in a set of draft articles relating to succession of States in respect of non-financial obligations which the Commission could consider more fully if it so wished. For the time being, the Commission was confining its efforts to a consideration of succession of States in respect of debts, in other words, in respect of obligations that were exclusively *financial*.

29. Referring to the example of railway companies given by Mr. Ago, he said that a loan contracted by a genuine State corporation would not give rise to any difficulties. If the loan had been contracted by a public establishment, such as SNCF, the matter would have to be settled by internal law, which could treat such a debt as a State debt. It should be remembered that the Commission had already decided that by State property was to be understood property legally belonging to the predecessor State. It was not concerned with hypothetical cases such as those Mr. Ago had mentioned of what would be the fate of property belonging to railway companies; that was a matter for internal law.

30. Both Mr. Ago and Mr. Schwebel had expressed the opinion that the creditor might not necessarily be a State; their observations had paved the way for the introduction of chapter II of the report. Mr. Schwebel had also referred to action which the successor State could take in order to prevent a local authority from ensuring the servicing of or the payment of annuities and interest on, a local debt. That problem was, however, not relevant to the subject under consideration because it implied an act or omission by the successor State which accordingly would fall within the scope of State responsibility. Lastly, Mr. Schwebel had quoted the example of a colony which, when it had achieved independence, would benefit from the construction of port installations financed through a loan from the predecessor State or from the World Bank. That example actually supported his (the Special Rapporteur's) own position. Indeed, what was to be feared was not that the successor State, as a colony which had become independent, might not assume responsibility for part of the debt, but rather that it might be compelled to assume the debt in its entirety, on the pretext that the World Bank had concluded the loan with the central organ of the colony and that the predecessor State had merely given its guarantee. In using the example of a loan contracted by organs of the colony, he was completely tied by the very restrictive definition of State debt and, thus, had to consider that it was the colony that had contracted the loan, although in actual political fact it was the predecessor State which had done so. However, because of the guarantee which the predecessor State had given, it could be asked to assume responsibility for the debt. If the debts contracted by the metropolitan State for the benefit of the colony had to be imputed to the newly independent State, other considerations would have to be taken into account; otherwise, in the last analysis, the former colony might conceivably find itself obliged to buy back its own territory from the former Administering Power, after colonial exploitation. That was a problem which would be dealt with in chapter V.

31. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to refer draft article O to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[17]

[17] For the consideration of the text proposed by the Drafting Committee, see 1447th meeting, paras. 3 and 12-26.

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)

32. The CHAIRMAN invited the Special Rapporteur to introduce chapter II of his report (A/CN.4/301 and Add.1), and, in particular, draft articles R, S, T and U, which read:

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

In the relations between the predecessor State and the successor State, a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the present articles.

Article S. Effects of the transfer of debts with regard to a creditor third State

State debts or fractions of State debts which, pursuant to the present articles or to agreements concluded between the predecessor and successor States, pass from the former to the latter do not, at the date of the succession of States and in consequence only of such transfer, become debts of the successor State vis-à-vis the creditor third State.

Article T. Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State

The debts of a predecessor State do not become, at the date of the succession of States, debts of the successor State in consequence only of the fact that the successor State has made a unilateral declaration by which it decides to assume responsibility for them.

Article U. Expression and effects of the consent of the creditor third State

The consent of the creditor third State to be bound by an agreement concluded between the predecessor State and the successor State, or by a unilateral declaration by the successor State, concerning State debts in a succession of States can result from the intention expressed or conduct engaged in by the third State or from any formal or tacit act by that State.

Such consent entails, with regard to the creditor third State, the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State.

33. Mr. BEDJAOUI (Special Rapporteur) said that chapter II of his report, which was devoted to the problem of the third State, dealt with the status of the creditor, whereas chapter I, which proposed a definition of State debt, dealt exclusively with the status of the debtor. There was thus a clear correlation between those two chapters, which complemented one another. That meant that chapter II would deal with the same problems as had been dealt with in chapter I in connexion with the source of the obligation and, in particular, the status of the creditor, which could be a State, an international organization, or a foreign public or private enterprise—in other words, a subject of public international law, or a legal person in foreign internal public law or again a physical person in foreign internal private law. It could therefore be questioned whether only the State should be taken into consideration as creditor. Before dealing with that problem, however, it was first necessary to consider the legal position of the creditor third State vis-à-vis the protagonists of the succession of States, namely, the predecessor State and the successor State.

34. The succession of States as such created an exclusive legal relationship between the predecessor State and the successor State. It ought not therefore to affect the creditor State—or, at least, it ought not to affect it without its consent.

