Document:-
**A/CN.4/SR.1450**

**Summary record of the 1450th meeting**

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

*The meeting rose at 1 p.m.*

[10] 1444th meeting, para. 56.

[11] See para. 4 above.

## 1450th MEETING

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

*Chairman:* Sir Francis VALLAT

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

## Succession of States in respect of matters other than treaties (*concluded*) (A/CN.4/301 and Add.1, A/CN.4/L.254, A/CN.4/L.256 and Add.1 and 2, A/CN.4/L.257)

[Item 3 of the agenda]

### Draft articles proposed by the Drafting Committee (*concluded*)

### Article 22 (Newly independent States) [1] (*concluded*)

1. The CHAIRMAN invited Mr. Schwebel to reply to the comments made on the text he had proposed for article 22 (A/CN.4/L.257).

2. Mr. SCHWEBEL said that, whereas some members of the Commission considered that paragraph 1 of his proposed text was defective because it admitted the possibility of the passing of State debts without agreement, he considered that possibility to be a virtue. Moreover, he could not accept the view that the passing of any debt to a newly independent State would render its independence meaningless or less meaningful, for there had been specific cases in which newly independent countries, such as Singapore, Malaysia, Kuwait and the Ivory Coast, had been able to afford to take over the debts of their predecessor States. He therefore believed that the rules which the Commission was formulating should be flexible enough to take account of the situation of such newly independent States.

3. A second consideration in support of paragraph 1 of his proposed text was that, since the debts with which the Commission was concerned were debts that had been contracted in colonial circumstances, their transfer had rightly been very narrowly confined to the particular circumstances to which he had referred in paragraph 1 of his draft. He had, moreover, given a certain weight to equitable considerations in that paragraph, though he had perhaps not given them sufficient weight, as Mr. Francis had observed.[2]

4. The third reason why he preferred the substance of paragraph 1 of his draft was that it provided an incentive for the conclusion of agreements by predecessor and successor States. That point, to which Mr. Reuter had referred,[3] was one which had not been covered in the text of article 22 approved at the previous meeting. It should, however, be borne in mind that it was desirable to have reciprocal agreements by which States could settle their differences and which would embody rights and obligations for all the parties involved.

5. With regard to paragraph 2 of his text, he noted that Mr. Francis had pointed out that it did not mention the capacity to pay. Although he agreed with Mr. Francis that the importance of capacity to pay was obvious and undeniable, he thought it would be inconceivable for two parties which negotiated an agreement concerning a debt not to take account of that capacity. Consequently, he had not thought it necessary to refer explicitly to the capacity to pay in paragraph 2.

6. That paragraph had also been criticized on the ground that permanent sovereignty was supreme and did not have to be exercised in accordance with international law. However, since the wording of paragraph 2 of his draft was based on that of article 1, paragraph 2, of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,[4] it had solid precedents, which, he assumed, no one would challenge. Even more important, however, was the fact that, if international law was to have any meaning or purpose at all, it had to be recognized that it was binding on all States, which could exercise their sovereign rights only in accordance with it.

### Article 20 (Effects of the passing of State debts with regard to creditors) (*concluded*) [5]

7. The CHAIRMAN invited the Commission to consider the title and text of article 20 as proposed by the Drafting Committee (A/CN.4/L.256/Add.2), which read:

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

**1. The succession of States does not as such affect the rights and obligations of creditors.**

**2. An agreement between predecessor and successor States or, as the case may be, between successor States concerning the passing of the State debts of the predecessor State cannot be invoked by the predecessor or the successor State or States, as the case may be, against a creditor third State or international organization [or against a third State which represents a creditor] unless:**

**(*a*) the agreement has been accepted by that third State or international organization; or**

**(*b*) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part.**

8. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, pursuant to the decision taken by the Commission at its 1447th meeting, the Drafting Committee had reviewed the text it had originally submitted to the Commission.[6]

9. The Drafting Committee had tried to take account of the comments made by some members during the consideration of the original text. In paragraph 1, the word "third-party" had been deleted because the Committee had considered that the omission would not alter the meaning of the rule embodied in that paragraph. The words "and obligations" had been added after the word "rights" in order not to leave the rule open to the interpretation that a succession as such could affect the aspect of the debt relationship involving the creditor's obligations arising out of the State debt.

