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Summary record of the 1504th meeting

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

Extract from the Yearbook of the International Law Commission:-
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of India, which had been a member of the League of Nations. Moreover, in 1945 a separate delegation had represented India at the San Francisco Conference at which the Charter of the United Nations had been drafted. Thus although it could be affirmed that at that time the Dominion of India had had separate international legal personality, its dominion status had been materially different from that of Canada, for example. In the negotiation of treaties entailing obligations for India, the spokesman for India had in almost every instance been a British national. Not until September 1946, when an interim Government had been established, had an Indian national become the minister responsible for India's external affairs. Consequently, although India had in some sense acquired treaty-making capacity, such capacity had not been that of a truly independent State. Until India's accession to independence, ultimate responsibility for its international relations had remained with the United Kingdom. In 1947, therefore, India would have come under the definition of a newly independent State contained in article 3 (*f*) of the draft, although it must be remembered that that definition reflected a concept that had emerged only after 1955, largely as a result of the practice of African States.

27. Between the announcement of independence for India and the date of the transfer of power under the Indian Independence Act passed by the United Kingdom Parliament in July 1947, the Governor-General, with the assistance of representatives of India and of what was later to become Pakistan, had issued numerous Orders-in-Council specifying the obligations to be assumed by India and by Pakistan in such matters as treaty obligations, property, debts and other financial matters. No mention had been made, however, of the relations between the United Kingdom and India itself, and no separate devolution agreement had been concluded between the two countries, for the United Kingdom had maintained that India, upon accession to independence, would undergo a qualitative and quantitative change in its international legal personality, but that that personality could not be regarded as being newly acquired. The question had therefore arisen whether the State of India had been dissolved or whether Pakistan could be considered as territory that had separated from India. The United Nations Counsel had expressed the opinion that India continued to have international legal personality and, unlike Pakistan—a State that had come into being as a result of the separation of territory from India—it did not have to reapply for membership of the United Nations. Hence the case of India and Pakistan had not been a case of dissolution in 1947. India had respected that position until about 1968, despite the emergence of what might be termed the "clean-slate" concept of a newly independent State.

28. There had, however, been cases in which the parties to treaties concluded by the United Kingdom on behalf of India had claimed that, in view of the political changes that had occurred, the treaties were no longer in force and would have to be renegotiated with India, which must be treated as a newly independent State. Such cases had occurred even though India had still considered itself a party to the treaties. India had not yet come to a firm conclusion on the matter, but it was clear that, on balance, although in practice they had observed treaty obligations incurred prior to 1947, India and Pakistan should be described as newly independent States rather than as successor States resulting from the dissolution of a State.

29. With regard to article 25, it was indeed difficult at times to differentiate between cases of separation of a part of the territory of a State and cases of dissolution of a State. Nevertheless, that was still a sound distinction and, although it gave rise to difficulties of interpretation, it should be maintained.

30. The two paragraphs of the article should be numbered and the wording of the second paragraph should be brought into line with that of paragraph 1 of article 24, which used the words "taking into account, *inter alia*", rather than the words "taking into account such factors". In addition, it might be advisable to determine whether paragraph 1 of article 24 included, by implication, the factor of the successor State's "tax-paying capacity", referred to in article 25. He shared Mr. Ushakov's view that the first paragraph of article 25 should be harmonized with the introductory paragraph of article 16; the positive formulation of article 25 imposed an obligation on the States concerned, and account should be taken of the fact that agreement was sometimes extremely difficult, if not impossible, in the case of the dissolution of a State, which was a painful affair. The use of the word "disappears" caused him no difficulties; nor, for that matter, did the use of the word "dissolution", although he would not object to its being replaced by the term "break-up". Lastly some members appeared to see a link between article 25 and article W. But since any form of State could be dissolved, and not only a union of States, it was desirable to retain the formula used at the beginning of article 25, which referred simply to "a State".

The meeting rose at 6 p.m.

1504th MEETING

Tuesday, 20 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Castañeda, Mr. Dadzie, Mr. El-Erian, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

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

[Item 3 of the agenda]

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

ARTICLE 25 (Dissolution of a State)[2] (*continued*)

1. Mr. CASTAÑEDA said that the Special Rapporteur had been right to deal separately, in articles 24 (A/CN.4/313, para. 26) and 25, with the cases of separation of part of a State and dissolution of a State. He realized, however, that it was sometimes difficult to make any clear distinction between the two cases. The Special Rapporteur had had in mind, in drafting article 24, instances where only a relatively small part of a State's territory separated to form a new State, so that the basic identity of the predecessor State was preserved. Article 25 was intended to cover the very different case in which the predecessor State broke up into several States.

