Document:-
A/CN.4/SR.1423

Summary record of the 1423rd meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1977, vol. I

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.

Nordic countries, had said that the Governments of those countries shared the opinion that the balanced representation in the Commission of forms of civilization and legal systems, which was the aim of the gentleman's agreement but which had not been respected in the elections held at the thirty-first session of the General Assembly, should be maintained.

2. He announced that, at a private meeting, in accordance with its Statute, the Commission had elected Mr. Abdul Hakim Tabibi, of Afghanistan, to fill the vacancy caused by the dealth of Mr. Edvard Hambro.

3. Mr. Tabibi had been invited to take part in the Commission's proceedings.

The meeting was suspended at 11.05 a.m. and resumed at 11.20 a.m.

Welcome to Mr. Tabibi

4. The CHAIRMAN congratulated Mr. Tabibi on his election and said that he was glad to welcome back one who had been a respected member of the Commission for many years.

5. Mr. TABIBI thanked the Commission for the great honour it had done him by electing him a member, thereby restoring the balance for by the gentleman's agreement which had not been respected at the thirty-first session of the General Assembly. He was fully aware of the need for a new international legal order and would do his utmost to meet the expectations and aspirations of the peoples of the third world. He regretted only that the occasion of his rejoining the Commission should have been to replace so worthy a man, so eminent a jurist and diplomat, and so dear a friend as Edvard Hambro.

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) [2] (*continued*)

6. Mr. SCHWEBEL said that he shared the views expressed by Mr. Francis [3] on the question whether the draft articles should cover not only debts between States but also debts that a State incurred through borrowing from a non-State party. He fully agreed with Mr. Castañeda [4] that the definition of State debt contained in article O was an appropriate one, for it did not exclude creditors other than States. Similarly, he could agree that it was apparent from the foot-note to paragraph 96 of the report (A/CN.4/301 and Add.1) that non-State parties did fall within the scope of the draft. Consequently, he questioned the relevance of the Special Rapporteur's references [5] to the Calvo clause, which was an expression of national law, and in some instances of constitutional law, but not one of customary or conventional international law. Obviously, no State could cite its national law in derogation of its international obligations. Mr. Ago [6] had commented pertinently that if the Commission was to deal solely with inter-State debts, it could be argued that the draft articles on succession of States in respect of treaties were sufficient, for the origin of inter-State debts—if not always, at least frequently—lay in treaties.

7. For both legal and practical reasons, he was inclined to suggest that the draft should encompass loans to the State from non-State entities of a public international character, such as loans of the World Bank, which were expressly governed by international law, and also loans by non-State entities of a private character, such as loans by bank consortia, which in many cases were not governed by international law.

8. If a loan contract was based on the national law of the predecessor State, surely the successor State was obliged under customary international law to accord due respect to the law of the predecessor State in so far as it had a bearing on private parties and private rights and obligations; otherwise, the responsibility of the successor State might be engaged. It could even be inferred that, under the terms of the draft articles, the successor State was not obliged to assume inter-State debts but was bound to assume debts to parties based on the national law of the predecessor State, to the extent that it was the successor to that law. Again, if the consent of a third State was seen to be required for novation of a debt, such consent might be expressed by a third State on behalf of its nationals who were creditors of the predecessor State and, it could be argued, of the successor State.

9. He sought to raise those questions because the protection of international law extended to alien property and contractual rights, even though those rights were created by national law—a view adopted in much of the law on State responsibility for many hundreds of years and one that should be taken into account in considering the law of State succession. While the protection of international law did not afford any guarantee of such rights, it none the less covered arbitrary or discriminatory action by a State against aliens and would cover repudiation of a debt in circumstances in which repudiation was arbitrary. It was by no means certain that his arguments could be dismissed with the reply that they could only be weighed, if at all, when the Commission came to deal with State responsibility. In his opinion, a clear-cut

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

[3] 1422nd meeting, para. 37.

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

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

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

differentiation could not be made between areas of concern that had substantive links both in fact and in precedent.

