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Summary record of the 1427th meeting

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

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54. The CHAIRMAN said that it would therefore be advisable to proceed as he had already indicated. As regards afternoon meetings, he felt that apart from the meetings for the adoption of the report, which was practically automatic, it would be preferable to hold only morning meetings since, in the interests of the discussion, members of the Commission needed time for thought and reflection.

The meeting rose at 1 p.m.

1427th MEETING

Wednesday, 25 May 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, 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. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

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

[Item 3 of the agenda]

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

ARTICLE C (Definition of odious debts) *and*

ARTICLE D (Non-transferability of odious debts) [1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) said that, in summarizing the discussion of chapter III of his ninth report, he would first go through the general comments of members and then deal with the specific comments on article C and article D, respectively. The general comments could be grouped under three heads: Why should odious debts be dealt with at all? In which part of the draft should they be dealt with? How should they be dealt with?

2. To take the first question, some members had alleged that, in dealing with odious debts, the Commission was moving away from the realm of law into that of morality. Sir Francis Vallat [2] had said that, although consideration of odious debts should perhaps not be ruled out altogether, it would certainly prove to be difficult. Other members, such as Mr. Quentin-Baxter,[3] had said that merely by referring to the possibility that a debt might be contracted for an illegal purpose, the Commission was moving outside the confines of the subject with which it was supposed to be dealing. Other members had asked why the subject of odious debts should be studied since such debts concerned a very special aspect of the relationship between the predecessor State and the successor State. Mr. Riphagen had said [4] that that special aspect would not come up again in connexion with the articles on the different types of succession and that he had some doubts about the need to study odious debts since it was far from clear that the purpose for which the debt was intended was the criterion by which it should be categorized. Still other members, particularly Mr. Ushakov [5] and Mr. El-Erian,[6] had said that they did not think odious debts should be studied at all, since consideration of such debts raised the problem of régime debts and it was not certain whether they came under succession of Governments or succession of States. Finally, some other members had asked why it was necessary to discuss odious debts at all since that subject was, to a large extent, covered by draft article 2 [7] concerning the validity of a succession of States.

3. He (the Special Rapporteur) was of the opinion that odious debts had to be considered, simply because they existed. Both State practice, as analysed in his ninth report, and diplomatic history and jurisprudence, bore witness to the fact that odious debts existed. The question of odious debts should not however, be confused with the question dealt with in article 2, namely, the validity of a succession of States. Mr. Calle y Calle [8] had rightly claimed that, quite apart from any consideration of the validity of their source, odious debts were intrinsically immoral, and had referred to the "clean hands" theory. Mr. El-Erian [9] had referred to *jus cogens*, the principle of self-determination, and the unlawfulness of recourse to war. He (the Special Rapporteur) thought that the problems of the source of the obligation and the source of the succession were irrelevant because, even if a treaty was invalid, it could still have been the source of a debt, and the amount of the corresponding loan might already have been paid to the predecessor State. Conversely, even if the treaty was valid, the purpose for which the debt was intended could be unlawful. He had already had occasion to stress that a distinction should be made between the problem of the unlawfulness of the succession and the problem of odious debts. In a lawful succession, even some valid debts could be classified as odious debts because of the purpose for which they had been intended. Similarly, a distinction should be made between the problem of odious debts and that of the validity of the legal source of odious debts. He mentioned that distinction in order to answer those members who had referred to the concept of invalidity *ab initio*.

4. He would point out that he himself had recommended that it would be better for the Commission to avoid a discussion of régime debts on the ground that they could

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[1] For texts, see 1425th meeting, para. 28.

[2] 1426th meeting, paras. 43 and 44.

[3] *Ibid.*, para. 40.

[4] *Ibid.*, para. 37.

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

[6] *Ibid.*, para. 29.

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

[8] 1426th meeting, para. 1.

[9] *Ibid.*, para. 28.

be considered as coming under either succession of States or succession of Governments, or both.