2. It would be difficult, however, to place firmly in either category a situation in which, for example, one of the constituent states left the United States of America; the union as recognized before the event would indeed be disrupted, but the United States as a country would in all probability continue to exist. Opinions might differ even with regard to historical events; for example, his own view concerning the demise of the Austro-Hungarian Empire was that, although the Empire had split into four roughly equal parts, there had been an element of continuity, for one of those parts had retained from the days of the Empire its name and capital, which international law viewed as important symbols of national identity. He believed that, from the legal point of view, the difference between separation and dissolution was not fundamental but a matter of degree.

3. He agreed with Sir Francis Vallat (1503rd meeting) that political factors must be taken into account in determining the passing of debt. Since it seemed impossible to mention all the relevant factors in the article, it would have to be tacitly understood that such factors were always present. Other elements that must be taken into account in assessing responsibility for State debt were, as the article already indicated, equity, capacity of the successor State to pay, and the property, rights and interests that passed to it. The Special Rapporteur had been justified in laying the emphasis in article 24 on the passing of debt in accordance with considerations of equity and in article 25 on its passing on the basis of agreement between the successor States. That distinction constituted the main difference between the two articles.

4. He approved the suggestions of Mr. Ushakov and Mr. Jagota[3] concerning the reconciliation of the wording of article 25 with that of other articles. That task should be undertaken by the Drafting Committee, to which the article might now be referred.

5. Mr. VEROSTA pointed out that the Danubian Monarchy had been formed from the union, under international law, of three historical units: the Austrian Empire, including Slovenia and the city of Trieste; the Kingdom of Bohemia, including Moravia and Silesia; and the Kingdom of Hungary, including Croatia. A union had first been formed in the seventeenth century between Austria and Bohemia, which had come together after the Thirty Years' War in order to ward off the Ottoman danger and had adopted a common administration, centred in Vienna. Hungary had remained a separate entity. Its position had been confirmed in 1867, so that the Danubian Monarchy, dissolved in 1918, had consisted of two States: on the one hand the Austrian Empire, comprising Austria and Bohemia, part of Poland and Dalmatia, and on the other hand the Kingdom of Hungary. The Austrian Empire had been completely dissolved, for Bohemia had seceded and Austria had been established as a new State; the Poles of Galicia had joined Poland, while Dalmatia had been divided up between Yugoslavia and Italy. Hungary, however, although shorn of two thirds of its territory, had insisted on preserving its identity, a circumstance that showed clearly that the distinction to be made between cases of separation and cases of dissolution depended not only on the size of the territory concerned but also on the will of the parties.

6. It was therefore impossible to speak of dissolution of a State, within the meaning of article 25, in the case of the Austrian Empire, whch had disappeared and given birth to two new States: Czechoslovakia, including a part of northern Hungary, and Austria, divested of its Slovene and Italian territories. The disappearance of the Austrian Empire had of course led to difficulties at the Peace Conference (Paris, 1919), where the Allies had been faced with two new States: the Czechoslovak Republic and the Republic of Austria. Under the Treaty of Saint-Germain-en-Laye, therefore, the Republic of Austria had been obliged, for form's sake, to cede territories which, as a new State, it no longer possessed. Unlike the dissolution of the Austrian Empire, the dissolution of the Danubian Monarchy was not the type of State succession referred to in article 25, for it had involved the dissolution not of a State but of a political union, a topic not covered by the draft articles. The Danubian Monarchy had in fact been a dual monarchy, consisting of two separate States, the Austrian Empire and the Kingdom of Hungary, which had been dissolved as a result of the disappearance of one of its members, namely, the Austrian Empire.

7. The wording of article 25 should be brought into line with that of the other articles and the reference to the capacity of the successor State to pay should be deleted. In mentioning that criterion, the Special Rapporteur had probably had in mind newly independent States. It might perhaps be mentioned in arti-

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

[2] For text, see 1503rd meeting, para. 1.

[3] 1503rd meeting, paras. 22 and 30 respectively.

cle 22[4] that, in cases where the successor State was a newly independent State, its capacity to pay should be taken into account for purposes of the passing of State debts.

