Document:-
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Summary record of the 1671st meeting

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

Extract from the Yearbook of the International Law Commission:-
1981, vol. I

23. Referring to observations made by Mr. Sucharitkul (*ibid.*), he said that, while it was possible to expel a State from an international organization, the rights and duties of that State under international law remained in force. That question was, in fact, dealt with in paragraphs 77 and 78 of his preliminary report. Moreover, it had been his impression that most members of the Commission had not wished to include that question within the scope of the draft articles. In any event, it would certainly be dealt with in connection with the response of international organizations to internationally wrongful acts.

24. In his earlier remarks, Mr. Ushakov (*ibid.*) had adopted a somewhat limited approach in which he had stressed the danger which internationally wrongful acts presented to the international community. While that aspect was an important one, the draft articles had to take account of many other obligations which did not affect the interests of the international community as a whole. He agreed with Mr. Ushakov's remark that, in national systems of law, the judge, in determining sanctions, frequently applied the principle of proportionality without being forced to do so by law.

25. As for Mr Ushakov's observation concerning paragraph 40 of the report, and in particular the expression therein "*fournir des directives*", the problem was essentially one of translation, since the word "guidance" had been used in the original English text. He did not think that many jurists would share the view expressed by Mr. Ushakov that judges only applied the law and did not make it.

26. In commenting on article 3, Mr. Ushakov had also observed that the rights of States could be infringed under Article 2 of the Charter of the United Nations. In that connection, he wished to point out that that Article dealt specifically with enforcement measures, and not with the other legal consequences of wrongful acts.

27. Finally, referring to the later statement made by Mr. Ushakov, he emphasized that article 1 dealt with wrongful acts *as such*.

28. With regard to Mr. Pinto's reference at the previous meeting to the obligations of co-operation and their legal consequences, he said that article 1 would apply to such obligations, which would also be covered by the second parameter, particularly in so far as it concerned countermeasures. The question of obligations of that type and the limits placed on possible countermeasures was dealt with in paragraph 93 of his preliminary report.

29. He felt that articles 1 to 3 could be referred to the Drafting Committee.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 1 to 3 to the Drafting Committee.

It was so decided.

The meeting rose at 11.35 a.m.

1671st MEETING

Monday, 15 June 1981, at 3.05 p.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 15 (Scope of the articles in the present Part) *and*

ARTICLE 16 (State debt)

1. The CHAIRMAN invited the Commission to consider Part III of the draft articles (State debts), and particularly section 1, entitled "General Provisions". The first two articles of this section are articles 15 and 16, which read:

Article 15. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

Article 16. State debt

For the purposes of the articles in the present Part, "State debt" means:

(*a*) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(*b*) any other financial obligation chargeable to a State.

2. Mr. BEDJAOUI (Special Rapporteur) said that articles 15 and 16 were applicable to all types of State succession in which a problem of State debts arose.

3. Article 15 had not elicited any particular comments, either in the Sixth Committee or in the written replies of Governments. In the context of Part III of

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* Resumed from the 1662nd meeting.

the draft, it was the counterpart of article 4, in Part II.[1]

4. On the other hand, article 16, in which the Commission had sought to define State debt, gave rise to difficulties. In view of the structure of the text adopted on first reading, the Commission had selected two criteria for the definition, namely, the international personality of the creditor and the fact that financial obligation was chargeable to the predecessor State. Its choice immediately and inevitably raised the question of whether those conditions were cumulative and had to be met in order for a State debt to exist, or whether one condition alone sufficed.

5. The extensive discussion in the Sixth Committee of subparagraph (*b*) had led to much criticism of the Commission, relayed at length by chancelleries. The comments made were analysed in detail in paragraphs 120 to 151 of his report (A/CN.4/4/345 and Add.1 and 2). The arguments put forward were of differing value, and the Commission must first of all decide whether it was advisable to reopen a debate on the issue on second reading, since the individual positions were known, as were the arguments involved.