5. The question of where in the draft the question of odious debts should be dealt with had been raised by several members. Some had been of the opinion that the Commission should consider the substantive rules relating to each type of succession before dealing with odious debts; others had said that the rule of the non-transferability of odious debts, as enunciated in article D, constituted an exception to the principle of succession to debts, and that it would therefore be better to consider it at the beginning of the draft. In his (the Special Rapporteur's) view, the entire question was one of method. There would, of course, be advantages in beginning with special rules, but, on that basis, it would also be possible to leave until later the definition of State debt and the problem of the third State. In any event, he was sure that if he had gone straight into the problem of the different types of succession—in other words, the special rules—many members of the Commission would then have asked why he had not dealt first with the definition of State debt, the problem of the third State and odious debts. Consequently, he endorsed Mr. Tsuruoka's view that the Commission could, for the time being, adopt a general provision like the article on odious debts, even though Mr. Riphagen's view [10] was that it concerned a very special aspect of the relationship between the predecessor State and the successor State.

6. The question of how odious debts should be dealt with had given rise to various suggestions. Some members, such as Sir Francis Vallat,[11] had said that the Commission should formulate a general saving clause in order to reserve the case of odious debts. Others, such as Mr. El-Erian,[12] had said that odious debts should be dealt with in a dispositive article which would not be preceded by a definitions article. In that way, the Commission would not be bound by a definition and would be able to explain its concept of odious debts in the commentary. Most members of the Commission had, however, been of the opinion that articles C and D should be included in the draft but that they should be improved. He personally could accept any of those suggestions but thought that it was for the Drafting Committee to take a decision.

7. With regard to the comments on article C, which defined odious debts, he noted that Mr. Tsuruoka had said [13] that the words "the major interests of the successor State" were too vague and that it was difficult to see where serious impairment of the interests of the successor State began and normality ended. Mr. Calle y Calle [14] had rightly pointed out that while the notion of serious harm was extremely vague the Commission had already used it in other draft articles, such as those on State responsibility, and that it was quite possible to speak of serious harm to the fundamental rights of the successor State, its right to survival, its independence or its integrity.

8. Some members had expressed the view that the substance of article C (*b*) was covered by article 2, which was worded in practically identical terms. But article 2 dealt with the succession of States, which *a priori* was taken to be lawful, while article C (*b*) related to the debt as such. There were thus three possibilities, depending on whether it was the succession, the legal source of the debt or the debt itself, which was invalid.

9. In his subtle analysis of article C, Mr. Francis [15] had said that subparagraphs (*a*) and (*b*) related both to the debtor's intent and to the consequences of his act—and, sometimes, to both of those aspects of the problem at the same time. Mr. Quentin-Baxter [16] had endorsed that point of view in stating that, in the case of subparagraph (*b*), what was illegal was also certainly immoral, but that subparagraph (*a*) dealt with situations in which the outcome had to be known before the debt could be stigmatized as odious. Sir Francis Vallat [17] had been of the opinion that it was difficult to apply the criterion of the illegality of the purpose sought by the predecessor State in contracting a debt, that such a criterion might lead to all kinds of subtle distinctions, and that it would have to be decided whether account should be taken of the stated purpose of the predecessor State—which might be different from its real purpose, of the creditor State's knowledge of the real purpose—and whether or not it had encouraged the act of the predecessor State, and of the use of which the funds were put. Those questions clearly showed the difficulties involved in the subject of odious debts. Although he (the Special Rapporteur) had never tried to conceal those difficulties, he did not think that the Commission could use them as an excuse for passing over the problem of such debts in silence.

10. Mr. Ushakov [18] had criticized the loose wording of article C, which spoke of "debts contracted by the predecessor State", although at the time when the debts had been contracted, there had been no predecessor State and no successor State which they could have injured. The case he (the Special Rapporteur) had had in mind was nevertheless clear enough: it was the case where a State contracted a war debt for the purpose of starting hostilities, or a subjugation debt for the purpose of suppressing a liberation movement or colonizing a territory, and which then, by a succession of States, became a predecessor State in relation to a successor State which had been its victim or, though not having been its victim, refused to assume the odious debt in order not to lend support to an operation that was reprehensible on both moral and legal grounds.