8. Mr. ŠAHOVIĆ supported the position of the Special Rapporteur as reflected in article 25 and explained in chapter III of his tenth report (A/CN.4/313). The Special Rapporteur had been faced with a difficult situation, for he had been obliged to deduce general rules from highly diverse practice. He had rightly distinguished between separation of one or more parts of the territory of a State and dissolution of a State, because in the latter instance the predecessor State disappeared, whereas in the former it continued to exist.

9. The question arose, however, whether the Special Rapporteur had been right to emphasize in the report the distinction to be drawn between the situation of a unitary State and that of a federal State. The rule enunciated in article 25 should be broad enough to cover both situations, for in either case dissolution of a State was involved, and he hoped the Drafting Committee would formulate a sufficiently clear rule in that respect. The commentary, moreover, should indicate that the rule was a general one and applicable both to unitary and to federal States.

10. The problem posed by the application of the principle of equity had to be considered in the light of the Commision's report on the work of its twenty-eighth session,[5] which clearly indicated the direction to be followed in that respect. It might well be questioned whether emphasis should be placed on certain aspects of that principle, for example on the successor State's capacity to pay, to which the Special Rapporteur had referred in the second part of the article. Was it a matter of the principle of equity in general or of equitable principles, such as the International Court of Justice had sought to apply in certain cases? The Commission's intentions in that regard would have to be clarified.

11. In conclusion, he proposed that the wording of article 25 as a whole should be maintained, taking into account the comments of a purely drafting nature that had been made.

12. Mr. SUCHARITKUL wholeheartedly approved the wording of article 25. If a State were dissolved and disappeared without the formation of two or more States from the parts of its territory, there would be no succession of States, since there would be no successor State and the territory of the vanished State would become *terra nullius*. However, a case of that kind had never as yet occurred, and there was consequently no reason to provide for it.

13. In the case covered by article 25, where the parts of the territory of the predecessor State formed two or more States, it was fitting that the apportionment of the State debts of the predecessor State should be settled by agreement among the successor States, without the intervention, approval or participation of the predecessor State or the creditor third State.

14. The Special Rapporteur had also been right to provide that, in the absence of agreement, "the State debts of the predecessor State shall be assumed by each successor State in an equitable proportion, taking into account such factors as its tax-paying capacity...".

15. A further point was that a change in the name or title of a State—a very common phenomenon in South-East Asia—did not alter the personality of the State if there was evidence of legal continuity in its international personality. That was true of Burma, which had changed its title a number of times since its accession to independence. It was also true of the newly independent States that had formerly made up French Indo-China, such as Cambodia and Laos, which were not covered by article 25; the case of the unification of Viet Nam in 1975 did not come under article 25 either, but under article W.[6]

16. However, there was a lacuna in the draft articles in connexion with the establishment of Malaysia in 1963. That State had not been a newly independent State, for it had consisted of the former Federation of Malaya, already independent, and the territories of Sabah and Sarawak. Nor had there been annexation or dissolution of a State within the meaning of article 25. The Federation of Malaya had been totally dissolved and had ceased to exist in law, but its parts had not formed two or more States, because the entire territory of Malaya had become part of the new State. Consequently, the case of the creation of Malaysia was not completely covered by the article. However, the problem posed by that case had not been difficult to resolve, for Malaysia had succeeded to all the State debts of the former Federation of Malaya.

17. Mr. NJENGA congratulated the Special Rapporteur on his introduction of article 25 and on his comprehensive commentary on the question of dissolution. As other speakers, particularly Sir Francis Vallat (1503rd meeting), had pointed out, the Commission should seek, in dealing with dissolution, to protect not only the successor States but also the creditors of the predecessor State. That was a very important point and, although the article took it into account to some extent, the Drafting Committee should try to allay still further the natural fear of a creditor that, in the event of the predecessor State "disappearing" creditors might find themselves at the mercy of a variety of successor States all seeking to evade their predecessor's obligations. In that connexion, he agreed with the comment made by Mr. Tabibi at the previous meeting concerning the use in the article of the word "disappears".

[4] See 1500th meeting, foot-note 8.

[5] See *Yearbook... 1976*, vol. II (Part Two), pp. 131-133, doc. A/31/10, chap. IV, sect. B, 2, introductory commentary to section 2, paras. (12)-(24).

[6] See 1500th meeting, para. 21.