35. The succession of States raised the problem of whether the rights and obligations which benefited or were incumbent upon the predecessor State should be transferred to the successor State. There lay the first difference between the problem of succession to rights—State property—and that of succession to obligations—State debts. In succession to State property, the problem was whether the successor State could benefit from property belonging to the predecessor State. The legal relationship thus existed only between the predecessor State and the successor State, for the patrimonial rights in question concerned them only. It had therefore been easy, in the case of succession to rights, to exclude the third State by saying that it was not affected by the legal relationship involved in the transfer or non-transfer of property from the predecessor State to the successor State. The Commission had thus been able to adopt an article X relating to the absence of effect of a succession of States on third State property.

36. But although a bilateral relationship existed in the case of State property, the same was not true in the case of the financial obligations of the predecessor State. He was not considering, for the time being, debts assumed by the predecessor State to the State which was to become the successor State, for it was quite obvious that such debts did not affect the third State and that they came within the context of the bilateral relationship between the predecessor State and the successor State. But in considering the predecessor State's debts to a third State, the legal relationship created by the succession of States between the predecessor State and the successor State was no longer just a bilateral relationship; it was a triangular relationship. It was therefore not possible to proceed in the same way as in the case of property, where the third State was not affected, for in the case of the predecessor State's debts to a third State, there were debt-claims to be taken into account—i.e., property belonging to the third State—and such property could not be dealt with by simply excluding the third State from the legal relationship between the predecessor State and the successor State.

37. Nevertheless, the rules of State succession which governed the fate of financial obligations—in other words, their transfer or non-transfer from the predecessor State to the successor State—had a relative effect, which was limited solely to the bilateral relationship created by the succession of States between the predecessor State and the successor State. The partial or total change of debtor to which those rules gave rise was not auto-

matically applicable in relation to the creditor third State. Before those rules could affect the creditor third State, it was necessary for the latter to express its consent to the legal novation involved.

38. The parallelism between the fate of property and of debts in the case of a succession of States was thus limited by the nature of the subject-matter, since property involved two partners and debts could involve three. A parallelism might, however, then be established between succession to debts and succession to treaties. It was on a twofold parallelism of that kind that draft articles R, S, T and U were based.

39. Draft article R, which related to the obligations of the successor State in respect of State debts passing to it, was based directly on the corresponding article 6 on State property.[18] Although it established a parallel between property and debts, draft article R indicated the major difference between property and debts, for it expressly stated that the rule enunciated had a relative effect, limited solely to the legal relationship between the predecessor State and the successor State. That indication had been unnecessary in article 6 because in the case of State property the relationship was solely bilateral, but in draft article R it was essential in order to reserve the rights of the creditor third State. The words "In the relations between the predecessor State and the successor State", at the beginning of draft article R therefore meant that the succession of States in respect of State debts created a legal relationship between the predecessor State and the successor State with regard to the debts between the predecessor State and a third State, but that the succession could not, in itself, create a direct legal relationship between the creditor third State and the successor State which had just assumed its predecessor's debts.

40. The succession of States thus had the effect of creating a new legal relationship between the debtor predecessor State and the successor State and enabling the former to shift on to the latter all or part of its debt —its financial obligation—to the creditor third State. However, the effects of the succession of States stopped there. The new "predecessor State/successor State" relationship did not affect the third State. It did not have the effect either of automatically extinguishing the old "predecessor State/third State" relationship or of automatically replacing it with a new "successor State/third State" relationship in respect of the debt in question.

41. A parallel between the problem of debts and the problem of treaties in cases of succession of States had been drawn in draft articles S, T and U.

42. Draft article S, which related to the effects of the transfer of debts with regard to a creditor third State, was modelled on article 8 of the draft articles on succession of States in respect of treaties adopted by the Commission in 1974.[19] In paragraph 106 of his report (A/CN.4/301 and Add.1), he had referred to the initial treaty relationship existing between the predecessor State and the third State; that reference might suggest that the source of the debt lay exclusively in that treaty relationship. In order to take account of the pertinent observations made by Mr. Castañeda during the discussion of chapter I of his report,[20] it would be preferable to refer simply to a "*de jure* relationship", the source of which could be an agreement or anything else. That *de jure* relationship, which had existed between the predecessor State and the creditor State, became the subject, either by application of a succession treaty—i.e., a devolution agreement between the predecessor State and the successor State—or by application of a rule of State succession, of a specific legal arrangement between the predecessor State and the successor State in respect of the debt in question.

43. When the predecessor State and the successor State established such a legal arrangement by application of a devolution agreement, the third State, in consequence of its debt-claim, possessed a right which the predecessor State and the successor State could not dispose of at their discretion. The general rules of international law concerning treaties and third States embodied in articles 34 to 36 of the Vienna Convention[21] quite naturally applied in such a case.