11. With regard to the comments on article D, he would first like to draw attention to the conflicting conclusions reached by some members of the Commission, who had, nevertheless, all started from the same premise, namely, that the aggressor State must assume alone its debt of aggression. Whatever the conclusion they reached, all were agreed that the aggressor State ought to pay: some believed that it should pay twice rather than once,

[10] *Ibid.*, para. 36.
[11] *Ibid.*, para. 46.
[12] *Ibid.*, para. 28.
[13] *Ibid.*, para. 11.
[14] *Ibid.*, para. 1.
[15] *Ibid.*, paras. 33-34.
[16] *Ibid.*, para. 41.
[17] *Ibid.*, paras. 44-45.
[18] *Ibid.*, para. 5.

if that were possible, even if it ceased to exist; others thought that some sanctionary element required that it repay its debt. But, while supporters of the first view had concluded that the successor State or States were obliged to pay, supporters of the second view concluded that the successor State was not obliged to pay. That difference of conclusions was explained by the fact that some members had in mind the case of a predecessor State which ceased to exist and was replaced by several States which had taken part in the act of aggression and could not be cleared of responsibility for it; Mr. Ushakov even considered that, in the case of the separation of a province of an aggressor State, that province, in other words, the successor State, ought to pay. The other members had had in mind the case of a newly independent State, even if it emerged by separation of a province and union with a neighbouring State. In that case, it was the predecessor State which should pay.

12. Some members of the Commission pointed out that State practice was inconsistent. For example, quoting the case of Japan and Thailand, Mr. Sucharitkul [19] had noted that war debts sometimes passed to the successor State. In his report, he (the Special Rapporteur) had himself indicated that some treaties, such as the peace treaties concluded after the First and Second World Wars, had been based on political considerations. Such cases should doubtless be taken into account, even though the vast majority of precedents showed that odious debts did not pass to the successor State. Mr. Sucharitkul [20] had also said that the interests of creditors should not be overlooked, but he (the Special Rapporteur) did not fully share Mr. Sucharitkul's opinion on that point. He preferred the view of Mr. Njenga [21] that States which might be tempted to contravene the purposes of the Charter of the United Nations, such as those which granted loans to South Africa, should be discouraged. Of course, if the predecessor State continued to exist, Mr. Sucharitkul's comment would have to be taken into consideration, but in that case it would be a matter of the relations between the creditor and the debtor predecessor State and not of a succession of States. It had been in the same vein that Mr. Quentin-Baxter [22] had referred to certain factors which were decisive in determining the odious nature of a debt. If a succession of States occurred, for example, following hostilities or a breakdown of relations between the predecessor State and the successor State, it was unlikely that the successor State would be willing to assume war debts which had been forced upon it or colonial debts incurred for the purpose of suppressing the national liberation movement which had led it to independence.

13. Lastly, there had been two comments of a drafting nature. Sir Francis Vallat had expressed doubts about the appropriateness of the words, "not transferable", [23] while Mr. Calle y Calle [24] had suggested that article D be divided into two paragraphs, the first stating the rule and the second the exception, and had expressed the hope that the Drafting Committee would collate article D and article W.

14. The very full discussion to which articles C and D had given rise, as well as the indications which he had just provided, should enable the Commission to refer those two articles to the Drafting Committee.

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles C and D to the Drafting Committee.

It was so agreed.[25]

ARTICLE Z/B (Transfer of part of the territory of a State)

16. The CHAIRMAN recalled that it had been agreed provisionally at the previous meeting that, with a view to accelerating its work, the Commission should now proceed to consider the question of transfer of part of the territory of a State. For that purpose, the Special Rapporteur had circulated informally among the members the text of a single article, article Z/B, with the following wording:

Article Z/B. Transfer of part of the territory of a State

1. When a part of the territory of a State is transferred by that State to another State, the passing of the debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.