18. The object he had in mind might be achieved by indicating more fully how the "factors" referred to in the second paragraph of the article would be related to the State debts concerned. The need for clear-cut rules on that point was a real one. If there had been no debt-sharing problems on the termination of the unions between Norway and Sweden and between Denmark and Iceland, that had no doubt been because most of the debts contracted by those unions had related to diplomatic activities. But if a State were dissolved as a result of civil war or external interference, the successor States would probably be as little disposed to agree amicably on their respective responsibilities for the obligations of their predecessor as—to borrow an analogy from the Special Rapporteur—the parties to a divorce. Similarly, if the break-up of the unions between African States to which the Special Rapporteur had referred in his report had not created any problem for the creditors of those unions, it was probably because the unions had not existed long enough to incur serious debts. But creditors might find that even major claims were ignored if the Commission did nothing to prevent a return to the *status quo ante* in the event of the dissolution of a State or union that had been in existence for some time. Moreover, the Special Rapporteur had drawn attention to the fact that the apportionment of debt in accordance with the principle of equity was complicated by differing views as to what was equitable. It would be helpful, therefore, if the article were made more detailed, along the lines of article 16.

19. It was ultimately a State's tax-payers who bore the burden of its financial obligations. While accepting the idea that, following dissolution, all those who had been tax-payers of the predecessor State might be asked to continue their contribution to the reimbursement of its general debt, he did not think it would be fair to charge them for debts incurred in connexion with the construction of facilities, such as dams or railways, which the drawing of the new boundaries placed in the territory of a successor State other than their own. The Commission should make it clear that debts of a prticular character should pass to a particular successor State; it might do well in that respect to consider the inclusion in the article of a rule like the one suggested by Fauchille, and quoted by the Special Rapporteur in paragraph 73 of his tenth report (A/CN.4/313). Such a rule would benefit both successor States and creditors.

20. Mr. EL-ERIAN said that the Special Rapporteur's written and oral introductions to article 25 demonstrated the wealth of scholarship and painstaking research the Commission had come to expect from him. He agreed with the Special Rapporteur's contention that there should be two separate articles on the distinct situations of separation and dissolution, although admittedly the dividing line between those situations was not always clear. Because of that lack of clarity, it was necessary, when assessing the value of historical decisions as precedents for instances of separation or dissolution, to ask why the rules underlying the decisions had been applied.

21. For several reasons, it was difficult to say whether the break-up of the United Arab Republic, mentioned by the Special Rapporteur (A/CN.4/313, para. 57), had been an instance of separation or of dissolution. First, the formal situation—the merging of Egypt and Syria to form a unitary State—had differed from the real situation, namely, that for all practical purposes, and despite the existence of a central government and parliament, the State had embraced two separate regions, Egyptian and Syrian. Three elements of particular relevance to the Commission's current work were those it had noted in connexion with its draft articles on succession of States in respect of treaties: (*a*) the fact that, prior to uniting, both regions had been internationally recognized as fully independent sovereign States; (*b*) the fact that the process of uniting had been regarded not as the creation of a wholly new sovereign State or as the incorporation of one State in the other but as the uniting of two existing sovereign States into one; (*c*) the explicit recognition by Egypt and Syria of the continuance in force of the pre-union treaties of both component States in relation to—and only to—their respective regions, unless otherwise agreed.[7] Against that background, the decision of the United Nations not to require the newly formed United Arab Republic to make its own application for membership of the Organization, but to consider the union as the successor to two earlier Members, Egypt and Syria, which had merged into one Member, must be seen as a pragmatic one. The decision reached by the Organization concerning the membership of Egypt and Syria upon the break-up of their union had also been pragmatic: Egypt, having declared that Syria had seceded from the United Arab Republic and that the latter remained in existence, had had no problem in obtaining recognition for its continued membership of the Organization, while Syria had been allowed to resume its former, separate seat, on the assumption that its original membership of the United Nations had been in abeyance during its participation in the union.

22. With regard to India's membership of the League of Nations and of the United Nations, to which Sir Francis Vallat had alluded at the previous meeting, it should be remembered that, under the League of Nations Covenant (art. 1, para. 2), membership of the League had been open to "any fully self-governing State, Dominion or Colony". Membership of the United Nations was admittedly restricted by the Charter to "States", and not only India but also the Philippines had doubtless been admitted as original Members in anticipation of their imminent accession to full independence. Furthermore, in 1952, in the *Case concerning rights of nationals of the United States of America in Morocco,*[8] the International

[7] *Yearbook... 1974*, vol. II (Part One), p. 258, doc. A/9610/Rev.1, chap. II, sect. D, articles 30, 31 and 32, para. (24) of the commentary.