6. The Commission might resolve the problems in a procedural manner, without raising the substantive issue. Since article 2, subparagraph 1 (*a*),[2] which defined "succession of States", unequivocally placed it in the sphere of inter-State relationships, the Commission could avoid a belated discussion by deciding to delete article 16, subparagraph (*b*)—a course which would not mean that it was disregarding the problem of debts, but would show its concern to seek the minimum bases for an agreement, the lowest common denominator within the Commission, by limiting the content of article 16 to the text of subparagraph (*a*).

7. Such a solution had been suggested to him by the written comments of some Governments, including the Government of Italy (A/CN.4/338/Add.1). The arguments adduced in its favour were not without cogency. Whereas the definition of succession of States set the draft articles within the legal framework of inter-State relationships, subparagraph (*b*) of article 16 could be applied to relationships between States and private persons. However, the overall structure of the draft up to that subparagraph had by and large respected the definition of State succession as an inter-State international legal relationship. The Commission might be compelled to revise that position if it made provision, in matters of debts, for the situation of private creditors or private individuals affected by a succession of States. Moreover, if the wording of subparagraph (*b*) was to be left unchanged, the text might impose on the successor State to which part of the debt would pass a number of international obligations towards its own nationals. However, a State's relations with its nationals could be based only on internal law. Similarly, by relinquishing subparagraph (*b*), the Commission would not be sacrificing the interests of private creditors in a sphere which in fact lay outside State succession and could be studied and regulated in another context. The Government of Italy had commented that article 16, subparagraph (*b*), would make for a draft that was very broad in scope, yet other provisions, especially articles 19 and 23,[3] were limited to inter-State relationships. In short, retention of subparagraph (*b*) might be a source of endless difficulties, and it was better to seek a minimum basis for agreement, even though a conference of plenipotentiaries might decide to enlarge the scope of the future instrument in that respect.

8. He stressed that, should the Commission choose to relinquish subparagraph (*b*), it might indicate the reasons for its decision in the commentary, in the interests of clarity.

9. Again, article 16, subparagraph (*a*), might itself give rise to difficulties because of the expression "any other subject of international law", whose meaning could be interpreted in different ways. Clearly, the reference to international organizations had been imperative in conjunction with the reference to States, in view of the very close relations that now existed between States and international organizations, especially financial organizations. However, the expression "subject of international law" might, for instance, cover a national liberation movement, transnational corporations or even an individual. In that regard, subparagraph (*a*) created difficulties comparable to those stemming from subparagraph (*b*).

10. Accordingly, he proposed that the expression "or any other subject of international law" should be deleted from paragraph (*a*). He was concerned at the tendency which could be observed among writers to make multinational companies subjects of international law. Some writers had contended that a State which entered into a contract with a transnational corporation indirectly conferred on the latter part of its international personality. Consequently, he feared that the wording of subparagraph (*a*) might open the way to a broad interpretation of the concept of subject of international law.

11. Lastly, he pointed out that the Commission had agreed not to deal with the question of "odious debts" in its draft articles. However, he was entirely at the Commission's disposal in the matter of attempting to formulate a satisfactory text, should it reconsider its decision in that regard.

12. Mr. USHAKOV noted that, while draft article 15 did not give rise to difficulties, such was not the case with article 16.

13. The definition of State debt in article 16 was formulated in general terms, but in fact it related solely to the debts of the predecessor State. Subparagraph (*a*)

[1] See 1660th meeting, para. 17.

[2] See 1659th meeting, para. 25.

[3] See 1658th meeting, footnote 3.

was directed towards obligations under international law, and might lead to problems only if an excessively broad interpretation were placed on the concept of the subject of international law. Some representatives in the Sixth Committee had, none the less, taken the view that the Commission had adopted too theoretical an approach to the subparagraph. To his mind, it was the expression "other subject of international law", rather than the substantive aspect, that was open to criticism. He believed that it would not be enough to mention States and international organizations alone without mentioning the other subjects of international law, since they actually existed in modern international legal life, as the example of the EEC, in particular, showed. One solution might be to speak of persons in international law defined as entities which, in the exercise of their supranational functions, could enter into an obligation under international law. For instance, when the EEC incurred a commitment under international law, it validly bound its members, and therefore constituted another "subject of international law". History also offered the example of the free cities. In modern life, Berlin [West] was recognized as an international person whose international relations were regulated by international law.