2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, corresponding to the property, rights and interests which pass to the successor State.

[*Alternative for paragraph 2*]

2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, taking into account the relationship between the State debt concerned and the property, rights and interests which pass to the successor State.]

17. He invited the Special Rapporteur to introduce the article.

18. Mr. BEDJAOUI (Special Rapporteur) said that the Commission was now beginning its consideration of the articles relating to the different types of succession, starting with the transfer of part of the territory of a State. He had proposed a number of articles for that type of succession. Like all the other articles in his ninth report (A/CN.4/301 and Add.1), those being considered now had not been numbered but had been identified by letters which were not in alphabetical order, that allowed him to introduce any given article rather than another. In view of the short time the Commission had left to continue its study of the draft articles, he had combined articles YZ and B in a single article, article Z/B. He did not need to point out that the commentary contained in chapter IV of his report applied in substance to article Z/B. For the time being, the Commission should confine itself to that article, on the understanding that it could come back later to any of the other articles in the report, relating to transfer of part of a territory.

[19] *Ibid.*, para. 26.

[20] *Ibid.*, para. 25.

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

[22] *Ibid.*, para. 41.

[23] *Ibid.*, para. 46.

[24] *Ibid.*, para. 2.

[25] For the recommendation of the Drafting Committee, see 1447th meeting, paras. 4-5.

19. In chapter I of his report he had described the whole range of possible debts, including general debts contracted by the predecessor State to meet the general needs of the transferred territory or of other parts of its own territory, special or localized debts contracted to meet the exclusive needs of the transferred territory, local debts guaranteed by the predecessor State and local debts proper. The latter type of debt did not come within the subject being considered. A guarantee given by the predecessor State for a local debt might be examined later if it were decided that that problem did come within the subject. Consequently, only general State debts and localized State debts had been taken into consideration in article Z/B, although they were not specifically mentioned in it.

20. With regard to general debts of the predecessor State, the problem was to determine whether the successor State must assume part of such debts and, if so, how its share should be calculated. In his report, he had first defined general State debt, then described the uncertainties in the literature and presented the theories favourable to or opposed to transfer of part of the general debt, then gone on to the judicial precedents, which were generally against transfer of part of the general debt, and concluded with State practice, which varied considerably. In article YZ, he had referred first to the agreement which could be concluded by the predecessor State and the successor State, but had then gone on to suggest that, in the absence of an agreement, the successor State should be made to assume a part of the general debt which would be proportionate to the contribution of the transferred territory to the financial resources of the predecessor State. That was, in fact, the criterion most frequently adopted by the writers.

21. In dealing with specialized State debts, he had found more solid ground. A specialized debt was a debt which had served the interests of the territory exclusively, or nearly exclusively, whatever the nature of the property it had been used to create, which had passed to the successor State. The literature was generally in favour of the passing of such debts, which, like property, followed the territory. The practice of States in that respect was also more homogeneous and had allowed him to draft article B, which set out the rule that, in the absence of an agreement between the parties, the special debts of the predecessor State relating to the transferred territory were assumed by the successor State.

22. On reflection, however, he had realized that, if no distinction were made between general debt and localized State debt, and thus if no definition were given of those two types of debt, it would be possible to replace articles YZ and B by a single article. Better criteria were thus available for determining which debts passed to the successor State. In article YZ, he had taken the contributory capacity of the territory as the criterion for determining how much of the general debt the territory should assume. According to the practice of States and the literature, that criterion was based on population figures, the size of the territory and the share of taxes it paid. Since the territory's contributory capacity was calculated on the basis of its economic potential, natural resources, property and assets, which all passed to the successor State, it was only fair that a part of the general debt corresponding to the economic potential it had inherited should also pass to it. He had not provided any criterion for the assumption of localized State debts, since such debts all passed to the successor State. As the criteria provided in articles YZ and B might seem either too broad or too restrictive, he had relied on the concept of equity when he had combined those two articles in the new article Z/B and had used the expression "equitable proportion", which had already been employed in the articles relating to State property. In so doing, he had taken account of the comments of those members of the Commission who had said that emphasis should be placed on the parallelism between the articles relating to State property and the articles relating to State debts.

