Document:-
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**Summary record of the 1422nd meeting**

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

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

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

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

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

*The meeting rose at 1 p.m.*

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## 1422nd MEETING

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

*Chairman:* Sir Francis VALLAT

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

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

[Item 3 of the agenda]

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

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

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

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

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

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

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

2. Mr. BEDJAOUI (Special Rapporteur) said that, in introducing chapter II of his report (A/CN.4/301 and Add.1), he had started from the assumption that the creditor could only be a State. He now proposed to tackle the problem of the status of the creditor and to address himself to the question whether there were not creditors other than States. If the creditor was an international organization or an international financial agency, the problem was not difficult to resolve, for such organizations or agencies could be called "subjects of international law". The problem remained, however, where the creditor was a multinational or transnational corporation or a natural or legal person under internal private law and a national of a foreign State. That problem was parallel to that of the status of the debtor, which had been considered in chapter I, in connexion with the definition of State debt. Should the creditor also be required to have the status of a State or, at least, that of a subject of international law, interpreted in the broad sense to include an inter-state organization? Or should the stress be laid on the fact that the subject in question was that of State debt, and that therefore what mattered most was that the *debtor* should be a State? He had approached that problem with some diffidence and relegated it to a foot-note [2] taking the view that the main consideration was that the debtor should be a State. He had not overlooked the important problem of the status of the creditor, but he had had at least three reasons for limiting his study to the debt-claims of a subject of international law.

3. First, he had taken into consideration the need to establish a parallel between succession to State debts and succession to State property. According to the draft articles concerned with State property, property of the third State could be defined as State property belonging exclusively to the third State in its capacity as a subject of international law, the third State having been defined in article 3 [3] as "any State other than the predecessor State or successor State". Debt-claims of the third State were, precisely, State property of the third State as so defined. It would thus be inadvisable to adopt a different definition with respect to the creditor third State. According to the definition contained in the articles already adopted, "State property of the third State", which included its debt-claims, should be interpreted strictly as applying to State property belonging to the third State and not to an inferior entity or to a natural person who was a national of that State. The definition of the creditor third State in the draft articles relating to State debts ought similarly, therefore, to cover only debt-claims belonging to the third State, to the exclusion of debt-claims belonging to other entities.

4. He had also considered the question of acquired rights, which had been dealt with in his second report,[4] and in particular the problem of the alleged acquired rights of nationals of a foreign State, whether natural or legal persons.

5. Lastly, he had taken into account the problem of diplomatic protection, which would arise if all debt-claims, whether of the third State itself or of its nationals, were regarded as third State debt-claims under international law. In fact, foreign investors were subject to the laws of the debtor State in which they had invested and to the jurisdiction of the courts of that State. That was the import of the "Calvo clause", according to which any contract concluded by the State with an alien and any concession granted to an alien must stipulate expressly that such alien was subject to the laws of the State and to the jurisdiction of its courts and waived any claim to diplomatic protection. That clause, which placed aliens on the same legal footing as nationals, was to be found in the constitutions of most Latin American countries —Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Peru and Venezuela. Article 32 of the Peruvian Constitution provided that, "in so far as property is concerned, aliens shall enjoy the same status as Peruvians and may in no case claim special status in that regard or claim diplomatic protection". Similarly, article 27 of the Constitution of Mexico provided that "the State may accord the same right to aliens, provided that they declare to the Ministry of Foreign Affairs their willingness to be regarded as Mexicans in so far as [their] property is concerned and undertake not to claim the protection of their Government with respect to any matters relating thereto, on pain of being declared deprived of the property thus acquired, which shall devolve to the nation". Under the Calvo clause therefore, the debt-claim of a foreign natural or legal person could not be regarded as a debt-claim on the same footing as that of a foreign State. That did not mean that the debt-claim of a foreign natural or legal person should not be recognized, but merely that its fate was assimilated to that of a debt-claim held by a natural or legal person who was a national of the predecessor State. In other words, the change of debtor resulting from the transfer of the debt to the successor State occurred without the necessity of the consent of the third State of which the creditor was a national. The consent of the third State was necessary only in the case of a debt-claim belonging to that State in its own right, and not to its nationals. Consequently, in the case under consideration, what was involved was simply a bilateral relationship between the predecessor State and the successor State.

