United Nations Conference on Succession of States in respect of State Property, Archives and Debts

Vienna, Austria
1 March - 8 April 1983

Document:-
A/CONF.117/C.1/SR.31

31st meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on Succession of States in respect of State Property, Archives and Debts (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

Copyright © United Nations

portunity to contract fictitious debts which would pass to the successor State unless the qualification "arising in good faith" was incorporated in the wording of article 31. The second condition, that financial obligations incurred by a State must be in conformity with international law, was a logical extension of the requirement of good faith. The definition proposed in his delegation's amendment would cover all financial obligations of a State, whether contractual or non-contractual, but would exclude any obligations which were not in conformity with international law.

83. Mr. MORSHED (Bangladesh) said that a definition of "State debt" must take into account the need to ensure that a successor State did not find itself encumbered by debts incurred by a predecessor State from which the successor State had not derived benefit. He appreciated the efforts made by the International Law Commission to arrive at a generally acceptable definition but reserved the right to comment on article 31 in greater depth at a later stage.

The meeting rose at 12.50 p.m.

31st meeting

Wednesday, 23 March 1983, at 3.20 p.m.

Chairman: Mr. ŠAHOVIĆ (Yugoslavia)

Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982 (*continued*) (A/CONF.117/4, A/CONF.117/5 and Add.1)

[Agenda item 11]

Article 31 (State debt) (*continued*)

1. Mr. NAHLIK (Poland), referring to the amendment submitted by Pakistan (A/CONF.117/C.1/L.11), said that it was, in fact, a request for clarification. He agreed that the phrase "any other subject of international law" presented problems both in the science of international law and in State practice in international relations. Before the Second World War it had been the almost universally accepted view that only States could be subjects of international law. Since then, however, with the proliferation of international organizations, the view had gradually been accepted that some major intergovernmental organizations could be considered subjects of international law, although their rights and obligations were not identical to those of States.

2. The question had then arisen whether there could be yet other subjects of international law. Views on that point were divergent. It was his view, however, that in a convention of a codificatory nature which was to have a longer life than a mere bilateral agreement, the way should be left open for future developments. That possibility had been reflected in many international instruments, including the 1978 Vienna Convention on Succession of States in Respect of Treaties,[1] article 3 of which explicitly mentioned agreements concluded between States and other subjects of international law. In view of such precedents, he considered that the possibility of there being "other subjects of international law" should be envisaged in the draft convention under discussion.

3. Mr. BEDJAOUI (Expert Consultant) said that whereas the definitions of State property and of State archives adopted by the International Law Commission served the aims or objectives of the draft convention without really defining the concepts, because they defined them only in relation to the predecessor State, the Commission had been more successful in defining State debt, because it had succeeded in defining it without any specific reference to the predecessor State.

4. He understood the Syrian Arab Republic's delegation's desire to clarify, through its amendment (A/CONF.117/C.1/L.37), the concept of State debt. The concept of good faith was commonly referred to in international instruments, one instance being article 2, paragraph 2, of the Charter of the United Nations. In such a sensitive convention as the one under discussion, a reference to good faith was even more necessary. However, he was afraid that the introduction of that concept might lead to difficulties. For example, a predecessor State might in good faith contract a debt which it considered necessary to its survival, whereas the successor State might in equally good faith consider such a debt odious.

5. Another problem which had been raised at the preceding meeting was that of categories of creditors. As indicated in paragraph 46 of its commentary on article 31, the International Law Commission had considered at length the advisability of retaining a subparagraph (*b*) which extended at the same time the definition of State debt to cover "any other financial obligation chargeable to a State", which was intended to cover State debts to private creditors, whether natural or juridical persons. However, the definition of succession of States in article 2 referred to the replacement of one State by another in the responsibility for the international relations of territory. That involved a juridical relationship governed by public international law and therefore excluded debts owed by the predecessor State to private creditors. Consequently, the International Law Commission had deleted the subparagraph (*b*) concerned. Being nevertheless concerned with the problem of private creditors, it had included certain safeguard clauses in the draft con-

[1] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties*, vol. III (United Nations publication, Sales No. E.79.V.10), p. 185.

vention, a general clause in article 6 and a special clause in article 34, paragraph 1.

6. Another question which had been raised concerned subjects of international law. In the complex terminology of international law, that term was considered to refer to States, certain entities such as the Holy See and international organizations of an inter-State nature. A fourth category consisted of certain inter-State organizations which were mainly regional in character but had supranational powers, such as the European Economic Community. National liberation movements had also been considered subjects of international law. In the context of the present draft convention it was unlikely that a predecessor State would incur a debt with respect to a national liberation movement but it might possibly undertake by treaty to pay such a movement a certain sum each year.