10. Apart from legal reasons, there were practical grounds for ensuring that the draft articles took cognizance of loans to States from non-State parties. The bulk of existing debt consisted of loans from such parties and there appeared to be no reason to assume that time would alter that situation. The Commission would not help to maintain the flow of international capital, including the flow of loans from private parties, which, as recent history had demonstrated, were of vital importance to the developing countries, if it excluded such loans from the terms of the draft articles. It should also be remembered that, in a changing world, State borrowers might merge into larger, or split into smaller, sovereign States. It would not be enough to suggest that the Commission should deal with inter-State loans now and with loans from non-State parties later on. In proceeding with its work, the Commission should deal with the whole of the real world of international finance.

11. Mr. NJENGA said that the Special Rapporteur was to be congratulated on his efforts in drafting articles R, S, T and U. In dealing with a triangular relationship, it was not easy to make each article complete in itself and the provisions of those articles must be seen together if their full meaning was to be understood. Consequently, while article R seemed to refer solely to the effects of succession for the predecessor and the successor States, it should be read in conjunction with article U, which showed that those effects were in fact dependent on the consent of the creditor third State. If the Commission felt that some reference to that consent should be included in article R, it could easily be added by the Drafting Committee.

12. With regard to article S, he shared the fears expressed by Mr. Sette Câmara.[7] At first sight, it suggested that the devolution agreements to which it seemed to refer established firm rights and responsibilities for the successor State. There was, however, great danger in suggesting that either devolution agreements or unilateral declarations could have such an effect. The Commission had rightly taken the view, when discussing succession of States in respect of treaties, that devolution agreements and unilateral declarations represented no more than an expression of intent on the part of the successor State —an intent which, moreover, might not always have been entirely freely expressed—and had therefore relegated them to a very minor position. It would be for the Drafting Committee to correct the impression given by article S as it stood, that devolution agreements could do more than was in fact the case. Perhaps, indeed, nothing would be lost if article S were deleted and only some form of article T retained, for the latter provision gave a description of the force of unilateral declarations which was entirely correct.

13. With regard to article U, all members of the Commission would appreciate that the Special Rapporteur's intention in allowing the creditor third State to assent to or reject arrangements between the predecessor and the successor States, or unilateral declarations by the successor State, was to ensure that its rights were secured. However, the article as it stood went—no doubt unintentionally—too far, in that it not only enabled the creditor third State to protect its own interests, but in fact gave it a sort of power of veto over decisions by the predecessor and successor States concerning the succession to the debts owed to it. The third State would even be able to reject a change of debtor in the case of localized debts, which typically passed to the successor State. Some means must therefore be found, perhaps by the Drafting Committee, of limiting the creditor third State's power with regard to the final outcome of succession to debts.

14. Since the Commission was dealing with international law, it was only right that it should confine its study to debts contracted between subjects of international law. He readily admitted Mr. Schwebel's point that the flow of loans which they received from private bodies was very important to the developing countries, but that was not a matter which came within the framework of international law. On that point, he agreed entirely with the statement of position made by Mr. Ushakov at the previous meeting.[8] There were ways in which a private creditor could seek recourse, through his Government, to an international tribunal, but the local remedies provided by the laws of the State of which he was a creditor were often entirely adequate and should be exhausted first. The Commission had already been reminded that the constitutions of many Latin American countries gave foreigners the same rights as nationals, and the same was true, for example, of the Constitution of Kenya, which allowed both foreigners and nationals to approach the local courts when they felt their interests had been harmed by, say, nationalization. Consequently, there did not seem to be any reason to mention foreign private creditors in the draft articles under discussion. It was, indeed, not until there had been a denial of justice that, under the rules of State responsibility, action at the State level would be required to protect the foreign creditor. A very difficult situation would be created if a State were liable to be taken before an international tribunal every time it took an action which affected a foreigner. He accordingly construed the foot-note to paragraph 96 of the Special Rapporteur's report, to which Mr. Schwebel had referred,[9] as meaning that State debts could exist where the creditor was a foreign private person, but that the interests of such creditors were protected by the normal rules already in existence. On the other hand, provision should be made in the draft articles for the situation in which the creditor of the predecessor State was an international organization.