6. It was for those reasons that, for the purposes of the articles proposed in chapter II of his report, he had considered only States as creditors.

7. He suggested that the Commission deal first of all with articles R, S, T and U, which concerned the debt-claim of the third State as a subject of international law. Those articles did not appear to him to present any difficulties, since they established a parallel between succession to debts and succession to treaties, both of which created a triangular relationship between the predecessor State, the successor State and the third State.

8. After dealing with those articles, the Commission should examine separately the question of the debt-claims of aliens, whether natural or legal persons. It might decide either to disregard such debt-claims and consider only State debt-claims, thus considerably limiting the subject, or to declare such claims admissible, in which case it could easily settle the problem in two

[2] A/CN.4/301 and Add.1, foot-note 68.

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

[4] *Yearbook ... 1969*, vol. II, p. 69, document A/CN.4/216/Rev.1.

stages. First, it would have to leave the definition of State debt proposed in article O "open", merely stating that State debt was a debt assumed by the State, without specifying to whom—in other words, defining debt solely in terms of the debtor, and leaving in suspense the question of the nature of the creditor. It would then have to supplement articles R, S, T and U with a new article V, which would state, first, that aliens under private law were assimilated to nationals of the predecessor State in so far as the fate of their respective debt-claims was concerned, and secondly, that the fate of such debt-claims of private persons, whether nationals or aliens, was determined, in the context of succession of States, by a bilateral legal relationship (predecessor State/successor State), and not by a triangular legal relationship—in other words, that the consent of the third State whose national was a creditor of the predecessor State was not necessary.

9. Mr. CASTAÑEDA supported the Special Rapporteur's suggestion that articles R, S, T and U should be supplemented by an article concerning creditors other than States. Nothing in article O [5] excluded from the definition of State debt which it contained debts owed by a State to private individuals. A clear explanation of what the Special Rapporteur intended to be the scope of article O was to be found in foot-note 68 of his report which stated: "There is a 'State debt' of the predecessor State even if the creditor is a foreign private person; it is enough simply for that debt to have been contracted by the Government of the predecessor State".

10. He agreed entirely with articles S, T and U and also with the Special Rapporteur's contention with regard to article R that the novation occurred only in the legal relationship between the successor and the predecessor States.[6] He did not, however, accept that, as stated in article R, "a succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State". Succession alone was not sufficient to give rise to such effects; it was, in fact, a generally recognized principle of law, and one which underlay all the four articles under consideration, that there could be no change in the identity of the debtor unless the creditor agreed thereto. For that reason, and in order to be consistent with the provisions of the second paragraph of article U, some means should be found of stating in article R that the effects to which it referred were dependent on the expression by the creditor third State of its consent to the substitution of the successor for the predecessor State as its debtor.

11. Mr. VEROSTA said that the title of chapter II of the report—"The problem of the third State"—was significant, since it raised the question whether the rules relating to succession in respect of State debts should apply only to debts contracted by the predecessor State to another State, or whether they should also apply to debts contracted by the predecessor State to another State, or whether they should also apply to debts contracted by the predecessor State to other subjects of international law.

12. Those other subjects of international law could be unions of States, which had a legal personality distinct from that of the States which composed them. For instance, Montenegro had had debts to the Austro-Hungarian monarchy, which had not been a third State but a union of two States—Austria and Hungary—having an international personality distinct from that of the two States composing it. When Montenegro had united with the Kingdom of Serbia in 1918, its debts to the Austro-Hungarian monarchy had passed to the new Kingdom thus established. Those were debts not to a third State, but to another subject of international law, the real Austro-Hungarian union.