7. A much more controversial problem was that of transnational corporations. The work being done to develop a code of conduct for such corporations had led certain delegations to suggest that that activity conferred on them a certain international personality. Such a contention had been strongly rejected by other delegations which considered, on the other hand, that a contract between a State and a transnational corporation could by no means be compared to a treaty, in spite of extremes of doctrine and misguided arbitral jurisprudence. In any case, it was clear that in international law no single State had the power unilaterally to confer the status of subject of international law upon any entity.

8. It was obvious that in the draft convention the International Law Commission had understood the term "subject of international law" in its generally accepted meaning. To avoid any ambiguity the Conference might possibly prefer not to use the term "subject of international law" at all. He wished, however, to point out that article 3 of the 1969 Vienna Convention on the Law of Treaties[2] clearly referred to "other subjects of international law" as did article 3 of the 1978 Vienna Convention on Succession of States in respect of Treaties.[1]

9. Mr. SUCHARIPA (Austria) expressed regret that, despite the study of different categories of State debts contained in the International Law Commission's commentary on article 31, the Commission's detailed discussion of different types of State debt was not reflected in the wording of the articles in Part IV of the draft convention. That was all the more regrettable because the failure to distinguish between different categories of State debt had led to the otherwise unnecessary introduction into some articles of the concept of equity, which had no generally accepted meaning in international law. The fact that the categorization of State debts contained in the commentary to article 31 was not actually applied led to particular difficulties with respect to article 36, to which his delegation would refer later.

[2] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

10. The wording of article 31 limited, for the purposes of Part IV, the definition of the term "State debt" to financial obligations of a State towards subjects of international law, thus excluding debts owed to natural or juridical persons which were not subjects of international law. He understood that the members of the International Law Commission generally agreed that by virtue of article 6 of the draft convention, the debts owed by a State to private creditors were legally protected and not prejudiced by the occurrence of a succession of States. Nevertheless, the problem of the inclusion of private loans in the definition remained to be discussed and his delegation therefore welcomed the Brazilian amendment (A/CONF.117/C.1/L.23).

11. His delegation had considerable difficulty in excluding debts owed to private persons from the scope of application of the draft convention. It considered that question to be of fundamental importance in view of the volume of credits extended to States from foreign private sources. It did not agree that that subject fell outside the scope of the draft convention. Its inclusion would bring Part IV into line with the definition of State property in article 8, which extended to property, rights and interests owned by the predecessor State, without distinguishing whether the corresponding debtors were subjects of international law or not.

12. He stressed, however, that the current wording of the provisions in Part IV of the draft convention ran counter to the interests of private creditors and would make it almost impossible for them to pursue their legitimate rights and interests. In particular, major disadvantages would arise for private creditors in the allocation of the State debt in accordance with article 35, paragraph 2, and article 38. In certain cases both the predecessor State and the successor State should be regarded as co-debtors. Therefore, if the scope of article 31 was extended to cover debts owed to private persons, as his delegation wished, consequential changes would have to be made in article 34.

13. At the current stage of the discussion, the Austrian delegation would vote in favour of the inclusion of a reference to debts owed to non-subjects of international law, but it might be obliged to change its position in the light of the discussion of articles 32 to 39.

14. Mr. TSYBOUKOV (Union of Soviet Socialist Republics) said that his delegation supported the definition of State debt which had been proposed by the International Law Commission. The proposal of the Brazilian delegation to include in that definition the phrase "any other financial obligation chargeable to a State", namely, obligations towards entities which were not subject to international law, was unacceptable as a matter of principle, as being outside the scope of the draft convention, which could not be extended to cover matters governed by civil law, even if one of the parties involved was a State. A situation where a State had concluded a contract with a private person was regulated either by internal law or otherwise, as specified in the contract. Disputes arising from such contracts were likewise subject to settlement by recourse either to domestic juridical bodies or to commercial arbitration, as provided for in the contract concerned.

15. Secondly, the Brazilian amendment would inevitably include in the definition obligations of the State to its own natural and juridical persons, arising in particular in connection with internal loans. Such obligations were exclusively within the competence of the State concerned. Acceptance of the amendment would therefore constitute inadmissible interference in the internal affairs of States. The question of the rights and obligations of natural and juridical persons was dealt with in article 6.