[8] *I.C.J. Reports 1952*, p. 176.

Court of Justice had ruled that Morocco had been a State at the time it had been linked with France by a protectorate treaty. That seemed to confirm the view that an entity exhibiting all the internal, if not the external, characteristics of a State might be considered to be a State.

23. Since the word "disappears" had caused problems, the Commission might wish to reconsider its use in article 25 (and also in article 16), or to include in the commentary an invitation to governments to comment on the advisability of altering the word or deleting it. Meanwhile, he would ask the Special Rapporteur to explain why he had thought it necessary to use both the terms "is dissolved" and "disappears". In any event, what disappeared was clearly the predecessor State's structure, and not its people or territory. He doubted whether the expression "tax-paying capacity", in the English version, was the most felicitous translation of the French term "capacité contributive".

24. Mr. QUENTIN-BAXTER observed that the Commission's draft so far displayed three separate approaches to the question of agreements, reflecting three different kinds of situation. In the case of newly independent States, the Commission had referred to the possibility of an agreement in a cautionary manner only, the aim being to maintain the "clean slate" principle, the right to self-determination and the notion that the new State should not be prejudiced by arrangements reached before or upon independence. In the case of the transfer of part of the territory of a State, the Commission had quite properly presumed that the States concerned would reach an agreement; where it was a question of a border adjustment involving no act of self-determination on the part of a group of people whose nationality changed, the conterminous States must be assumed to be making the adjustment by agreement, otherwise they would probably be acting in accordance with criteria no longer recognized as those of an ordered international society. In the cases of separation of part of a State and of dissolution of a State, the way had been left open for States to reach agreement in the hope that they would do so, the residuary provisions of the draft providing them with reasonable guidance; however, the Commission had not presumed that they would necessarily conclude an agreement, in view of the difficulties that might be inherent in a given situation. In article 25, therefore, he would prefer the Commission to use the formula adopted in articles 15, 16 and 24.

25. The difficulty in distinguishing between cases of separation and dissolution was generally recognized, and the various references made in that connexion, for instance to the precedent of the Austro-Hungarian Empire, showed that, other things being equal, the international community tended to defer to the choice made by the States directly concerned. The Commission had rightly seen fit, in articles 15 and 16, concerning succession to property, as well as in the articles under consideration, concerning debts, to maintain substantially the same rules for both kinds of case, so that there were no artificial compulsions or inducements for States to prefer one form to the other. The possibility of hybrid cases, presenting some aspects of both, had to be recognized. In that connexion, he considered that the extension of Malaysia to include Sabah, i.e. North Borneo, would fall within paragraph 2 of article 24, since it involved the transfer of territory from one sovereign to another, not in simple terms of a frontier adjustment but primarily on the basis of the right to self-determination of the peoples affected. The system of categories evolved by the Special Rapporteur would thus appear to be sufficiently flexible to meet the different circumstances that might arise.

26. As would be seen from the articles on property, with which those under consideration were closely linked, the question of equity arose at two different levels. It was a governing rule, and one not involving the principle of equity, that certain property must pass to the successor State; for instance, there was a very strong presumption that immovables situated in the territory of the successor State belonged to that State. Movables indispensable to the activities of the successor State were likewise held to pass to that State. Where other movable property was concerned, however, the notion of equity—in the sense of an equitable proportion or apportionment—came into play, and at a second level the notion of equitable compensation. In other words, if the first pair of rules, relating to immovables and to movables connected with essential activities of the State, yielded a result particularly favourable to one successor State as opposed to another, or as opposed to the predecessor State, that must be taken into account when apportioning movable property not governed by those two rules. That seemed to him to be both reasonable and entirely in keeping with the Commission's intention.

27. In the case of debts, it would seem that the reference to property, rights and interests was intended to convey the idea that those who reaped the benefits also assumed the related obligation. In a sense, therefore, that reference introduced the notion of equity at both levels. However, it left open the questions of capacity to pay, introduced in article 25 but not in article 24, and of the direct connexion of the debt with the property that passed. There again, it would seem that some flexibility was called for and that it must be recognized that the principle of equity applied both to debts and to property at the two levels. The contention that there could be no absolute relationship between immovable property or property necessarily passing to the State and the charges borne by that property, which was particularly compelling in the case of newly independent States, might also have some residual application in other cases of separation or dissolution. A successor State finding itself the possessor of property that it would not have considered worth the outlay should not be burdened with all the related charges. *Prima facie,* therefore, the proposition should be that the benefit of a particular piece of property that passed carried with it the obligations relating to that property, but that,

where there was no such relationship and the debt was a general one, the ordinary principles of equitable distribution should apply. There was much to be said for the view that the criterion of capacity to pay had a place not only in article 25 but also in article 24. Possibly the point could be met by further aligning article 15 with article 24 and article 16 with article 25, so that the nuances of equity would operate at both levels in relation not only to property but also to debts.