13. While the expression "creditor third State" could perhaps be accepted as covering confederations and unions of States, it could not possibly cover international organizations such as the United Nations or international financial agencies such as the World Bank or the International Monetary Fund. There might be a case where a multinational State Member of the United Nations which had not paid its contributions for several years was dissolved without having paid its debt to the United Nations, and new States were formed on its territory and admitted to membership of the United Nations. There could then be a passing to the successor States of the debt contracted by the predecessor State to the United Nations, a creditor subject of international law.

14. It should thus be made clear in the title of chapter II that the rules concerning debt-claims of the third State also applied to debt-claims of other subjects of international law.

15. Mr. THIAM noted that the Special Rapporteur had not taken a final position on the question whether the creditor must be a State or whether it could equally well be another subject of international law, leaving it to the Commission to settle that question.

16. In his view, the four articles R, S, T and U were closely connected. The idea embodied in those articles could be summed up in three main points: a succession of States could not of itself affect the rights of a creditor third State; it could not of itself create new legal links between the creditor third State and the successor State; and, for there to be a substitution of debtor, there must be agreement between the creditor third State and the successor State, whence the need, emphasized by Mr. Castañeda, for the creditor third State to express its willingness for the debt owed to it to be transferred to the successor State. He endorsed that approach, which seemed to him to be logical and to take into account both the inerests of the creditor third State and those of the successor State.

17. As regards article S, it stated, on the one hand, that debts passed from the predecessor State to the successor State and, on the other, that they did not become debts of the successor State vis-à-vis the creditor third State; that gave the impression that the status of such debts was uncertain and that the holder of the debt-claim was unknown. Article S ought therefore, he thought, to be reworded.

[5] 1416th meeting, para. 1.

[6] 1421 st meeting, para. 39.

18. That reservation apart, he fully endorsed the Special Rapporteur's approach to the problem of State debts, on the understanding that a more thorough examination would be made of debts contracted to subjects of international law other than States.

19. Mr. AGO said that it was important to define precisely the limits of the subject under consideration. He had no objection to its being restricted, provided there was no possible ambiguity. It could be limited to succession of States with regard to debts of the predecessor State to a third State, or it could be expanded by adding to the third State other subjects of international law, or it could be expanded still further by adding to subjects of international law foreign private persons, whether natural or legal. However, such persons were always foreign creditors. In the consideration of succession of States in respect of State debts, on the other hand, "State debt" was used to mean primarily succession with respect to the public debt—the debt contracted by the State to its own citizens (Treasury bonds, etc.). It would be perfectly feasible to decide to exclude that aspect, but it would then be necessary to amend the definition of State debt given in article O, which clearly included debts contracted by the State to individuals and to its own nationals in the first instance. Moreover, debts contracted by a State to a foreign State were often recorded in an international treaty: it could therefore be said that that matter related in part to the succession of States in respect of treaties, whereas debts contracted towards individuals who were nationals related solely to the topic at present under discussion.

20. He had nothing against the Special Rapporteur's approach to the problem, but it did seem to him essential to define clearly the limits of the subject from the outset, so as to avoid any misunderstanding.

21. Mr. SETTE CÂMARA said that the fundamental principle underlying the articles proposed by the Special Rapporteur in chapter II was that succession, whilst creating a special relationship between the predecessor State and the successor State with regard to a debt owed by the former to a third State, could not of itself create a direct relationship between the successor State and the third State; for such a relationship to arise, there must be some form of expression of consent by the third State to the assignment of the debt from the predecessor to the successor State. However, in paragraph 101 of his report (A/CN.4/301 and Add.1) the Special Rapporteur made a subtle distinction between the transfer of obligations and that of rights: he said that certain obligations of the predecessor State to third parties were transferred to the successor State independently of any manifestation of will on the part of the predecessor or the successor State, but that such transfer did not extinguish the predecessor State/third State relationship, nor—contrary to what had been decided in article 6 concerning State property —establish a new successor State/third State relationship. That explained the text of article R, which confined the effects of succession in respect of debts to the relations between the predecessor and the successor State. The Special Rapporteur explained, in paragraph 103, that the predecessor State retained its debtor status and responsibility for the debt to the third State; novation or assignment of rights could take place only with the consent of that third State.