10. The Drafting Committee had decided to redraft the introductory sentence of paragraph 2 in order to avoid any conflicts with the interpretation of the law of treaties, as codified in the Vienna Convention,[7] and in order to stress the non-opposability against a creditor of an agreement concluded between the predecessor and successor States or, as the case might be, between succes-

[1] For text, see 1449th meeting, para. 4.

[2] 1449th meeting, para. 28.

[3] *Ibid.*, paras. 20-21.

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

[5] See 1447th meeting, paras. 28-51.

[6] 1447th meeting, para. 3.

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

sor States concerning the State debt of the predecessor State. In that connexion, reference might be made to the concept of non-opposability reflected in Article 102 of the Charter of the United Nations. Paragraph 2 now provided that the agreement in question could not be invoked against a creditor unless one or the other of the conditions set out in subparagraphs (*a*) and (*b*) was fulfilled. In order not to make the text of paragraph 2 unduly heavy, the Drafting Committee had decided not to add a reference to other subjects of international law after the words "creditor third State or international organization", on the understanding that the rule embodied in that paragraph did apply to other subjects of international law. That understanding would be fully reflected in the commentary to article 20.

11. In conformity with the Commission's decision to retain the word "international" in square brackets in article 18, the Drafting Committee had decided that, although the words originally placed in square brackets in subparagraph (*a*) should be retained, they should be transferred to the introductory part of paragraph 2, which had been redrafted in such a way as to make clear the international character of the relationship involved. The word "creditor" had been deleted from subparagraph (*a*) in view of the new wording of the introductory part of paragraph 2. The words "or other arrangement" had been deleted from the introductory part of the paragraph and the words "or arrangement" from subparagraphs (*a*) and (*b*), in order to make it clear that the passing of State debts to which article 20 referred was that which took place by agreement.

12. Lastly, for the sake of consistency with other articles in the draft, the words "contained in Section 2 of Part II of these articles" in subparagraph (*b*), had been replaced by the words "of the articles in the present Part".

13. Mr. USHAKOV said that the new text of article 20 proposed by the Drafting Committee was an improvement on the previous one but still raised difficulties. The question arose, for example, whether the two conditions laid down in paragraph 2 (*a*) and (*b*) were cumulative. If they were not, what would happen if only one of them was fulfilled?

14. If the consequences of the agreement between the predecessor State and the successor State were in accordance with the provisions of the articles under consideration, but the agreement had not been accepted by the creditor third State, there were two possible situations: either the refusal of the creditor third State was invalid and the agreement could be invoked, even though the condition laid down in subparagraph (*a*) had not been fulfilled, or the acceptance of the creditor third State was necessary for fulfilment of the condition laid down in subparagraph (*b*), in which case the two conditions were cumulative.

15. Conversely, if the agreement had been accepted by the creditor third State, but its consequences were not in accordance with the provisions of the articles under consideration, was the agreement valid? He did not think so for, in his opinion, the creditor third State was required to accept an agreement between the predecessor State and the successor State only if that agreement was in accordance with the general rules on State succession in respect of debts. If the contrary was true, the agreement could not be invoked against a creditor third State, even if that State had accepted it.

16. He considered that, to solve the problem raised by the twofold condition in paragraph 2, it would be better to use a wording similar to that of article 19 of the Vienna Convention and say:

> "An agreement between the predecessor and successor States ... may be invoked ... against a creditor third State or international organization unless:
>
> "(*a*) the agreement has not been accepted by that creditor third State or international organization; or
>
> "(*b*) the consequences of the agreement are not in accordance with the provisions of the present articles."