14. Thus, apart from States and international organizations, there were persons regulated by international law who could be creditors in international law. Consequently, the form of words adopted in subparagraph (*a*) reflected one aspect of the situation, and certain doctrinal exaggerations should not prevent the Commission from acknowledging the existence of those other subjects of international law. The expression was by no means a new one, since it appeared in article 3 of the 1969 Vienna Convention[4] and in various other codification treaties. Hence there was no reason why the Commission should not use it in the draft.

15. With respect to subparagraph (*b*), the members of the Commission who had urged that the text should contain such a provision had done so with the obvious intention of seeking to protect private persons, and more particularly foreign private persons, in cases of succession of States. In the context of the Commission's draft, it was indeed desirable and possible to endeavour to protect the legitimate interests of natural and juridical persons in private law. Among its nationals, the USSR had juridical persons in civil law who were not State organs and, for instance, concluded loan agreements. It was right that a State should wish to protect the interests of such persons in matters of State succession.

16. However, although subparagraph (*b*) was acceptable from that angle, it did not seem effective enough to protect all the interests of all persons in private law, since it concerned only private persons who were nationals of a third State, and not those who were nationals of the predecessor State. Furthermore, it protected only persons to whom financial obligations were owed, and not persons who had other kinds of claims. Its scope was therefore extremely limited, and the original goal had not been attained. Furthermore, the private persons concerned would not be able to address their claims directly to the predecessor State or to the successor State. They would be required to assert their rights before the competent authority under the applicable law, in other words, the law of contract, either in the internal law of a State or in an arbitral tribunal. Hence, considerable difficulties of principle would be involved, since international law had no bearing on relationships with private persons and contracts were always concluded under the internal law of a State or the law of contract itself. Lastly, if subparagraph (*b*) was retained, subparagraph (*a*) would become superfluous.

17. Consequently, the need to protect the legitimate rights of private persons in cases of State succession was an argument in favour of drafting a different provision, in the form of a safeguard clause which would specify that the articles in the draft did not affect the rights and obligations of private natural and juridical persons. He noted in that regard that article 18, paragraph 1, took the form of a safeguard clause. In principle, he was in favour of that provision, and had agreed to it on first reading, although he had been opposed to subparagraph (*b*) of article 16.

18. However, he now doubted whether an article such as article 18 was enough to protect all the rights and obligations of private persons, for, over and above creditors in respect of financial obligations, persons with other kinds of claims also had to be protected. The safeguard clause should therefore be cast in broader terms and appear in the section on general provisions, so as to apply to all claims related not only to debts but also to State property and archives. The Drafting Committee should work along those lines.

19. In conclusion, if "odious debts" (see A/CN.4/345 and Add.1 and 2, paras. 135, 136, 146, 160) did exist, the question of their definition had implications that went beyond the scope of State succession. If such debts had no legal force in international law, that was necessarily true at all times, and not simply when a succession of States occurred. The problem therefore lay outside the scope of the draft articles and could not be regulated in the limited confines thereof. Moreover, if such debts existed, they related not to succession of States but to succession of governments, and chiefly involved cases in which the previous government had itself been odious and the new regime had been set up in response to the will of the people. In short, he believed that odious debts had no place in a draft which was concerned expressly and exclusively with succession of States. However, caution was required, and a definition of that kind of debt could be based only on specific criteria.

[4] See 1659th meeting, footnote 7.

20. Mr. REUTER said that he shared the misgivings expressed by the Special Rapporteur, whose views he supported.

21. He considered that the Commission might prepare the text of a provision on odious debts, but deferred to the view of the Special Rapporteur, particularly in view of the time available. However, the Commission should at least broach the topic in its commentary.

22. The comments by Mr. Ushakov on that and other aspects raised a problem which left him in some doubt as to the meaning of the words "financial obligation" in article 16. It should be made clear whether the Commission had in mind exclusively obligations whose origin was initially financial—namely, debts arising from loan contracts—or whether it also included all operations which resulted in financial obligations at some time or another. For example, an aggressor State might be responsible for delictual obligations as the result of an act of aggression on its part and it was desirable that the successor State should continue to be responsible for them. However, if a State had contracted a loan prior to an act of aggression in order to finance the military preparations for that purpose, the fact that the debt thus contracted was considered to have an absolute unlawful cause would remove the validity of the loan *ab initio*, and therefore render the debt non-existent.