22. He found the distinction between the treatment of obligations and that of rights difficult to understand. It was his view that, once an obligation had been transferred by the predecessor to the successor State, the corresponding rights of the creditor third State should also be transferred. If those rights could not be transferred without the intervention of the third State, might not the same be true of obligations? The third State might not agree that an obligation towards it should be extinguished for the predecessor State and arise for the successor State, which it might, for instance, consider a less reliable debtor.

23. With regard to chapter II, section C, of the report, he found the reference in paragraph 106 to the possibility that the fate of a debt could be settled through a devolution agreement inconsistent with article 8 of the draft articles on succession of States in respect of treaties,[7] recently adopted by a conference of plenipotentiaries, and which provided that devolution agreements were nothing but a statement of intentions and could not of themselves bind the successor State or assign to it rights or obligations of the predecessor State. The text of article S proposed by the Special Rapporteur seemed also to refer to devolution agreements, since it spoke of "agreements concluded between the predecessor and successor States" which were in force at the date of succession. His own view was, that in addition to their inability to transfer to the successor State debts owed by the predecessor State to a third State, devolution agreements were incapable of themselves of giving rise to a novation of obligations as between the predecessor and the successor States; such a change would require a fresh expression, once it had become a sovereign entity, of the will of the successor State to be bound by those obligations.

24. Article T was more in line with article 9 of the draft articles on succession of States in respect of treaties, since it was couched in general terms, stating that the debts of the predecessor State did not become debts of the successor State in consequence only of a unilateral declaration by the latter. Unlike article S, article T did not contain the qualification "vis-à-vis the creditor third State", which implied the possibility of the debts being transferred to the successor State vis-à-vis the predecessor State. The Commission should continue to give identical treatment to unilateral declarations and devolution agreements, as it had done in its draft articles on succession of States in respect of treaties.

25. He had similar misgivings with regard to article U, for he did not think that devolution agreements and unilateral declarations by a successor State should be dealt with as if they were normal means for the expression of consent by such a State to assume debts, or in other words as valid and binding acts to which the third State could subscribe. First, he thought that the problems raised by article U pertained more to the field of succession of States in respect of treaties than to the present topic. Secondly, he maintained his reservations with regard to the references to agreements, which sounded very

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

much like devolution agreements, and to unilateral declarations by the successor State. Thirdly, he had reservations concerning the wide admission of tacit consent for which the article provided. To emphasize his reservation, he read out the text of article 35 of the Vienna Convention.[8]

26. Mr. CALLE Y CALLE said that the Commission was concerned with debts of an international nature and should therefore restrict the definition of State debt which it proposed to give in article O to debts contracted by and owed to subjects of international law. Subject to that reservation, he believed that the article should be couched in the most general terms possible.

27. He had at first felt the same misgivings with regard to article R as Mr. Castañeda, but considered, after rereading it, that they were adequately catered for by the stipulation that the effects of succession to which it referred would be subject to the "provisions of the present articles", namely, articles S, T and U. Those articles made it clear that novation could occur only if the debts in question were transferable and if the creditor State clearly expressed its agreement to the change. In his view, article R, if not parallel to, had at least been inspired by article 8 of the draft articles on succession of States in respect of treaties, and was sufficiently clear. It and the other articles under consideration could now be sent to the Drafting Committee.

28. Mr. QUENTIN-BAXTER said that he had no difficulties with regard to article R, since it dealt, in the same form of language as had the corresponding article on succession to State property, with a relationship between the predecessor and the successor States. However, with regard to the other articles under consideration, he was somewhat apprehensive about a seeming reversion to issues that involved treaty relationships.