16. Referring to the amendment submitted by the Syrian Arab Republic, he said that his delegation had no objection to the inclusion of the phrase "in conformity with international law", although it considered that concept to be implicit in the original text. The use of the words "arising in good faith" could present difficulties, however, inasmuch as obligations could arise also as a result of a decision by a competent international body.

17. Consequently, his delegation supported the text of article 31 proposed by the International Law Commission.

18. Mr. ZSCHIEDRICH (German Democratic Republic) noted that there was a conflict between State practice and international law doctrine with regard to succession in respect of State debts. Hence no generally recognized norms of customary law governing the passing of such debts had so far evolved, as had happened to some extent in the case of State property. The draft articles in Part IV constituted a further development of contemporary international law which his delegation welcomed as helpful in removing existing legal uncertainties. It agreed in principle with the definition of State debts in article 31, which was consistent with the decisions taken in respect of treaties and archives in that it dealt only with the international legal effects of succession. The term "financial obligation" was a necessary complement to the definition. His delegation furthermore fully agreed with the views concerning delictual debts expressed by the International Law Commission in paragraph (36) of its commentary.

19. Turning to the amendments to article 31, he said that his delegation saw merit in the Syrian proposal to add the phrase "in conformity with international law" in order to reinforce the concept that State debts of the predecessor State which were contrary to generally recognized international law and to the major interests of the successor State were not covered by article 31 and the subsequent articles. His delegation had initially found the other addition proposed in the Syrian amendment—"in good faith"—somewhat vague but it had been convinced by the Syrian representative's explanation of its meaning. The Syrian amendment enriched article 31 and his delegation would support it.

20. The Brazilian amendment reintroduced the original subparagraph (*b*) of article 31 which had been deleted from the final draft of that article after prolonged discussion both in the International Law Commission and in the Sixth Committee of the General Assembly of the United Nations. To impose upon the successor State an international obligation to leave unchanged the internal legal relationships of the predecessor State would be an unacceptable encroachment upon the sovereignty of the former and hence would be incompatible with principles of the sovereign equality of States and non-intervention in internal affairs. A successor State must have the inalienable right to establish its own political and legal system, which included regulating, at its own discretion, its relationship under civil law with natural or juridical persons.

21. His delegation understood the concern expressed by some delegations with regard to the legal status of foreign private creditors in the event of State succession. The safeguard clause in article 6 met such concern to some extent. It was not admissible, however, subsequently to transform what were originally relationships under civil law into relationships governed by international law, thus restricting unilaterally the rights of the successor State. His delegation welcomed article 31 in that it limited the subject matter of the convention, as a matter of principle, to international debt relationships.

22. Mrs. THAKORE (India) said that her delegation supported the restrictive definition of State debts in article 31, which kept the topic of State succession within its proper limits. The International Law Commission's commentaries on articles 6, 31 and 34 amply justified the definition proposed and rejection of the broader definition of State debts which had been favoured by certain delegations. The interests of international creditors were adequately protected in article 34 and any agreement which departed from the rules in that article had to be accepted by the third State or other subject of international law concerned. Article 6 explicitly provided for the legal protection of the interests of natural or juridical persons. She did not think that the present text of article 31 would limit the capacity of developing countries to attract credit.

23. The Indian delegation had nothing to add to the Expert Consultant's comments on the Syrian amendment. With regard to the Brazilian amendment, she recalled that a similar provision had been rejected by the International Law Commission in second reading. It had been generally agreed that debts owed by a State to private creditors were legally protected and not prejudiced by a succession of States—a position reflected in the adoption by the Commission of article 6 as a safeguard clause. Those members of the Commission who had considered that the definition of State debts should be limited to financial obligations arising at the international level had contended that debts to private creditors fell outside the scope of the convention. The adoption of the Brazilian amendment would raise new issues that the Committee of the Whole had no time to consider. In that connection, she read out observations made by the Special Rapporteur during the discussion of the relevant article at the 1671st meeting of the International Law Commission.[3]

24. The Special Rapporteur had suggested that the Commission might resolve the problem in a procedural manner by deleting the provision concerned, a course which would show its concern to seek the lowest com-

[3] *Yearbook of the International Law Commission, 1981*, vol. I (United Nations publication, Sales No. E.82.V.3), 1671st meeting, paras. 4-7.

mon denominator within the Commission by limiting the content of the article to the present text of article 31. Such a solution had been suggested to him by the written comments of some governments, including that of Italy. She said she would leave the members of the Committee of the Whole to draw their own conclusions.