17. Mr. SETTE CÂMARA said that his doubts about the new text of article 20 proposed by the Drafting Committee were similar to those expressed by Mr. Ushakov. Although paragraph 1 was easier to read now that its wording had been simplified, it was less accurate than the original version, which had referred to "third-party creditors". Moreover, the reference to the "rights and obligations of creditors" was confusing because it might also apply to the predecessor State or to the successor State.

18. He agreed with Mr. Ushakov that the use of the words "it shall not be effective unless", in paragraph 2 of the previous text, had been more consistent with the reality of the situations contemplated. The new paragraph 2 stated that an agreement could not be "invoked by the predecessor or the successor State or States ... against a creditor third State or international organization". If such an agreement could not be invoked by those States, it was because it was not valid.

19. Lastly, for the sake of consistency, the words which had been placed in square brackets in paragraph 2 should be repeated in subparagraph (*a*).

20. Mr. FRANCIS said that, in his opinion, subparagraphs (*a*) and (*b*) could mean that, even if a third State or international organization or a third State representing a creditor did not accept the agreement between the predecessor State and the successor State, that agreement could be invoked against them, thus defeating the purpose of the requirement that the third-party creditor had to accept any agreement between the predecessor State and the successor State. Thus, as it stood, that paragraph implied that, if a creditor third State accepted an agreement which was not in conformity with the basic premises of the draft articles, that agreement was valid. He therefore suggested that, in order to avoid any possible misinterpretation of article 20 and to take account of equitable principles, the Commission should consider whether it might not be advisable for subparagraphs (*a*) and (*b*) to have a cumulative effect. To produce that effect, it would be sufficient to replace the word "or" at the end of subparagraph (*a*) by the word "and".

21. Mr. SUCHARITKUL said that the basic rule laid down in article 20, paragraph 1, was not only a statement of fact but also a kind of introduction to subsequent rules, providing that the rights and obligations of third-

party creditors would not be affected by a succession of States without their consent. The acceptance of an agreement between predecessor and successor States by a creditor third State or international organization involved a process of novation leading to the creation of rights and obligations, which would be affected by a change of debtor and by differences in the capacity of the States involved to pay.

22. Article 20, paragraph 2, referred to "An agreement between predecessor and successor States or, as the case may be, between successor States". It did not, however, take account of the fact that, in the case of the dissolution or incorporation of a predecessor State, that State would cease to exist. Paragraph 2 (*a*) referred to the acceptance of such an agreement by a creditor third State or international organization, but did not make it clear how such acceptance should be expressed. He assumed that the Drafting Committee had intended that provision to be flexible so that a third State or international organization could accept an agreement either tacitly or expressly. In adopting such a provision, the Commission would be giving effect to the principle of consensus, which was particularly relevant in the present context since the passing of a State debt could, in any case, take place only with the consent of the creditor third State or international organization.

23. He suggested that, in the second line of paragraph 2, the words "or any part or parts thereof" should be added after the words "the State debts" to show that such debts could pass either *in toto* or, as had been envisaged in earlier drafts, in an equitable proportion. The words in square brackets at the end of paragraph 2 might imply automatic recognition of a process of subrogation, which would take the Commission into an entirely new area of international law, and he suggested that, in order not to prejudge the progressive development of international law in that area, those words should be deleted altogether.

24. Lastly, he suggested that paragraph 1 might be clearer if the words "as such" were placed immediately after the words "The succession of States".