29. He shared the view that the term "State debts" should have a sufficiently broad connotation to include all debts that passed from the predecessor State to the successor State, regardless of whether the creditor happened to be a State. On the other hand, he had many reservations concerning the concept of State debts. While he could readily believe that there might be a need for special subsidiary rules on the important and complex question of succession to financial obligations, as yet he saw no reason to suppose that the broad principle applicable to such obligations did not also apply to other kinds of obligations.

30. In its consideration of succession in respect of matters other than treaties—succession to State property, for example—the Commission was concerned essentially with a relationship between two international persons, namely, the predecessor State and the successor State. It was certainly true that, having moved on from State property to State obligations, the Commission was now also dealing with a third party, for the transfer of responsibility for a debt necessarily involved a creditor. In that instance, however, the questions that arose lay chiefly within the realm of internal law rather than international law. Article 5 of the draft established that State property meant "property, rights and interests which, on the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State". The rules of international law which governed State succession intersected the rules of internal law which delineated and, in some sense, even created the property that was the subject of the succession. In that connexion, he saw no difference of principle between rights and obligations and believed that the proper subject of the present study was obligations which, according to the internal law of the predecessor State, were owed by that State. The point at which the third State's interests in that matter were raised to the international level by international agreement was something that went beyond the present draft articles and came under the heading of succession in respect of treaties.

31. He had no wish to make an easy and superficial equation between property and debt or between rights and obligations. Succession to obligations might well follow different and more complex rules than did succession to rights. Nevertheless, some assistance should be sought from the Commission's conclusions with regard to property, rights and interests. The Commission had felt, in that case, that it could confine the consequences of the draft articles to the very moment of the occurrence of succession, and had taken for granted the basic proposition that the internal legal order was not changed merely as a result of a succession of States. Cases in which the predecessor State itself was, according to its internal law, the owner of the property were cases in which a transfer was necessary and inevitable. In his view, that represented a good starting point for considering the question of debts or other obligations.

32. One of the difficulties of the subject of State succession was that even the best authorities had marked off its boundaries in very different ways. Examples discussed in textbooks often related to other issues, many of which fell within the category of State responsibility, by which he meant State responsibility considered as a series of norms regulating a State's duties towards a third State or towards nationals of the third State or even, in modern international law, towards its own nationals. In the case of State property, it had seemed sufficient to allow State responsibility to cover everything that might occur after the actual moment of succession, but perhaps that course would not prove so easy in the matter of State obligations, since the successor State might regard the succession itself as a factor that had a bearing on its duties or its freedom of action with regard to property in which a third State or nationals of the third State had an interest.

33. The best approach would be for the Commission to discuss the problems posed by doctrine and State practice when it came to consider in sequence the various types of succession that it had already identified in dealing with State property. It was not his intention to exclude the very important issue of the rights of third States in a succession of States, an issue that might have to be discussed in some detail, but at the present stage the Commission was concerned only with the relationship at the international level between two States, a predecessor State and a successor State. Naturally, in dealing with that relationship, nothing should be done to prejudice the

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

position of the third State or to reduce its options. It was an elementary principle of the law of treaties that an arrangement between two parties could not be binding on a third party. Again, in some cases of State succession the predecessor State might well disappear without trace and, if the third State had no established right of recourse against the successor State, it had no effective rights of any kind. Later on, it would have to be remembered that a third State must be protected not only from infringements of its sovereignty but also, to some extent, from arbitrary conduct on the part of a successor State.

34. Mr. SUCHARITKUL said that he fully supported all the proposals made by the Special Rapporteur in chapter II of his report. He nevertheless wished to draw attention to the general interests of creditor States, such as Japan and Thailand, which had to be borne in mind when considering some of the events taking place in South-East Asia. The Special Rapporteur had rightly taken account of the triangular relationship between the predecessor State, the successor State and the creditor third State and had, accordingly, taken the creditor third State into consideration in draft articles T and U.