23. The principle of equity had already been discussed by the Commission in 1976 during its consideration of the articles relating to State property.[26] The position taken by the International Court of Justice on the subject of the principle of equity in the *North Sea Continental Shelf* cases was described in the part of the Commission's report relating to that discussion.

24. Article Z/B was based on article 12, relating to the fate of State property in the case of the transfer of part of the territory of a State. Like article Z/B, paragraph 1, article 12, paragraph 1, related to the case of settlement by agreement. Under article 12, paragraph 2, in the absence of an agreement, the immovable property of the predecessor State situated in the territory to which the succession of States related passed to the successor State; the same was true of the movable property of the predecessor State connected with its activity in respect of the transferred territory. Under article Z/B, paragraph 2, the debt of the predecessor State passed to the successor State in an equitable proportion corresponding to the property, rights and interests which passed to the successor State. That wording might seem vague, but it allowed the fullest scope for the principle of equity. It could happen that there was no localized State debt in a ceded territory and that all the property which passed to the successor State had been created from part of the general State debt. The wording of paragraph 2 thus made it possible to ensure that a part of that general debt corresponding to the ceded property was assumed by the successor State in accordance with the principle of equity.

25. The equity criterion was also applied in the alternative for paragraph 2, but on the basis of a direct relationship between the property and the debt which had created it. The debt passed only if it was attached to such property. That provision related in particular to localized State debts specially contracted by the predecessor State for the exclusive needs of the territory.

26. Mr. USHAKOV said that he fully supported the principle enunciated in the new article Z/B proposed by the Special Rapporteur, which reflected the principle stated in article 12 concerning the passing of State property in the case of the transfer of part of the territory of a State. It was indeed only fair to provide that, in

[26] *Yearbook ... 1976*, vol. II (Part Two), pp. 132-133, document A/31/10, chap. IV. sect. B, paras. (16)-(24) of the introductory commentary to section 2 of part I of the draft.

general, the passing of debts, like the passing of property, must be settled by agreement between the predecessor State and the successor State (para. 1), and that, in the absence of an agreement, the settlement must be equitable (para. 2).

27. When it was the predecessor State which took the initiative of ceding part of its territory to another State, the passing of the debt was, as a rule, settled by an agreement between the predecessor State and the successor State, in accordance with paragraph 1. If, however, it was part of the territory of the predecessor State which took the initiative of separating from that State in order to unite with another State, there might not be an agreement between the predecessor State and the successor State and, in that case, the passing of the debt would be settled in accordance with paragraph 2.

28. Since article Z/B dealt with State debt, he suggested that the word "State" be added before the word "debt".

29. Mr. RIPHAGEN said the Special Rapporteur had rightly emphasized that an important factor was the contributory capacity of the territory which passed to the successor State. He wondered whether that capacity was covered by the phrase "the property, rights and interests which pass to the successor State", which was used in both versions of paragraph 2 of the article. The phrase "property, rights and interests" seemed to envisage the successor State as a subject of internal law. It gave the impression of referring solely to the property, rights and interests mentioned in the earlier parts of the draft and not to the contributory capacity and the jurisdiction that passed to the successor State.

30. Mr. BEDJAOUI (Special Rapporteur) said that, according to the literature, contributory capacity could be considered either from the point of view of the number of inhabitants or the geographical size of the transferred territory, or as a purely fiscal criterion. Mr. Riphagen had asked whether, in referring to property, rights and interests, the Commission was not taking the point of view of the successor State and whether such property, rights and interests were not being considered in terms of its internal law. He (the Special Rapporteur) did not think that that was the case because such property, rights and interests were being considered from the point of view of the internal law of the predecessor State, not from the point of view of the internal law of the successor State, and corresponded roughly to the contributory capacity of the transferred territory. From that point of view, the first version of paragraph 2 which he was proposing seemed the more appropriate because it took account of such contributory capacity and did not establish a direct link between the problem of the property which passed to the successor State and the problem of the debt which had created such property.