44. The agreement between the predecessor State and the successor State was not designed to be detrimental to the interests of the creditor State; rather, it was designed to protect the third State's debt-claim. As the Commission had stated, however, "the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States".[22]

45. He had therefore taken the liberty of proceeding by analogy and he had proposed a draft article S, based on article 8 of the draft articles on succession of States in respect of treaties. Draft article S meant that the customary or contractual rule by which all or part of the predecessor State's debt would be transferred to the successor State did not, in itself, have the effect of binding the creditor third State. The creditor third State had to express its consent to the transfer. Until such consent had been expressed, the predecessor State was not released from its debt to the creditor third State and the third State did not have a claim against the successor State equal in nature and amount to that which it had had against the predecessor State. By making a debt-claim against the successor State, the creditor third State expressed its consent to the change of debtor.

46. Draft article T, which related to the effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumed debts of the predecessor State, had been prompted by similar concerns and based on article 9 of the draft articles on succession of States in respect of treaties. According to that article, if the successor State decided unilaterally to assume the predecessor State's debts, such a unilateral declaration would be to the advantage of the predecessor State and also, theoretically, to that of the creditor State, for it would safeguard the debt jeopardized by the territorial

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

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

[20] 1417th meeting, para. 33.

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

[22] *Yearbook ... 1974*, vol. II (Part One), p. 184, document A/9610/Rev.1, chap. II, sect. D, article 8, para. (5) of the commentary.

change, which might have diminished the debtor predecessor State or even have caused it to disappear. However, except in the case where the predecessor State totally disappeared, the creditor State might have a political or material interest in refusing to agree to the change of debtor and in rejecting the unilateral declaration. It could base its decision on the personal relationship which it had had with the predecessor State. It might also consider that the successor State had taken over either too small or too large a share of the predecessor State's debt and that, consequently, its interests were not adequately protected. Two considerations were therefore to be taken into account—the solvency, respectively, of the predecessor State and the successor State as assessed by the creditor State, and the nature and quality of the political relations between the creditor State on the one hand and the predecessor and successor States on the other. Thus there was no automatic creation of a relationship between the successor State and the third State.

47. The questions how the consent of the creditor third State could be expressed and what effects such consent had were the subject of draft article U, which related to the expression and effects of the consent of the creditor third State. The first paragraph of that article provided that consent was expressed with regard either to an agreement concluded between the predecessor State and the successor State—a debt devolution agreement, or to a unilateral declaration by the successor State that it was willing to assume the debts of the predecessor State. The problem was whether a debt could be transferred from the predecessor State to the successor State simply by an agreement or unilateral declaration, or whether such transfer could not also be required by a rule of the law of State succession. In the latter case, it had to be determined whether, despite the existence of a rule of international law requiring the transfer of the debt, the consent of the third State was necessary. The rule in question would, in a way, be a relative or conditional rule, a rule in a state of suspension, which would have no effect vis-à-vis the creditor State until the latter gave its consent.

48. He had many doubts on that point and would be inclined to say that, in such a case, there was no enforceable rule of public international law applicable on the one hand, to the relations between the predecessor State and the successor State, and on the other, to the relations between the creditor third State and the two other States. On the face of it, he did not see how there could be a viable legal rule which would link the predecessor State to the successor State but which would have full effect between the predecessor State and the successor State and between those two States and the creditor third State only when that third State had given its consent. Either there was a rule of succession drawn from international law—and it must then apply to all the States involved in the triangular relationship—or the consent of the third State was necessary in which case it would seem pointless to speak of the existence of a rule of succession drawn from international law. That was why draft article U did not refer to the prior existence of such a rule of public international law. It was, in fact, in the rule embodied in draft article U, in which there was a meeting of the will of the third State and the will of the successor State, on the one hand, and a meeting of the combined wills of the predecessor State and the successor State, on the other, that the genuine rule of international law was to be found. It was that triangular relationship which could lead to the change of debtor, with all the legal consequences which such a change could have for the creditor third State.

49. Draft articles R, S, T and U nevertheless left unresolved the question whether only State debt-claims should be considered or whether it was also necessary to consider the debt-claims of other subjects of international law, such as intergovernmental organizations and international financial institutions, and those of private persons, such as foreign multinational corporations. That was the question which he intended to deal with next.

The meeting rose at 1 p.m.

1422nd MEETING

Wednesday, 18 May 1977, at 3.10 p.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

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

[Item 3 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE R (Obligations of the successor State in respect of State debts passing to it),

ARTICLE S (Effects of the transfer of debts with regard to a creditor third State),

ARTICLE T (Effects, with regard to a creditor third State, of a unilateral declaration by the successor State that it assumes debts of the predecessor State) *and*

ARTICLE U (Expression and effects of the consent of the creditor third State)[1] (*continued*)

1. The CHAIRMAN said that he wished to apologize for his unavoidable absence during the initial part of the session and to express his pleasure at the progress which had been made during that period under the guidance of the first Vice-Chairman.

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[1] For texts, see 1421st meeting, para. 32.