25. Mr. EDWARDS (United Kingdom) said that his delegation supported the Brazilian amendment. In the Sixth Committee of the General Assembly the United Kingdom had expressed the opinion that the draft convention should cover not only inter-State debts but also debts whose creditors were alien individuals or corporations, in view of the fact that by far the larger part of State borrowing came from sources other than States and international organizations. If the Brazilian amendment was not accepted, the draft convention would have a serious gap. If it was adopted, certain substantive adjustments would have to be made to articles 34, 35 and 36.

26. His delegation could not support the Syrian amendment which would introduce into the definition of State debts—which should be objective and factual—terminology that was vague, subjective and open to abuse.

27. He had understood the Expert Consultant to say that a number of bodies, including transnational corporations, were subjects of international law. His delegation did not accept that view.

28. Mr. ABED (Tunisia) stressed the importance attached by his delegation to article 31, which contained key provisions governing the application of the rules and principles that would be adopted regarding the effects of a succession of States on State debts.

29. The development of financial relations was one of the most prominent features of modern life. International loans within the framework of inter-State co-operation and co-operation between States and international organizations had become customary for all countries. That situation gave rise to new practices, institutions and legal difficulties. The International Law Commission had appreciated the importance of that situation and had provided a very substantial commentary on article 31, which would facilitate the adoption of a clear, unambiguous definition. His delegation endorsed the views of the Commission. Nevertheless, in order to limit the legal problems which might arise in applying the expression "any other subjects of international law", he thought that the Drafting Committee should be requested to explicate that term.

30. With regard to the Brazilian amendment, which extended the definition of State debts to include natural or juridical persons under private law, he pointed out that the International Law Commission had stated that a succession of States did not affect debts of that type, a position confirmed by the inclusion of article 6 in the draft convention as a safeguard clause. His delegation considered that such other debts fell outside the scope of the draft convention. Natural or juridical persons under private law had at present means of pressing their claims directly against States. His delegation was therefore unable to support the Brazilian amendment.

31. The intention of the Syrian amendment was commendable, but the addition to article 31 of language which was vague in its interpretation might impede application of the effects of a succession of States in respect of State debts.

32. Mr. OESTERHELT (Federal Republic of Germany) said that the Brazilian amendment to article 31 sought to correct an imbalance which had already been remarked upon on numerous occasions in various bodies. The concept of State property comprised debt claims against private debtors whereas the concept of State debts did not comprise debts owed to private creditors. If article 31 remained as proposed by the International Law Commission, private creditors would fall outside the scope of the convention. That, of course, did not signify that they would not be protected. Their rights and obligations in that event would simply be determined by the general international law applicable in such cases, as in all other cases where the convention did not apply because the States concerned were not parties to it. Article 6 contained a necessary clarification in that regard.

33. Referring to the Syrian amendment, he pointed out that the International Law Commission had wisely avoided burdening the definition of State debts with the question of "odious debts": a definition should be free of elements not pertaining strictly to the definition itself. His delegation endorsed the Commission's decision not to include any provision concerning odious debts. In paragraph (44) of its commentary the Commission characterized State debts as being "international" financial obligations, but that left open the question whether the debtor-creditor relationship was to be governed by international law or whether it would suffice, as the text seemed to indicate, that the debtor and creditor were subjects of international law. He would welcome comments on that point in light of the fact that the term "treaty" was defined in article 2 of the 1978 Vienna Convention on Succession of States in Respect of Treaties as "an international agreement . . . governed by international law". In his comments, the Expert Consultant had seemed to imply that the same limitations applied to the draft convention. His delegation foresaw difficulties, not only in that respect, if both instruments were applicable to a given case, in view of the varying degree of parallelism between them.

34. Mr. BEDJAOUI (Expert Consultant), referring to the remarks made by the representative of the United Kingdom, said that he had not meant to say that the International Law Commission or he himself had maintained that transnational corporations were subjects of international law; rather he had said the opposite.

35. Mr. MONNIER (Switzerland) said that the representative of Poland and the Expert Consultant had both referred to earlier instruments to support the conclusion that the expression "any other subject of international law" was not a new one. The provisions of those instruments, however, were not the same as those contained in article 31 of the present draft convention. Article 31 contained the formula "State, an international organization or any other subject of international law". Article 3 of the 1969 Vienna Convention made no mention of international organizations, but it was understood in that context that "other subjects of international law" included international organizations, which the International Law Commission had

at the time felt should be covered. The Swiss delegation, like that of Pakistan, wondered therefore what was intended by the use of the expression "any other subject of international law" in the context of article 31. The Expert Consultant had referred to States and other international organizations and entities, and had also mentioned national liberation movements and transnational corporations, but there appeared to be no complete unanimity in that connection and the Swiss delegation doubted whether it was wise to attempt any enumeration.

