

Document:-
A/CN.4/SR.1514

Summary record of the 1514th meeting

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

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 11 a.m.

1514th MEETING

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

Chairman: Mr. José SETTE CÂMARA

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

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

[Item 3 of the agenda]

* Resumed from the 1505th meeting.

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

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 23, 24 AND 25

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

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

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

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

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

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

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

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

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

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

ARTICLE 23⁴ (Uniting of States)

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

Article 23. Uniting of States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 6.05 p.m.

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

1515th MEETING

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

Chairman: Mr. José SETTE CÂMARA

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

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

[Item 3 of the agenda]

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

ARTICLES 23, 24 AND 25 (*continued*)

ARTICLE 23 (Uniting of States)² (*concluded*)

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

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

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

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

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

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

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

³ See 1514th meeting, foot-note 2.