25. Mr. QUENTIN-BAXTER said that, if the rules which the Commission was formulating were obligatory, then the logic of the situation would suggest that the provisions of subparagraphs (*a*) and (*b*) should, in fact, be cumulative as Mr. Francis had suggested. However, the Commission was not trying to formulate binding residual rules; it was merely offering some guidelines which might be of assistance to States in solving the very complex problems concerning property, rights and interests that arose in connexion with a succession of States. Consequently, subparagraphs (*a*) and (*b*) could not be cumulative in nature; they could only be alternatives from which the States concerned would be free to choose. If they chose to conclude agreements that were in accordance with the residual rules laid down in the draft articles, creditor third States or international organizations could have no objection to such agreements. If, however, the predecessor and successor States chose to conclude agreements which departed from the rules laid down in the draft articles, creditor third States or international organizations could either reject them or accept them, although they might do so only tacitly, as Mr. Sucharitkul had suggested.

26. In that connexion, he drew the attention of Mr. Sette Câmara and Mr. Ushakov to the fact that article 20, paragraph 2, which provided that an agreement between predecessor and successor States could not be invoked against a creditor third State or international organization which had not accepted it, did not mean that the agreement was not valid. Indeed, States had a perfect right to conclude any agreements they wished but third-party creditors were certainly not required to accept an agreement that departed from the basic principles laid down in the draft articles.

27. He believed that the principles embodied in article 20 were sound and that they were essential to the Commission's purpose of laying down residual rules that applied not only to predecessor and successor States but also to creditors.

28. With regard to Mr. Sucharitkul's suggestion concerning the words "as such" in paragraph 1, the present wording was more or less in keeping with wording used elsewhere in the draft articles so that the change might not be necessary. As to the drafting comment made by Mr. Sette Câmara, it was true that there might be some inconsistency between the introductory part of paragraph 2 and subparagraph (*a*). That discordance could be avoided by replacing the words "against a creditor third State or international organization", in the introductory part of paragraph 2, by the words "against a third State or international organization which is a creditor". That would make it perfectly clear that the reference to a third State or international organization in the introductory part of paragraph 2 also applied to subparagraph (*a*).

29. Mr. REUTER said that the new text of article 20 proposed by the Drafting Committee was both clear and reasonable. The French version was clear because the use of the word "*ou*" instead of "*et*" indicated, without any possible ambiguity, that the two conditions laid down in subparagraphs (*a*) and (*b*) were not cumulative. The rule stated was reasonable, since subparagraph (*a*) restated the fundamental principle of the relative effect of treaties while subparagraph (*b*) provided for an entirely exceptional derogation from that principle. In that connexion, he pointed out that, in stating the rule in paragraph 2, the Commission was recognizing that a treaty between States could produce effects for a third international organization.

30. With regard to the drafting point raised by Mr. Sucharitkul in regard to paragraph 1, he thought that it would be better to leave the expression *en tant que telle* where it stood in the French version.

31. Mr. DADZIE said that the present wording of article 20 was an improvement on the text previously proposed by the Drafting Committee. Up to the end of paragraph 2 (*a*), the article emphasized acceptance by a creditor third State or international organization of an agreement concluded by the predecessor State and the successor State. It did not say how such acceptance should be indicated or communicated but he assumed that the procedure would be the normal one.

32. His difficulty with the article lay in paragraph 2 (*b*). It seemed to indicate that that subparagraph would apply automatically if the third State did not accept the agreement between the predecessor State and the successor State. In other words, if the third State did not accept the agreement but the consequences of the agreement were in accordance with the other applicable rules of the draft articles, then the agreement could be invoked against the creditor third State. In his opinion, that provision meant that rules were being imposed on creditor third States, and he did not think that that was what the Commission had intended.

33. He would prefer the main emphasis of article 20 to be placed on the third State's acceptance of the agreement between the predecessor and successor States, for the fact that the consequences of that agreement were not in accordance with the other applicable rules of the articles might be the very reason why the third State had not accepted the agreement in the first place. Thus, the rule stated in article 20 should enable third-party creditors voluntarily to accept a change of debtor. If they did not accept the change, the former debtor would have to assume responsibility for the debt owed to them.

34. Mr. USHAKOV said that in his opinion it was absolutely impossible to invoke against a creditor third State an agreement that was contrary to the rules of international law, since such an agreement would still be unlawful even if the creditor third State accepted it.