31. Mr. AGO said that, in principle, he agreed with the Special Rapporteur about the new article Z/B. As had been done in article 12 relating to succession to State property, it was very useful for the Commission to draw attention, in paragraph 1, to the advisability of a settlement by an agreement between the parties in respect of the passing of State debts, because the problems involved varied so much from one case to another that it was wise for States to take such a precaution. Thus, the rule enunciated in paragraph 2 was only a residual rule based essentially on the only possible criterion, namely, that of equity, though it was obvious that the criterion of equity would pose serious problems, particularly that of deciding by whom it was to be applied.

32 He would therefore confine himself to a few comments of a drafting nature for the benefit of the Drafting Committee. First, he had some doubts as to whether the words "the passing of the debt" should be used in paragraph 1. He understood that those words had been used by analogy with the words "the passing of State property" in article 12. In article Z/B, however, the passing was not exactly the same, because it could either be total—in the case of a localized debt—or partial—in the case of a general debt. Thus, instead of taking it for granted that the debt passed—for it could happen that it did not pass at all—it would be better to say "the succession of the successor State to the debt of the predecessor State", which was more neutral and safer.

33. He fully endorsed the criterion of "equitable" proportion used in paragraph 2, but found the criterion of the proportion "corresponding to the property, rights and interests which pass to the successor State" more difficult to accept because it was not at all certain that the proportion of the debt which was to pass really corresponded to the proportion of the property which passed from the predecessor State to the successor State. For example, if a province separated from a State and 20 per cent of the property, rights and interests of the predecessor State passed to the successor State, the proportion of the debt which would pass to the successor State would not necessarily be the same: it would be a higher proportion if there were localized debts which the predecessor State had contracted exclusively in the interests of the province, and a lower proportion if there were other debts which had exclusively benefited other regions.

34. He therefore wondered whether the criterion which was most likely to safeguard the concept of equity was not, rather, the benefit which the part of the transferred territory had derived from the use to which the debt had been put.

35. Mr. NJENGA said that, by and large, he found the consolidated article produced by the Special Rapporteur acceptable.

36. He had no difficulty at all with the first paragraph; it was better to require settlement by "agreement" than by the more complicated formula of a treaty, and the requirement that the matter be settled by the predecessor and successor States should be the general rule. With regard to the second paragraph, however, he thought it would be very difficult for parties which had tried and failed to reach an "agreement" to come to a conclusion as to what constituted an "equitable proportion" of the debt of the predecessor State. In addition, it would be preferable to treat separately the questions of the passing of general and special, or localized, State debt; it was general State debt of which an "equitable proportion" should pass to the successor State. In the case of special State debt, what was required was an additional paragraph on the lines of the original article B (A/CN.4/301

and Add.1, para. 238), for, if the benefits of such a debt had gone to the territory which had become the successor State, it was to that territory that the burden of the debt should go. A clear statement of that rule would have the effect of minimizing possible areas of conflict between the predecessor and successor States in a situation in which they had tried, and failed, to reach agreement on the fate of localized State debt.

37. If his suggestion for the inclusion of an additional paragraph was not accepted, he would prefer to see the Commission adopt the second of the Special Rapporteur's proposals for paragraph 2, since it went at least some way towards meeting his point.

38. Mr. SUCHARITKUL said that, in principle, he endorsed the general tenor of article Z/B submitted by the Special Rapporteur. The article was well-balanced because it took account of the interests of the three parties and, in particular, of the interests of the successor State, which must consent to the passing of the debt. He also thought that the legal effects of the total or partial passing of debts had been viewed from the right angle.