35. According to the typology of succession adopted by the Special Rapporteur, the predecessor State could disappear, in the event of annexation or unification. In that case, the consent of the creditor third State was neither helpful nor even necessary; what was important was the willingness of the successor State to succeed to the debts of the predecessor State. The Commission might learn something from the solutions adopted in that respect following the unification of Viet Nam. The present Viet Nam had already succeeded to many of South Viet Nam's rights and debts, particularly in ESCAP, and it had succeeded to the debts which South Viet Nam had contracted with the Asian Development Bank. In addition to the element of negotiation between the predecessor State and the successor State, which was very important, it was necessary to establish the criteria to be adopted by the successor State and the creditor State for determining the conditions for novation.

36. Mr. FRANCIS said that he agreed with Mr. Castañeda's comment concerning the scope of article R.[9] In general he could accept articles R, S, T and U and the principles enunciated therein, but it would be advisable to incorporate in article R a provision requiring the application of article U as a condition for the extinction of the obligations of the predecessor State.

37. At the start of the discussion on the present topic, he had had an open mind on the question of whether application of the draft articles should be confined to inter-State indebtedness. Unfortunately, he was now faced with something of a dilemma. Mr. Quentin-Baxter had already referred to article 5, concerning State property, and article 11 dealt with the passing of debts owed to the predecessor State by virtue of its sovereignty over, or its activity in, the territory to which the succession of States related. In his report, the Special Rapporteur discussed guarantees given by the predecessor State for debts contracted by local authorities. If it was agreed that guarantees could be given to entities other than States for obligations incurred by local authorities and if it was borne in mind that the Special Rapporteur made provision for such guarantees, it would be noted that chapter IV of the report, dealing with succession to debts in the case of the transfer of part of a territory, contained a definition of a general State debt which could cover obligations incurred by the predecessor State not only vis-à-vis a third State but also vis-à-vis its own nationals and other nationals. Should the Commission decide to restrict the scope of application of the articles, it might be open to the criticism that it sometimes dealt with situations affecting entities other than the State and at other times appeared to ignore them. He would prefer a flexible approach so that the draft articles were not confined to an inter-State relationship.

38. Mr. USHAKOV said, that unlike Mr. Ago, he thought that debts created by treaty were not part of the subject-matter of succession of States in respect of treaties, because it was not enough for a State debt to have its source in a treaty clause; it was also necessary for that clause to have been implemented. If a State or another subject of international law had pledged a loan to the predecessor State, but had not honoured its pledge, there was no debt; the fate of the treaty was of little consequence. If the treaty clause related to a loan which had actually been made, there was a debt, but, if the treaty was considered invalid as a result of State succession, the debt itself would not be invalid. Succession to treaties therefore had no effect, even on debts created by treaties. The phenomenon of succession affected only the fate of treaties or, in other words, their possible maintenance in force and the conditions for their maintenance in force.

39. Moreover, a State debt could come into being otherwise than by an agreement between States. As Mr. Verosta had indicated, the predecessor State might not have paid its contributions to the United Nations. A State debt could also come into being because the international responsibility of the State had been engaged as the result of an arbitral award or a judgment of the International Court of Justice. If only part of a treaty pledge for a loan had been honoured, the proportion of the debt which would pass from the predecessor State to the successor State would reflect the proportion of the pledge that had been honoured.

40. With regard to article X, adopted provisionally by the Commission and relating to the absence of effect of a succession of States on third State property, he noted that the Commission had considered that the property of a third State located in the territory of the predecessor State or the successor State was not affected by the succession of States. The draft articles were, however, not intended only for predecessor States and successor States; they contained general rules which would also apply to third States. If such rules were codified customary rules, they would be compulsory for all States and, if they were rules of the progressive development of international law, they would apply to the States parties to the future convention, if the draft did eventually take the form of a convention.