28. Lastly, he noted that the draft catered extensively for the position of creditors. It applied the principle that responsibilities and obligations would continue, and in article 20 (Effects of the passing of State debts with regard to creditors) it laid down the basic proposition of all succession law, namely, that the internal law continued until the new sovereign changed it; if it were so changed then, by implication, the new sovereign was bound by the principles of State responsibility. The draft also provided that an agreement between the predecessor and successor States would not be binding on the creditor unless the latter had participated in the settlement or unless the principles on which the agreement was based were so unexceptional and so much in accord with the rules laid down in the draft that they must be regarded as proper. All those provisions would be to no effect, however, if the basic relationship between debts and property and between internal an international law were not reviewed. That subject should be treated as a matter of priority at the Commission's thirty-first session.

29. Mr. SCHWEBEL approved the substance of article 25 and endorsed the comments made by previous speakers. In particular, he considered that, while Mr. Njenga's point was dealt with in some measure by the closing phrase of the article, relating the debts to the property, rights and interests that passed, more detailed wording might be desirable, as Mr. Njenga had suggested.

30. He also shared the view that the interests of creditors might be protected more emphatically, and to that end would suggest that the second paragraph of article 25 be reworded to read:

> "In the absence of agreement, the State debt of the predecessor State shall pass to each successor State in an equitable proportion, taking into account such factors as the property, rights and interests passing to it in connexion with the said State debt and any exclusive or predominant benefit it derives from the said property, rights and interests."

The concluding phrase of that proposal was a possible response to Mr. Njenga's suggestion. He was not entirely certain that the reference to capacity to pay should be removed; there might in fact be some point in adding it elsewhere.

31. He considered it essential, if the draft articles on succession to State debts were to be at all constructive, that the Commission should delete the word "international", placed between square brackets in article 18 (State debt), and also the square brackets in article 20 (Effects of the passing of State debts with regard to creditors). There was no other way of dealing with the core of the issue.

32. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had rightly distinguished between the separation of a part or parts of the territory of a State and the dissolution of a State. In the former case, there was interaction of the interests of the successor and predecessor States; in the latter case, interaction of the interests of the successor States themselves.

33. It was important to bear in mind the relationship between article 25 and article 16, which categorized the modes of transfer of State property in a case of dissolution, and to maintain as far as possible the necessary parallels between the two. He did not think it feasible, however, given the structure of the draft, to categorize the various kinds of debts, including localized debts, namely, debts incurred by the central government or by the territories concerned for the purpose of expenditure on projects in those territories. It could not be assumed that a State that emerged from the dissolution of another State would take responsibility for debts directly connected with the territory of another State. It might suffice to mention that question in the commentary, a possibility that the Drafting Committee might be asked to consider.

34. He too thought that the word "disappears" was not really necessary, since its meaning was covered by the preceding words, "is disssolved"; it could therefore be deleted in articles 25 and 16. He also shared the view that, at the end of the first paragraph of article 25, it would be better to employ the phrase used throughout the draft, namely, "unless otherwise agreed", rather than the mandatory formula "shall be settled by agreement", in view of the difficulty of enforcing such a requirement.

35. He shared the doubts that had been expressed regarding the introduction of the concept of capacity to pay as an element of equitable apportionment. He had had occasion before to voice his misgivings about the wisdom of seeking to codify matters relating to equity—in his view a virtually impossible task.

36. Subject to those comments, he approved the article as submitted. The Drafting Committee would doubtless have no difficulty in clarifying the various questions raised by members.

37. Mr. USHAKOV, referring to his statement at the previous meeting, explained that he had confined himself to showing how difficult it sometimes was to distinguish between cases of separation and dissolution on the basis of the criterion of the disappearance of the predecessor State; that had not meant, however, that he opposed articles 24 and 25. The substance of those two articles must be maintained. If the word "disappears" were deleted from article 25, that provision would not be clear. In that connexion, it should be noted that articles 24 and 24 related respectively to an agreement between "the predecessor

State and the successor State" and between "the successor States"; in the first case the predecessor State subsisted but in the second it disappeared.