39. The considerations which induced the successor State to accept the debts of the predecessor State were often political, as was clear from the practice of States, but the most decisive were perhaps economic considerations as in the case of the debt contracted by Japan to Thailand, whose acceptance had, in part, been motivated by a desire not to upset the two countries' trade relations. Acceptance of a debt often gave the successor State long-term advantages by, for example, enabling it to participate in international monetary or banking organizations.

40. He was in favour of the flexibility which the Special Rapporteur had imparted to the criterion of equitable distribution of the debt between the predecessor State and the successor State. The interests of the creditor third State had also been protected because, in the absence of an agreement, the passing of the debt was practically automatic.

41. Mr. VEROSTA said that he fully endorsed the idea underlying the new article Z/B submitted by the Special Rapporteur. In paragraph 1, however, it should be made clear that the passing of the debt from the predecessor State to the successor State was settled by an agreement for "the total or partial transfer of the State debt from the predecessor State to the successor State".

42. Like Mr. Ago, he thought that the idea of benefit should be introduced in paragraph 2, or in the alternative proposed for that paragraph, in order to make the criterion of equitable proportion fully objective.

43. Mr. FRANCIS, referring to the first paragraph of the proposed article Z/B, said that he would have preferred the question of general debt to be covered by a general provision like article Y (A/CN.4/301 and Add.1, para. 214). That was because the first paragraph of article Z/B presupposed that part of the general debt would be transferred to the successor State, whereas that was not always the case.

44. With regard to the second paragraph, on balance, the Special Rapporteur had been right to bring in the concept of equity, for the successor State might have been formed from a very depressed region of the original State and, notwithstanding its presumed liability for a portion of the general debt of that State, be unable to assume the full burden thereof.

45. With regard to the first version of paragraph 2, he interpreted the "proportion" of the general debt of the predecessor State which would pass to the successor State as being equal to the fraction which the property, rights and interests of the successor State represented of the property, rights and interests of the predecessor State. Like Mr. Njenga, he preferred the alternative version of the paragraph, but believed that it could have two meanings: the first was that an equitable proportion of the general debt of the predecessor State would pass to the successor State, with that proportion being expressed as he had just mentioned; the second was that, if it had been formed from a very depressed area of the predecessor State and had already borne the legitimate localized debts attributable to it, the successor State would not, under normal circumstances, be expected to bear that portion of the general debt of the predecessor State which would otherwise be attributable to it.

46. Mr. REUTER said that he agreed with the comments of Mr. Ago and Mr. Verosta on article Z/B, paragraph 1. Paragraph 2 raised the question whether all or part of the debt passed to the successor State, but the word "proportion" seemed to rule out the possibility that the successor State had to assume the entire debt.

47. When referring to equity, what was usually meant was equitable principles, for equity was an extremely complex notion based on a number of principles which it was hardly possible to enumerate. It would be better, therefore, to refer to "equitable principles".

48. He would also like to see all the specific cases mentioned. Whatever the benefits a territory might have derived from a debt, it could happen that all the localized investments in the territory were destroyed by some external event, thereby depriving it of all further benefit. In the case, for example, of the settlement of the debts of the Austro-Hungarian monarchy to the successor States, account had been taken, during the negotiations after 1945, of the fact that, as a result of external events, part of the investments financed through a certain loan of the Austro-Hungarian monarchy had been destroyed in countries such as Yugoslavia. Some mention might therefore be made of capacity to pay, a concept which was recognized in many international arbitrations.

49. In the alternative he had proposed for paragraph 2, the Special Rapporteur seemed to have wanted to establish a symmetry between the passing of debts and the passing of property, rights and interests. If, however, a distinction was to be made between what was general and what was local in the case of debts, the same distinction had to be made in respect of property, rights and interests. That in his opinion, was what was meant by equity. Such symmetry could be expressed in economic terms, for instance, by introducing the idea of benefit, as Mr. Ago had suggested. He had no objection to the introduction of an economic concept, but would like to see the Commission take a broader—and perhaps more judicial, because more abstract—view based on the idea

of symmetry. In the negotiations to decide the passing of debts, there would have to be some symmetry between the factors of enrichment and the factors of impoverishment.