35. With regard to the wording of the French version of paragraph 1, he would prefer the expression *n'affecte pas* to be used instead of *ne porte pas atteinte*.

36. Mr. QUENTIN-BAXTER said that the circumstances to which Mr. Ushakov had referred had nothing whatever to do with article 20, which neither permitted predecessor and successor States to conclude agreements that were contrary to the rules of international law nor required third States to accept the consequences of such agreements. That article did not, however, rule out the possibility that an agreement accepted by a third State or international organization might not be in accordance with the residual rules laid down in the draft articles, since the predecessor and successor States were not bound to comply with those rules in concluding an agreement. The main purpose of the article was, nevertheless, to protect the rights of creditor third States and international organizations whose interests might be prejudiced by agreements the consequences of which were not in "accordance with the residual rules laid down in the draft articles.

37. Referring to Mr. Dadzie's comments, which seemed to relate to the question whether the draft articles dealt only with a bilateral relationship or applied also to a triangular relationship, he said he had originally had some doubts about the possibility of a triangular relationship. He had, however, come to believe that the Commission should discuss such a relationship so that the rules it was formulating would be generally valid. The alternative was, as Mr. Dadzie had pointed out, to allow the creditor third State or international organization to accept or reject the agreement between the predecessor and successor States, but such an alternative worked both ways. For example, if, in the case of the dissolution of a State in which the predecessor State ceased to exist, the Commission said that the creditor State was free to accept or reject the agreement concluded by the successor States, that would surely imply that the successor States were also free to accept or repudiate the debt in question. Thus, if it was desired to give creditors the advantage of established rules of succession, they must also be required to accept solutions which were in accordance with those rules.

38. Mr. SCHWEBEL said that the members of the Commission seemed to agree on article 20, paragraph 1, although Mr. Sette Câmara had questioned whether it was clear that the word "creditors" meant "third-party creditors". Since there was no doubt that that was, in fact, what the Commission intended the word "creditors" to mean, that intention should be clearly explained in the commentary.

39. With regard to the questions raised by Mr. Francis and Mr. Dadzie in connexion with paragraph 2, he had found the explanations given by Mr. Quentin-Baxter and Mr. Reuter persuasive. As to the example given by Mr. Ushakov, he thought that it was quite clear that article 20 applied only to agreements relating to the passing of State debts.

40. Mr. Sucharitkul had raised an important point of substance in asking whether the Commission was not entering a new area of international law by retaining the words in square brackets in paragraph 2. He (Mr. Schwebel) believed that it was not, because in that area as much as in any other there were ample precedents. For example, States often represented bond holders. He therefore considered that the words in square brackets in paragraph 2 should be retained.

41. Mr. Sucharitkul had also suggested that the words "or any part or parts thereof" should be added after the words "the State debts" in paragraph 2. That was a valid suggestion but he thought that the Commission could deal with it in a more elliptical way by replacing the words "the State debts" by the words "State debt", which would also provide for the possibility of the passing of only part of a State's debts.

42. In conclusion, he said that, since the words "as the case may be", which appeared twice in paragraph 2, did not make the meaning of that paragraph any clearer, he thought they should be deleted.

43. The CHAIRMAN said he thought that the Commission could easily agree on article 20, paragraph 1. Although he was not sure about Mr. Ushakov's suggestion concerning the French text of that paragraph, he would point out that the English text was based on the precedent of article 11 of the draft articles on succession of States in respect of treaties.[8]

44. Article 20, paragraph 2, had, of course, given rise to discussion of some important substantive issues but he thought that, on the whole, the present text could be considered as a satisfactory result on first reading. All points raised and views expressed in connexion with the article would, in any case, be reflected in the commentary, and the drafting comments that had been made

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

would be considered again during the second reading of the article.