15. Mr. JAGOTA said that the Special Rapporteur opened chapter II of his report with a limited definition of "the third State", whereas in draft article O[10] he had proposed a definition of "State debt" which was somewhat open-ended, in that there was no indication of the identity of the creditor. The question therefore arose, with

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

[8] *Ibid.*, paras. 44 and 45.

[9] See para. 6 above.

[10] See 1416th meeting, para. 1.

regard to chapter II, whether creditor States only or all types of creditors should be considered.

16. It was increasingly the case, as had already been pointed out, that the creditors of States were financial institutions, private bodies or individuals. The Special Rapporteur had suggested that the study should at first be limited to creditors who were States, with the question of other types of creditors being considered at a later stage. The Commission itself had followed a somewhat similar approach in its study of the law of treaties, by considering separately the questions of treaties concluded between States and treaties concluded between States and international organizations or between two or more international organizations. The Special Rapporteur's suggestion, however, raised the problem of when the Commission would consider the other types of creditors and of what would happen to debts owed to them if it did not do so. In his view, it was not sufficient to say that such debts would be covered either by customary international law or, by analogy, by the rules governing debts owed to States. What was required was a broadening of the scope of chapter II to include debts owed not only to States but also to other subjects of international law. That would extend the provisions of the chapter to, first, unions of States, concerning which the Commission would have to decide whether it was the union itself which was a subject of international law or whether only its members had international personality, and secondly, international financial institutions and other subjects of international law, of which it would be necessary to give examples.

17. There would then remain the question of creditors who were natural or juridical persons, which would include both individuals and multinational corporations. The Special Rapporteur had referred in that connexion to the Calvo clause and had said that the matter was subsumed in domestic law and therefore not relevant. He had also referred to the question of diplomatic protection, but that was not germane to succession, since it was a matter of denial of justice and therefore of the protection of the interests of the State whose nationals had suffered that wrong. There was still, however, the possibility that the debt claims of private creditors might have been guaranteed by the State of which they were nationals, and that that State might have entered into an investment guarantee agreement with the State which was the recipient of the credits. Assuming that its nationals could seek local remedies in the recipient State, would the guarantor State have any right of recourse to the successor State in the event of a succession? He believed that the Commission should study all such problems before eliminating any of them from consideration in the draft articles, and should then explain the reasons for its choice, so as to give guidance to others on how far the rules it was seeking to elaborate would be applicable, *mutatis mutandis*, to cases not covered in the articles.

18. He gathered from paragraphs 100 and 101 of the report that the basic theory behind the articles the Special Rapporteur was now proposing was that two situations were involved in succession to State debts, namely, that which obtained between the predecessor and the successor State, and that of the "creditor third State" and, *mutatis mutandis*, of the other types of creditors. The problem was thus seen as being very different from that of succession to State property, and the Commission was asked with regard to debt obligations to visualize the triangular relationship as if it were dealing with the law of treaties. While the situation between the predecessor and the successor State was regulated by the law of succession, protection was provided for the creditor by the requirement that it consent to the change of debtor. The Special Rapporteur's approach was probably sound.

19. Mr. Ushakov, however, had argued that the requirement of consent by the creditor was merely procedural and that the creditor was therefore governed by customary international law rather than by the provisions the Commission was elaborating. If that was so, the Commission must state clearly by what substantive law the creditor was governed and what would be his rights if he did not give his consent. On the other hand, Mr. Njenga had claimed [11] that the requirement of consent gave an inequitable power of veto to the creditor. Perhaps those differing views were the result of deficiencies in the drafting of the articles under consideration. But if the requirement of consent had been only procedural, there would have been no mention in article U of the concept of implied consent. And if that requirement had really established a power of veto, the purpose of protecting the creditor would have been defeated, which was not the case.

20. It was stated in paragraph 101 of the report that the action of the law of succession would not have the effect of automatically extinguishing the relationship between the predecessor State and the creditor third State "except where the predecessor State entirely ceases to exist". That exception should be clearly stipulated in articles R, S, T and U, as should the rules which would apply in the event that the predecessor State did in fact disappear. To that end, it would be necessary to study the relevant State practice, as, for example, in the case of Viet Nam, to which Mr. Sucharitkul had already drawn attention.[12]

21. He agreed with Mr. Castañeda [13] that there should be no contradiction between articles R and U. His own opinion was that the inclusion in article R of the phrase "in accordance with the provisions of the present articles" made it sufficiently clear that the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State, to which the article referred, were subject to the consent of the creditor third State mentioned in article U. If that was not the case, the link between the two articles must be stated in article R.