50. Mr. DADZIE said that he had no difficulty in accepting the first paragraph of the consolidated article, but both the versions of the second paragraph caused him some problems. For example, each contained the phrase "equitable proportion": quite apart from the question of the complexity of equitable considerations, to which Mr. Reuter had drawn attention, there was the question who, in a situation in which the predecessor and successor States were in disagreement, would decide what was equitable. Similarly, who would decide what, as the first version of the paragraph required, corresponded to the property, rights and interests which passed to the successor State? The second version of the paragraph contained the phrase "taking into account the relationship between the State debt concerned and the property, rights and interests which passed to the successor State", thereby indicating that the question at issue was the passing of localized debt. If that were so, the question of equity would not arise, for the localized debt would relate to property, rights and interests situated in the transferred territory and, as the Special Rapporteur had already pointed out in paragraph 14 of his report, would therefore pass to that territory in accordance with the maxim *res transit cum suo onere*.

51. Mr. CALLE Y CALLE said that, in introducing article Z/B, the Special Rapporteur had indicated that the basis for it was to be found in chapter IV of his report, which would to a large extent constitute the commentary to the article to be submitted to the General Assembly. The Special Rapporteur had stated in his report that "the refusal of the successor State to assume part of the general debt of the predecessor State seems to prevail in writings on the subject and in judicial and State practice".[27] He had advanced theories in support of transfer of part of the general debt, but had said that they were inadequate, and had quoted weighty arguments against such transfer from authorities like Hall and Borel.[28] He had, however, been unable to find any clear rule governing the fate of general State debt, but had concluded from his treatment, in section C of chapter IV, of special State debts of benefit only to the ceded territory, that such debts passed to the successor State. Notwithstanding that situation, the article the Special Rapporteur was now proposing looked to the future in that it seemed designed to establish an embryonic rule to the effect that both general and special State debt could pass to the successor State.

52. If that was a correct interpretation of the article, it would, as Mr. Ago had already said, be better if the first paragraph referred to the "total or partial" passing of the debt of the predecessor State to the successor State, for passage would be partial in the case of general State debt and total in the case of localized State debt.

53. It would also be better to adopt the alternative version of paragraph 2, but in a modified form. Since equity would be an important factor in the apportionment of the general State debt, but less so in relation to the passage of localized State debt, the paragraph might be re-worded to read:

"2. In the absence of an agreement, an equitable proportion of the debt of the predecessor State shall pass to the successor State, taking into account both the relationship of the debt to the transferred territory and the property, rights and interests passing to the successor State."

The meeting rose at 1 p.m.

1428th MEETING

Thursday, 26 May 1977, at 10.05 a.m.

Chairman: Sir Francis VALLAT

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

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

[Item 3 of the agenda]

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

ARTICLE Z/B (Transfer of part of the territory of a State)[1] (*concluded*)

1. Mr. YANKOV said that, in general, he agreed with the approach and conclusions adopted by the Special Rapporteur in the commentary and articles he proposed in chapter IV of his report, which covered a complex subject for which there were no generally accepted rules of international law. While the consolidated article Z/B in some ways represented an improvement over the original proposals, it also gave rise to some problems.

2. For example, while he did not wish to challenge the Special Rapporteur's change in the first paragraph of article Z/B of the phrase "the contribution of the successor State to the general debt of the predecessor State shall be settled by treaty", which had appeared in the first paragraph of article Z (A/CN.4/301 and Add.1, para. 214), he wondered what was the reasoning behind the change. The new version seemed to lay greater emphasis on the operational aspect of the question, namely, the passing of the State debt of the predecessor State to

[27] A/CN.4/301 and Add.1, para. 209.

[28] *Ibid.*, paras. 194-195.

[1] For text, see 1427th meeting, para. 16.