38. Mr. BEDJAOUI (Special Rapporteur) noted that all the members of the Commission who had participated in the fruitful debate on article 25 had dealt with two questions. The first concerned the scope of the provision, and more particularly the classification of the cases falling within the scope of articles 24 and 25 respectively. The second concerned the place to be given to the agreement of the parties and to equity in the basic rule set forth in the article under consideration. Some members of the Commission had spoken of the succession of certain States to membership of an international organization, but the examples they had given had of course been merely illustrative. The Commission had long ago decided not to deal, in the draft under preparation, with either succession of governments or succession to membership of an international organization.

39. As to the first question, he agreed that it was difficult to find a sufficiently reliable criterion for distinguishing cases of separation from those of dissolution. As several members of the Commission had pointed out, it should nevertheless be possible to overcome the difficulty by adopting a pragmatic approach. If the separation did not profoundly affect the structure of the State concerned, as well as its political physiognomy and constitutional form, the predecessor State might survive. On the other hand, if 15 of the 23 federated states of Brazil separated from that country, a situation postulated by Mr. Ushakov, there would be a genuine dissolution. As Mr. Verosta had shown, really astonishing cases existed. However, the distinction between separation and dissolution was in fact clear and intelligible, despite the difficulties of application it might present. He had not ignored those difficulties, since he had referred *inter alia* to the case of the Ottoman Empire, in which Turkey had regarded itself as one successor State among others. Mr. Verosta had given a masterly account of the dismemberment of the Austro-Hungarian Empire, which had given rise to a crop of new or resurrected States and to a complete reparcelling of Danubian Europe. A point to remember was that a State might be so reluctant to regard itself as diminished as to prefer to undergo a genuine dissolution. That had been the case with Austria, which had regarded itself as a predecessor State. Conversely Hungary, although reduced by two thirds of its territory, had insisted on its continuity. It was important, therefore, also to take account of the will of the States concerned.

40. As the Commission had found when preparing the draft articles on succession of States in respect of treaties, and as it would find once again in preparing the draft articles under discussion, certain cases were unclassifiable. In the 18th and 19th centuries, Poland had several times been reconstituted through separation of parts of the territory of Russia, Prussia and Austria. For those States, that had not been separation, just as there had not been a genuine dissolution when Poland had broken up, since the separated parts had not each formed a State, as provided for in the draft, but had combined with one of the three former States. Poland had been dismembered four times. After the third partition, it had lost its political existence for 124 years, until 1918. It had always refused the status of a successor State, claiming that it had not succeeded to the States that had dismembered it and that it had re-emerged through an act of its own sovereignty, thus resuming possession of all State property and repudiating all the State debts of the predecessor States. Reference had been made in that connexion to the former notion of "dormant sovereignty", according to which sovereignty was not completely extinguished and could revive. That theory was comparable with the Roman law theory of *post liminium* or *jus post liminii,* according to which a Roman who was taken prisoner preserved his rights, which remained dormant in the Roman State until his liberation and return.

41. India's case had been admirably presented by Mr. Jagota at the previous meeting. The colonized countries had asserted a historical reality in claiming that they were the continuation of original States that had been "obliterated" by the colonizing States. The latter had then pushed that theory to the extreme, trying to give expression to that continuity in acts. Thus India had been prevented from starting with a "clean slate" and had been obliged to continue shouldering obligations inherited from the past. India had had the misfortune to accede to independence in an unfavourabe regional and world climate. In that connexion, he referred to the dissenting opinion of Judge Moreno Quintana in the *Case concerning Right of Passage over Indian Territory,* according to which "India, as the territorial successor, was not acquiring the territory for the first time, but was recovering an independence lost long since".[9] That, then, was another case of dormant sovereignty, revived in 1974.

42. Thus the question of the classification of certain situations arose not solely in cases of separation or dissolution, but also in the case of the creation of newly independent States. Ethiopia was an example of a newly independent State that had emerged after Italian fascist colonial annexation and exploitation. Yet the Ethiopian State had not regarded itself as a successor State: it had claimed a continuity that had been suspended from 1935 to 1947. Under the Treaty of Peace concluded with Italy in 1947,[10] the Ethiopian State had been restored. In the pertinent instruments of that period, it had been considered that the Italian expedition undertaken against the Ethiopian Empire in 1935, as well as the Italian occupation of Albania in 1939, had been improper acts that could not have any legal existence or impart legal consequences. The Franco-Italian Conciliation Commission established under the Treaty of Peace of 1947 had decided that Ethiopian sovereignty was retroactive to

[9] *I.C.J. Reports 1960,* p. 95.