22. On the question of the correspondence between article S and article U, he noted that article S stated that debts could pass "pursuant to the present articles or to agreements concluded between the predecessor and successor States", but that article U spoke of the consent of the creditor third State in relation only to the latter of those modalities of succession. If the passage of debts "pursuant to the present articles" was also subject to the

[11] See para. 13 above.

[12] 1422nd meeting, para. 35.

[13] *Ibid.*, para. 10.

consent of the creditor, that should be made clear in article U.

23. Finally, he wished to raise the question of counter-claims held by the predecessor State against the creditor third State, of which the Special Rapporteur had said that they were rights and would therefore automatically pass to the successor State, pursuant to article 6 of the draft articles.[14] The matter would, however, require further study, for while the consent of the creditor third State would not be necessary for passage of the right of the predecessor State to receive money from it, it would be necessary for passage of the duty of the predecessor State to pay money to it. The predecessor State might therefore find itself in the difficult situation of having lost its set-off claim against the creditor third State while remaining responsible for its original debt to that State.

24. Mr. ŠAHOVIĆ said that he did not clearly understand the scope of the draft articles submitted by the Special Rapporteur in chapter II of his report; there was some doubt in his mind about the exact meaning of draft article R in particular. He thought that article R was intended as a general provision corresponding to article 6, which explained the legal effects of a succession of States, but in view of the triangular relationship described by the Special Rapporteur, the purpose of that general rule should be made clearer. What, for instance, was the actual relationship between the predecessor State and the successor State? The wording proposed by the Special Rapporteur was not sufficiently clear on that point and could be improved and further clarified, as suggested by Mr. Ushakov.[15] The link between article R and article U should be stressed, as Mr. Castañeda had said,[16] and, in article R, account should be taken of the triangular relationship between the predecessor State, the successor State and the third State, for the Special Rapporteur had shown that that relationship was essential.

25. As the Special Rapporteur had indicated in paragraph 58 of his report, the debts of the predecessor State were the basic subject-matter of the current study. After giving a very general definition of State debt in article O, however, the Special Rapporteur seemed to have lost sight of the primary objective of the study and to have immediately taken a position on the question of the third State. What was now needed, therefore, was first to define the boundaries of the concept of State debt and clarify the relationship between the predecessor State and the successor State, and then to consider the question of the debt-claims of private persons, whether natural or legal.

26. He understood the idea contained in draft articles S, T and U, but, like Mr. Riphagen,[17] he thought it could have been worded positively and expressed in a single article.

The meeting rose at 1 p.m.

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

[15] 1422nd meeting, para. 43.

[16] *Ibid.*, para. 10.

[17] 1418th meeting, para. 12.

1424th MEETING

Friday, 20 May 1977, at 10.10 a.m.

Chairman: Sir Francis VALLAT

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

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

[Item 3 of the agenda]

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

ARTICLE 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. Mr. EL-ERIAN said that, as he understood chapter II of the Special Rapporteur's report (A/CN.4/301 and Add.1) and the discussion on it, the articles which the Commission was now considering envisaged a situation in which there was succession according to the provisions of those articles in respect of a State debt—succession which gave rise to a triangular relationship between the predecessor State, the successor State, and the creditor third State. In formulating rules governing that triangular relationship, the Special Rapporteur had laid down two principles: the first, with which all members of the Commission seemed to agree, was that the succession led to the termination of the relationship between the predecessor and the successor States; the second was the general principle which applied in relation to personal status and obligations in civil law systems, namely, that there was a subjective element in the situation of debt. The Special Rapporteur appeared to have adopted that second principle out of a desire to co-ordinate the present draft articles with those the Commission had produced on succession in respect of treaties;[2] the consequence of that adoption was that he had made provision for the exercise of an option by the creditor third State. Articles S, T and U then showed how the situation of that State would be affected by an occurrence of succession. In

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

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