36. The Expert Consultant had observed that the expression also marked the international nature of the problems arising as a result of the succession of States and had referred to the definition of succession of States in paragraph 1(*a*) of article 2, which was "the replacement of one State by another in the responsibility for the international relations of territory". That definition also appeared in the 1978 Vienna Convention, but while it was appropriate in a convention dealing with the succession of States in respect of treaties, he wondered whether it was really appropriate in a convention regulating succession of States in respect of State property, archives and debts. Since the present convention contained many references to internal law, another definition might be more appropriate.

37. The Expert Consultant had concluded that succession of States established a legal relationship which was the subject of international law. If article 31 was approached in that light it would be possible to avoid the necessity of stating whether the creditor should be a subject of international law and deciding whether or not the legal relationship involved was the subject of international law. That approach was all the more correct since contracts between a State and a private or juridical person could be either fully or in part the subject of international law. That approach finally gave rise to the question of internationalized contracts, which were a reality of international life and which were becoming increasingly important in, for example, investment loan contracts which referred to the internal law of one or more States and, increasingly, to international law. The proper legal approach therefore appeared to be to analyse whether or not the legal relationship involved was sufficient *vis-à-vis* international law. Such an analysis would take account of the realities of international relations and would avoid the sensitive issue of whether or not transnational corporations were subject to international law. In the light of those arguments, therefore, the Swiss delegation supported the Brazilian amendment to article 31.

38. There were two other legal arguments in favour of the Brazilian amendment. Paragraph (46) of the International Law Commission's commentary on article 31 referred to the divergence of opinion within the Commission regarding the need for a provision such as that now proposed by Brazil. Some of those who had favoured such a provision had argued that the deletion of the relevant subparagraph would result in a contradiction between the definition of State debt in article 31 and that of State property in article 8. That argument was an important one which should be borne in mind. The definition of State property covered property, rights and interests, defined in accordance with the internal law of the predecessor State, and article 8 did not raise the problem of whether debtors were or were not subjects of international law. The exclusion of private creditors from the definition of "State debts", therefore, left the definition in clear contradiction with the International Law Commission's definition of "State property", which the Committee of the Whole had already accepted.

39. The exclusion of private debts would be contrary to the ideas and concepts underlying and reflected in the Commission's draft. In the introduction to the report of the International Law Commission on the work of its thirty-third session[4] emphasis had been placed on the principle of equity not only in the sense of *ex aequo et bono*, which required the express agreement of the parties, but also as developed by the International Court of Justice as a rule of international law. The exclusion of certain categories of creditors in the context of the present draft convention would therefore be in contradiction with that principle. There were, moreover, a number of legal considerations which justified and clarified the inclusion of private debts in the definition of State debts in article 31, and his delegation could not support the idea that there were legal concepts opposed to such inclusion. The Expert Consultant had described the succession of States as a tricky problem because of its political dimension. There were certainly no legal arguments to oppose the inclusion of private debts in the definition of State debts.

40. Referring to the Syrian Arab Republic's amendment, he wondered whether it was necessary or useful to include the expression "in good faith", since good faith prevailed whenever financial obligations arose, and was in fact the basis of international law, as the Expert Consultant had observed. Furthermore, the reference to international law was meaningful only if there was a legal arbitration body which could decide, in accordance with international law, whether any financial obligation had arisen in connection with that law.

41. Mr. KADIRI (Morocco) said that article 31 referred to financial obligations in order to make it clear that State debts had a pecuniary aspect, and it divided financial obligations into three categories. "State debts" was understood as being any financial obligation of one State *vis-à-vis* another State, international organization or any other subject of international law. His delegation regretted the final decision of the International Law Commission to delete the word "international" qualifying "financial obligation" in article 31, since it considered that that word more explicitly described the nature of the obligations involved. Without it, the term "financial obligation" could be interpreted as meaning an obligation towards any juridical or natural person, in particular those with the nationality of the predecessor State, and would undoubtedly give rise to ambiguity. The Commission had held that to describe a debt as a legal obligation for a certain subject in law provided a certain definition. While the Commission might have been right in stating that State debts were those contracted by one State *vis-à-vis* another State or

[4] *Ibid.*, vol. II (United Nations publication, Sales No. E.82.V.4 (Part II)), paras. 76 *et seq.*

an international organization, the same was not true where any other subject of international law was concerned. As the delegation of Pakistan had indicated at the previous meeting, the expression required further clarification.