41. Thus, with regard to part I of the draft, relating to State property, the provisions of article 12, paragraph 1, for example, applied to third States because, when a part

[9] Para. 10 above.

of the territory of a State was transferred by that State to another State, and the predecessor and successor States agreed that the State property of the predecessor State passed to the successor State, the third State was bound to respect that agreement in respect of the State property of the predecessor State located in its own territory. Similarly, in the case of the uniting of two or more States, the third State was bound to consider the property of the predecessor States located in its own territory as the property of the unified State. Such rules were therefore presumed to be rules of general international law. In draft articles R, S, T and U, however, it was presumed that the third State was not bound by the special rules embodied in other parts of the draft. The situation was nevertheless the same: any third State would be bound by those rules if they were customary rules and, if they were rules of progressive development it would be bound by them only if it was a party to the future convention.

42. The articles on State property related not only to the passing of certain property to the successor State, but also to the modalities for such passing which might take the form of a unilateral declaration, an agreement between the predecessor State and the successor State, or a notification to the third State. The articles at present under consideration contained only rules relating to the passing of certain debts. They should be supplemented by rules relating to the modalities of such passing, whether in the form of a notification, negotiations, a conciliation or arbitral procedure or a judgment of the International Court of Justice. The articles under consideration were thus perhaps somewhat premature, with the exception of article R, in which the Special Rapporteur had tried to enunciate a general rule on the passing of State debts to the successor State.

43. Although it was always dangerous to enunciate general rules before special rules had been worked out, the provisions of article R were so general in nature that it seemed acceptable. He would nevertheless propose that it be worded along the following lines:

> A succession of States entails the extinction of the State debt of the predecessor State or of part of that State debt and the passing of that State debt or of part of it to the successor State or States in accordance with the provisions of the present part.

That wording would reflect the Special Rapporteur's intentions and remedy some of the shortcomings of the present wording of article R. It was better to speak of State *debt* rather than State *debts* and not to speak of obligations in that connexion, since a State debt was, according to the definition given in article O, already an obligation.

44. Going back to the definition of the concept of State debt, he said that he wished to draw attention to the existence of two categories of debts. If, for example, the Soviet Union contracted a debt to a Swiss bank, it could be asked whether the debt agreement was a treaty in international law or a contract between the Soviet Union considered as a legal entity under Swiss civil law, and a Swiss bank. In the latter case, the Soviet Union would automatically accept the jurisdiction of Swiss courts and the contract would be governed by Swiss private law; it would not be affected in any way by the rules of international law.

45. With regard to the comment by Mr. Ago [10] that a State could have a debt to its own nationals, he said that such a possibility was not one of the Commission's present concerns. In the case referred to by Mr. Ago, the matter would have to be decided by the internal law of the successor State. Of course, every State was sovereign and could assume debts to its own nationals, but such debts had nothing to do with international law. Moreover, if a State acted as a legal entity according to its own civil law or according to the civil law of the State to which it had contracted a debt, any problems of succession which might arise would be governed by the applicable civil law or by the rules of private international law, which would contain a *renvoi* to the appropriate national law. Consequently, a State debt in international law implied a financial obligation of a State to another subject of international law. In all other cases, the source of the debt lay in a civil law contract, governed by private law. Even if what he had just stated was incorrect, he thought that the Commission must, for the time being, limit itself to debts involving two subjects of international law, and only later consider other debts which might be governed by international law.

*The meeting rose at 6 p.m.*

[10] See para. 19 above.

## 1423rd MEETING

*Thursday, 19 May 1977, at 11 a.m.*

*Chairman:* Sir Francis VALLAT

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

### Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/299 and Add.1-2)

[Item 1 of the agenda]

1. The CHAIRMAN said that, in letters addressed to the Chairman of the Commission, the Chairmen of the Asian Group for the months of February and May 1977 respectively had asked that the vacancy in the Commission left by the death of Mr. Edvard Hambro should be filled by an Asian canditate in accordance with the gentleman's agreement of representation in the Commission.[1] In addition, in April 1977, the Permanent Representative of Norway to the United Nations, writing to the Secretary-General on behalf of the five

[1] See 1414th meeting, para. 14.