[10] United Nations, *Treaty Series,* vol. 49, p. 3.

the date of the entry of Italian troops into Ethiopia.[11] With regard to the Federation of Rhodesia and Nyasaland, Sir Francis Vallat had been right to emphasize (1503rd meeting) that India, prior to independence, had enjoyed a more marked international personality than had the Federation. He himself had mentioned it purely as an example, and in particular because the case was reported in *Materials on Succession of States in Respect of Matters other than Treaties,*[12] because it had been mentioned in connexion with the draft articles on succession of States in respect of treaties, and because it had been analysed in the literature. Before speaking of federation or uniting in that case, it would in fact be necessary to prove the existence of successor States that had joined together, and neither Rhodesia nor Nyasaland had actually been States. Before speaking of dissolution, it would be necessary to show the existence of a State that had disappeared and the emergence of new States. However, the Federation had not been a State and no new State had emerged from its dismemberment. The case of the Federation of Malaya, to which Mr. Sucharitkul had referred, had posed similar problems. Malaysia had not been annexed, neither had it been an annexing State, so that the case did not really come under article 25. The case of Borneo came under article 24, paragraph 2, as Mr. Quentin-Baxter had pointed out.

43. Mr. Sucharitkul had rightly emphasized that changes in name did not warrant the conclusion that the predecessor State had disappeared. Not only countries of South-East Asia but also some African countries had changed their names. For instance, the name "United Arab Republic" had been maintained in Egypt after the disappearance of the union in law; that name symbolized the unity so ardently desired by the Arab nation.

44. Mr. Ushakov's conclusion concerning the cases contemplated in articles 24 and 25 was correct: the rules set forth in those two provisions should be fairly similar. Moreover, they were akin to other rules in the draft in that they were based both on the agreement of the parties and on the notion of equity. The difficulty consisted in striking the right balance between those two elements.

The meeting rose at 1 p.m.

[11] *Reports of International Arbitral Awards,* vol. XIII (United Nations publication, Sales No. 64.V.3), p. 648.

[12] United Nations publication, Sales No. E/F.77.V.9, p. 547.

1505th MEETING

Wednesday, 21 June 1978, at 10.05 a.m.

Chairman: Mr. José SETTE CÂMARA

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

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

[Item 3 of the agenda]

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

ARTICLE 25 (Dissolution of a State)[2] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) explained that the question of classifying certain situations under one type of succession rather than another arose not only in connexion with article 25 and the preceding article; it had also arisen in an even more difficult form when the Commission had decided to apply two different régimes to a part of the territory of a State according to whether that part was transferred by the State to another State or separated from it and united with another State. The two cases were dealt with in article 21[3] and in paragraph 2 of article 24 (A/CN.4/313, para. 26) respectively, the emphasis in the first case being placed on agreement between the States concerned. Having drawn that fine distinction, the Commission could *a fortiori* distinguish between separation of a part of a State and dissolution of a State.

2. As in a number of other draft articles, it was important in the rule laid down in article 25 to accord their due place to agreement between the parties and to equity. In that connexion, Mr. Pinto had raised the question (1503rd meeting) whether it would be possible to consolidate the draft articles, omitting certain provisions and even some types of succession. Without altogether excluding that possibility, he would stress the need to maintain for the time being the existing structure of the draft, which had been painstakingly thought out. The advantage of the classification of types of succession adopted in the draft was that it set out ideas in a form that governments could readily understand. Perhaps the Commission could revert to the matter on the second reading of the draft. At the current stage it would suffice to note that, in the circumstances of separation dealt with in article 24, agreement between the parties was usually quite difficult to achieve, since the separation was often violent since since the predecessor State survived. On the other hand, in the case of dissolution dealt with in article 25, the successor States had very conflicting interests and therefore in general could only benefit from an agreement. That was why he had placed more emphasis on agreement in article 25 than in article 24. It should also be noted that the agreement referred to in article 24 was between

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

[2] For text, see 1503rd meeting, para. 1.

[3] See 1500th meeting, foot-note 8.