42. The concept of "any other subject of international law" had been clearly explained by the International Court of Justice in its opinion of 11 April 1949[5] which concerned United Nations officials. Neither legal nor natural persons in private law immediately and fully enjoyed the status of a subject of international law. There were several reasons for taking such a restrictive view of the international financial obligations of the successor State in the context of a succession of States. Succession to debts generally took place without giving rise to insoluble disputes, but through amicable arrangements touching on the law governing investments and succession to public debts. It would therefore be wrong to see in that approach any attempt on the part of the developing countries to escape the obligations contracted by them, or by the predecessor State on their behalf. Either the debt in question was covered by a guarantee from the creditor State under an agreement with the beneficiary State, in which case there was a succession to treaties in the conditions established by the 1978 Vienna Convention, or else the debt was contracted with private persons without previous or concomitant State intervention, any litigation being then subject to the rule of exhaustion of internal recourse. If necessary, recourse might be had to diplomatic protection, which might bring into play the international responsibility of the debtor State. Article 6 provided a very relevant safeguard in that respect.

43. In view of the very nature of the subject to be settled and the different nature of the parties involved, codification in the field under discussion depended more on commercial international law than on general international law.

44. The conclusions which could be drawn from the decision of the International Court of Justice in the Barcelona Traction case[6] were quite positive as far as international responsibility was concerned and *a fortiori* in respect of the succession of States. Morocco's experience in that connection had been most instructive. It had involved the gradual recovery and control of the national economy through lengthy financial litigation, only recently concluded, with the two former colonial powers. It was therefore as a matter of principle that his delegation was anxious to see the word "international" inserted before the words "financial obligation of a State" in article 31. His delegation did not share the view of some members of the Commission that the debts of the successor State also included the debts of private persons.

45. The transferability of State debts covered by a convention which would by definition be a convention between States, and governed by *jus gentes*, could not include the financial obligations contracted by subjects of international law. That did not, however, exclude financial international law which was based on public international law. His delegation consequently supported the restrictive concept of a subject of international law, and supported the definition of "State debts" as it was explained in the International Law Commission's commentary on article 31. It regretted that the Commission had not seen fit to include in the draft convention a separate provision concerning "odious debts".

46. The Moroccan delegation was unable to support the Brazilian amendment, as it went beyond the real scope of article 31 in particular and beyond the scope of the draft convention as a whole. The Syrian amendment made reference to an essential principle of international relations, the principle of good faith, which was already codified in article 26 of the 1969 Vienna Convention on the Law of Treaties. His delegation therefore fully supported that amendment.

47. Mr. NATHAN (Israel) said that his delegation had noted that the enumeration of debts contained in paragraph (13) of the International Law Commission's commentary included contractual debts and delictual or quasi-delictual debts. His delegation fully associated itself with the inclusion of delictual or quasi-delictual debts within the category of debts.

48. The view expressed in paragraph (36) of the commentary on article 31, that delictual debts arising from unlawful acts committed by the predecessor State raised special problems with regard to the succession of States, the solution of which was governed primarily by the principle relating to international responsibility of States, appeared to be supported by a reference to a rather old authority in international law on State succession, namely a work published in 1907 by A. B. Keith. The Israeli delegation disassociated itself from that notion, which was not in line with modern international law as reflected in some of the more modern decisions on the subject, such as in the Lighthouse cases arbitration,[7] and in the works of D. P. O'Connell and Feilchenfeld. It was true that the existence or otherwise of a debt arising *ex delicto* or quasi *ex delicto* came within the ambit of State responsibility. But once responsibility for the delictual debt had been established, however, the question of whether or not there was succession to such a financial liability clearly fell within the ambit of the subject of State succession and thus within the scope of the present draft convention.

49. His delegation fully supported the Brazilian amendment and considered that the draft convention, and in particular Part IV, would be incomplete and deficient if the definition of "State debt" were limited to States or other subjects of international law. His delegation fully associated itself with those members of the International Law Commission who had voted against the deletion of the relevant subparagraph (*b*) and whose views were set forth in paragraph (46) of the Commission's commentary on article 31. From the legal standpoint it was true to say that financial obliga-

[5] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* (*I.C.J. Reports 1949*), p. 174.