45. Referring in particular to the comment made by Mr. Francis concerning paragraph 2 (*a*) and (*b*), he said that, on balance, he thought those two subparagraphs should continue to be regarded as alternatives because they embodied residual rules, not rules of *jus cogens*. He suspected that Mr. Schwebel's suggestion concerning the deletion of the words "as the case may be", which appeared twice in paragraph 2, would give rise to a lengthy discussion. That suggestion might therefore be considered at a later stage.

46. The Commission might, however, agree to Mr. Schwebel's suggestion that the words "the State debts" in paragraph 2 be replaced by the words "State debt". It might also agree to Mr. Quentin-Baxter's suggestion that the words "against a creditor third State or international organization", in paragraph 2, be replaced by the words "against a third State or international organization which is a creditor".

47. If there was no objection, he would take it that the Commission agreed to adopt the drafting changes he had mentioned and to approve the title and text of article 20 proposed by the Drafting Committee with those amendments.[9]

*It was so agreed.*

**Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/285,[10] A/CN.4/290 and Add.1,[11] A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)**

[Item 4 of the agenda]

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

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

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) [12] (*continued*)

48. The CHAIRMAN invited the Special Rapporteur to introduce the drafting changes he proposed to make in the Drafting Committee's texts of articles 20 and 20*bis*.

49. Mr. REUTER (Special Rapporteur) said that those changes were the result of the discussion on articles 20 and 20*bis* which had taken place at the 1448th meeting.

50. Members of the Commission had pointed out that the category of treaties to which article 20 applied was indicated only in paragraph 1 and that it would be advisable to specify, at least at the beginning of each paragraph, that the treaties in question were treaties between several international organizations. In the opening phrase of paragraph 2, the words "of the treaty" should accordingly be replaced by the words "of a treaty between several international organizations"; in the introductory part of paragraph 3, the words "between several international organizations" should be inserted after the words "the treaty"; and in the opening phrase of paragraph 4, the words "between several international organizations" should also be inserted after the words "the treaty".

51. The following changes should be made to article 20*bis*. In view of the difficulties raised by the expression "as the case may be" and the enumeration following it at the end of paragraph 1, the whole of the last part of that paragraph, from the words "as the case may be", should be replaced by the words "the contracting State or States or the contracting international organization or organizations". The formula he had proposed at the 1448th meeting, "the other contracting parties, State or States, organization or organizations", had the disadvantage that the Commission would have been obliged to define the term "contracting party" in addition to the terms "contracting State" and "contracting organization", which were already defined in draft article 2.[13]

52. The first clause of paragraph 2 required the same kind of clarification as the corresponding provision in article 20: the words "the treaty" should be replaced by "a treaty between States and one or more international organizations or between international organizations and one or more States".

53. Paragraph 3 should be replaced by the following text:

"3. In cases not falling under the preceding paragraphs and unless the treaty between States and one or more international organizations or between international organizations and one or more States otherwise provides:

"(*a*) acceptance of a reservation by a contracting State or a contracting international organization constitutes the reserving State or organization a party to the treaty in relation to the accepting State or organization if or when the treaty is in force between the State and the organization or between the two States or between the two organizations;

"(*b*) an objection to a reservation by a contracting State or a contracting international organization does not prevent the treaty from entering into force

"between the objecting State and the reserving State,

"between the objecting State and the reserving organization,

"between the objecting organization and the reserving State, or

"between the objecting organization and the reserving organization unless a contrary intention is definitely expressed by the objecting State or organization".

Subparagraph (*c*) remained unchanged.

54. In the introductory phrase of paragraph 3, the words "between States and one or more international organizations or between international organizations and one or more States" had been inserted after the words

[9] See para. 7 above.

* Resumed from the 1448th meeting.