[6] *Barcelona Traction, Light and Power Company Limited, Judgment* (*I.C.J. Reports 1970*), p. 3.

[7] United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 161.

tions of a State towards a person not subject to international law did not arise at the international level and as such were not subject to international law.

50. On the other hand, while the debt as such and the interpretation and application of the contract creating the debt were not subject to international law, the effects of the succession of States on the financial obligations of the debtor State, whether towards other States or towards natural or juridical persons, were indeed a proper subject of international law and should fall within the scope of the draft convention. Moreover, international conventions governing succession of States in respect of debts invariably included debts of any category without distinguishing between debts owed to another State or those owed to a private or juridical person. It also appeared that the volume of credit extended to States by foreign private sources exceeded the volume of credit extended by governmental sources. It was therefore extremely important that the draft convention should give proper attention to that part of State debts which was owed to private creditors.

51. He fully agreed with the suggestion that the whittling down of the definition of "State debts" would create an inconsistency between the definition of "State debts" in article 31 and that of "State property" in article 8, which also extended to the property owned by the predecessor State in accordance with its internal law. That definition would obviously include debt claims and did not distinguish between the personality of the debtor State or private or juridical persons, and could consequently give rise to a situation in which debt claims towards private debtors were included while State debts towards private debtors were excluded.

52. He doubted the validity of the argument that the protection extended in article 6 to private creditors, whether juridical or private persons, was sufficient. The representative of the Federal Republic of Germany had rightly pointed out that private creditors would have to resort to the general rules of customary international law in such a case, and those rules were highly intricate, complicated, often ambiguous and unclear. That was particularly true in the case of the dissolution of a State, where the juridical personality of the original debtor disappeared altogether, leaving the private creditor with no other recourse than to address itself to the complicated situation between the various successor States following the dissolution of the dismembered State.

53. The Syrian amendment was in his view unnecessary and perhaps even harmful. It was unnecessary because the notion of good faith underlay every international or private contractual obligation, as did the invalidation of contracts created under conditions of fraud, duress or coercion. The amendment might even undermine the very notion of *pacta sunt servanda*.

54. His delegation disassociated itself from the view of the Expert Consultant that transnational corporations and national liberation movements had the status of subjects of international law. That point was not included in the International Law Commission's commentary and his delegation therefore assumed and understood that that view was not necessarily the view of the International Law Commission as a whole.

55. Mr. ECONOMIDES (Greece) said that, in his delegation's view, the Brazilian amendment did indeed fall within the scope of the draft convention, which was designed to establish the rights and obligations arising from State succession in its various aspects. Contemporary law and practice in respect of State succession did not distinguish between matters which were governed by internal law and those which were the subject of international law. That situation, which had been recognized in the definitions of State property and State archives, in articles 8 and 19 respectively, should, for consistency, also be reflected in the definition of State debt. The Brazilian amendment sought to correct a major deficiency in the draft convention and his delegation would therefore support it.

56. With regard to the amendment submitted by the Syrian Arab Republic, his delegation was sympathetic to the inclusion of the phrase "in conformity with international law", but considered an explicit reference to good faith in article 31 superfluous: that was surely an element inherent in the concept of international law.

57. Mr. YÉPEZ (Venezuela) said that his delegation supported the International Law Commission's text of article 31, which demonstrated a balanced approach to a complex matter. It also supported one element of the amendment submitted by the Syrian Arab Republic, namely, the inclusion of the phrase "in conformity with international law", which improved the Commission's draft. A specific reference to good faith in article 31 could, on the other hand, give rise to problems. His delegation would therefore like separate votes to be taken on those two aspects of that amendment.

58. His delegation's understanding of the purpose of the Brazilian amendment was that it had been submitted in order to ascertain the views of the Committee of the Whole on a subject which had given rise to controversy in the International Law Commission. While there was merit and logic in the position of those who had favoured adoption of the proposed new subparagraph (*b*), his delegation, having weighed the pros and cons, had opted in favour of dispensing with that provision. As the Expert Consultant had explained, State debts owed to private natural or juridical persons were adequately safeguarded elsewhere in the draft convention.

59. Most of the arguments advanced in favour of a reference to State debts owed to private creditors —such as the need to maintain sources of credit—were based on economic rather than legal considerations. Finally, the definition of State debt, which was a clear and independent concept, should be judged on its own merits, and not according to whether it was in complete alignment with the definition of State property.