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

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

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

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

"the treaty". To avoid problems of interpretation, subparagraph (*a*) had been drafted in terms that were closer to those of the corresponding provision of the Vienna Convention, namely, paragraph 4 (*a*) of article 20; three cases of the entry into force of treaties were now covered. Subparagraph (*b*) had also been brought closer into line with the corresponding provision of the Vienna Convention, and four cases were provided for. The new draft of that provision was cumbersome but had the merit of being precise, and it seemed that in that case precision should take precedence over elegance of style.

55. He suggested that, in paragraph 4, the words "a contracting State or organization" should be replaced by the words "a contracting State or a contracting international organization".

56. Mr. FRANCIS observed that no provision of the kind contained in article 20, paragraph 3, of the Vienna Convention appeared in either article 20*bis* as proposed by the Special Rapporteur in his fifth report (A/CN.4/290 and Add.1) or article 20*bis* as proposed by the Drafting Committee. In the commentary to article 20*bis* in his report, the Special Rapporteur had discussed that omission in the context of the improbability of the formation by two international organizations, in the foreseeable future, of a third international organization of which they themselves would be the sole members. He did not remember whether the Special Rapporteur had also commented at any stage on the possibility of the existence of an international organization comprising States and one international organization; he would be grateful for clarification on that point for it seemed to him that, if such an organization could exist, a provision akin to that of article 20, paragraph 3, of the Vienna Convention should be included in article 20*bis* of the draft.

57. The fact that article 20*bis*, paragraph 2, proposed by the Drafting Committee referred only to the "object and purpose" of a treaty, whereas article 20, paragraph 2, of the Vienna Convention referred to both the "object and purpose" of the treaty and the "limited number" of negotiating entities did not of itself create a problem. There was, however, the problem of determining which of article 20*bis*, paragraph 2, and article 19*bis*, paragraph 2, should prevail over the other, and of reconciling the answer with the dominant provision of article 20*bis*, paragraph 1. For example, it could be argued from article 19*bis*, paragraph 2, that, when the participation of a given international organization in a treaty was essential to that treaty, the organization must have the power to formulate reservations. However, given the fact that the organization's participation was essential to the treaty, should a reservation entered by the organization be subject to acceptance in accordance with the provisions of article 20*bis*, paragraph 2? If that was indeed the case, article 20*bis*, paragraph 1, would make no sense.

58. Although he was aware that article 20, paragraph 3 (*c*), and the corresponding provision of article 20*bis* followed, *mutatis mutandis*, the language of article 20, paragraph 4 (*c*), of the Vienna Convention, he thought that both should be amended since they made no sense as they stood. It was not the "act expressing the consent" of a State or an international organization to be bound by a treaty, subject to a reservation, which was ineffective until that reservation had been accepted but the consent itself. The act would always have an effect, for it was what moved the existing contracting parties to accept or reject the reservation in question. Consequently, he thought that, in both articles 20 and 20*bis*, the first part of paragraph 3 (*c*) should be redrafted to read: "the consent of a State or an international organization to be bound by the treaty, subject to a reservation, is effective as soon as ...".

59. In both articles, he would prefer the revised subparagraph to become the first subparagraph of paragraph 3, the present subparagraphs (*a*) and (*b*) becoming subparagraphs (*b*) and (*c*) respectively.

*The meeting rose at 1 p.m.*

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## 1451st MEETING

*Friday, 1 July 1977, at 10.10 a.m.*

*Chairman:* Sir Francis VALLAT

*later:* Mr. José SETTE CÂMARA

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

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

[Item 4 of the agenda]

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

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

ARTICLE 20*bis* (Acceptance of reservations in the case of treaties between States and one or more international organizations or between international organizations and one or more States) [3] (*concluded*)

1. The CHAIRMAN said that, if there was no objection, he would take it that the Commission approved the texts of articles 20 and 20*bis* proposed by the Drafting Committee, as orally amended by the Special Rapporteur at the previous meeting.

*It was so agreed.*

2. Mr. USHAKOV introducing his proposal for an article 20, entitled "Acceptance of reservations and objections to reservations" (A/CN.4/L.253), said that the article

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

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

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