60. Mr. do NASCIMENTO e SILVA (Brazil) said that his delegation could support to some extent the amendment submitted by the Syrian Arab Republic although it felt that a specific reference to good faith in article 31 was perhaps excessive.

61. The debate on the amendment submitted by his own delegation had confirmed its view that such a modification of the article was necessary. It was important to take a practical view of the matter, bearing in mind that international law had often been criticized

for not being in touch with modern reality, where financial, commercial and economic considerations loomed large.

62. Referring to some of the points mentioned during the discussion, he said it was not correct to state that the International Law Commission text represented a consensus. There had in fact been a tied vote in the Commission on the subject. It was for that reason that his delegation had thought it important to raise the question again in the Committee of the Whole. The representative of India had referred to a procedural justification for the deletion of the earlier subparagraph (*b*), but it was equally possible to find a justification for the retention of that provision.

63. The comment had been made that the Brazilian amendment ran counter to the sovereign rights of successor States. On the contrary, in many cases a newly independent State preferred to go to private sources of credit and pay higher interest rates rather than suffer a heavy political burden which could in fact be a greater menace to its sovereignty.

64. While the position of his delegation remained flexible, bearing in mind that the consideration of article 6 had yet to take place, and that there had been considerable support for the Brazilian amendment, he did not propose at present to withdraw that proposal.

65. Mr. SKIBSTED (Denmark) said that his delegation attached the utmost importance to the balance and internal consistency of the future draft convention. The definition of State property in article 8 clearly extended to financial claims towards natural or juridical persons. He therefore had difficulty in understanding why the International Law Commission had decided not to include in the definition of State debt reference to any financial obligation chargeable to a State other than those owed to another State, an international organization or any other subject of international law. His delegation was sympathetic to the Brazilian amendment, which it believed would make article 31 more balanced and logical.

66. So far as the amendment submitted by the Syrian Arab Republic was concerned, his delegation would be unable to support the addition of the phrase "arising in good faith", which it considered vague and imprecise.

67. Mr. SOKOLOVSKI (Byelorussian SSR) said that, in his delegation's view, the International Law Commission had been right to exclude financial obligations towards natural or juridical persons from the definition of State debt. That approach was in conformity with the Commission's mandate.

68. His delegation accordingly supported the text proposed by the International Law Commission and could not accept the Brazilian amendment, which sought to include in the definition of State debt matters which were not the subject of international law. Debts owed to private creditors, which should be settled in accordance with the internal law of the States concerned, were covered by article 6.

69. His delegation could support the amendment submitted by the Syrian Arab Republic, but considered the inclusion of the phrase "arising in good faith" to be unnecessary.

The meeting rose at 6 p.m.

32nd meeting

Thursday, 24 March 1983, at 10.20 a.m.

Chairman: Mr. ŠAHOVIĆ (Yugoslavia)

Consideration of the question of succession of States in respect of State property, archives and debts, in accordance with General Assembly resolutions 36/113 of 10 December 1981 and 37/11 of 15 November 1982 (*continued*) (A/CONF.117/4, A/CONF.117/5 and Add.1)

[Agenda item 11]

Article 31 (State debt) (*continued*)

1. Mr. ROSENSTOCK (United States of America), referring to the Syrian Arab Republic's amendment (A/CONF.117/C.1/L.37), said that the amendment was open to objection from a purely legal point of view, in that it referred to obligations which were binding only subject to certain conditions. An obligation that was defective was not an obligation. As the representative of Brazil had pointed out, the text of the draft convention was replete with references to agreements but nowhere was it specified that those agreements had to fulfil certain conditions in order not to be open to challenge on one or another ground of invalidity. The representative of the Soviet Union had clearly outlined at the previous meeting the difficulties which would arise if the phrase "in good faith" were included in article 31, as was proposed in the Syrian amendment.

2. Turning to the question of debts to creditors other than States or international organizations, he said that such debts were of even greater importance than debts to States and that to omit mention of them would inevitably tend to trivialize the convention. The arguments advanced for excluding private debts from the scope of the definition were so unconvincing as to be transparent, and were full of inconsistencies. Reference had been made, for example, to paragraph 1(*a*) of article 2, with the suggestion that private debts did not relate to "the replacement of one State by another in the responsibility for the international relations of territory". If it were indeed the intention to limit the scope of the convention in that way, the effect would be to exclude from its ambit a good deal of State property, both movable and immovable, and also archives, which had little or no connection with "international rela-