23. Consequently, the concept of financial obligations should be clarified; Mr. Ushakov had taken the view that it should have a very broad meaning and cover any commitment which could be resolved by a financial obligation, particularly in the event of non-performance.

24. He endorsed Mr. Ushakov's comments on the expression "other subject of international law" in subparagraph (*a*). In fact, the Commission had ultimately decided to use that very expression in the topic of the law of treaties; but he was able to accept Mr. Ushakov's position and agree to deletion of the expression, although such a course might make subparagraphs (*a*) and (*b*) contradictory.

25. For all that, retention of the expression "any other subject of international law" would open the door for controversial views which held that certain entities in private law also had the status of subjects of international law. In his opinion, the Commission should not take up a position in such doctrinal controversies, and should indicate its choice of that attitude in its commentary.

26. He both agreed and disagreed with Mr. Ushakov on subparagraph (*b*), since he too was by no means sure that such a provision was superfluous, yet thought it could well be drafted differently. For example, some international labour conventions might provide for protection which resulted in financial obligations by a State towards private persons, even aliens. Consequently, if a State committed a breach of such an instrument to the detriment of foreign nationals on its own soil, any successor States might be bound by the obligations thus chargeable to the predecessor State. Admittedly, the victims would not have the possibility of taking direct action against the debtor State and would have to go through the State of their nationality. However, it was possible that a remedy would be available to them in the form of a complaint to an international organization. There were instances in modern practice in which individuals were able to avail themselves of some protection through the resources of international law. Viewed from that angle, subparagraph (*b*) was not entirely superfluous.

27. A compromise solution might be to retain subparagraph (*b*), redrafted, for instance, to read:

> "any other financial obligation recognized by a rule of international law as chargeable to a State".

By selecting such a formula, the Commission would not be taking up a position on the issue of what might be a State's international obligations in respect of an individual, but it would regulate the situation in cases in which such obligations existed. A solution of that kind might be useful as a compromise, so that as the Special Rapporteur wished, a substantive debate on the matter could be avoided.

28. Mr. ALDRICH said he considered it important to retain the essence of subparagraph (*b*) of article 16.

29. There was little doubt that in international law a succession of States did not have the legal effect of relieving the successor State of the obligations for the debts of the predecessor State, but it appeared that in the course of drafting the articles, the Commission had come close to the point where it seemed almost wrong to deal with the obligations of States towards private persons. The purpose of the draft articles, as he understood it, was to set forth the law on succession of States in respect of property, archives and debts, and the articles dealt mainly with the rights and obligations of the successor and predecessor States and, in certain cases, of third States. In the case of State debts, however, there was no reason, in his view, for confining the draft articles to debts owed to States or to international organizations, and every reason for extending them to deal with the legal consequences of State succession in matters of all debts owed by the State, regardless of the creditor.

30. The draft articles were to be very narrowly construed in terms of time, since they dealt with the rights and duties of the predecessor State and the successor State at the moment of State succession. Consequently, he considered that the draft articles on State debts dealt not with the rights of either the predecessor State or the successor State to modify, repudiate or opt out of a debt, but simply with the legal consequences of the mere fact of succession, and one of those consequences was that, as a result of the succession, the successor State was not relieved of the debts of the predecessor State. That was what article 16 said, and should say.

31. In political terms, it could be said that the draft articles drew upon the history of the past thirty years, which was rich in examples of State succession. It was to be hoped that the draft would set the framework for dealing with future instances of State succession, which would probably be far fewer than in the past. Perhaps that was why some people considered that the type of convention in question was of more academic than practical interest, although he thought that it would be of considerable value to the world of the future and trusted that it would be adopted.

32. At the same time, it had to be admitted that there was little in the draft to attract the enthusiastic support of a sizeable number of countries, and certain aspects were positively repugnant to some countries, particularly some of the former colonial powers. The real question was what useful purpose the convention would serve. Were it not for article 16 and the protection afforded for the rights of creditors, including private creditors, he was not sure that it would be of much value, and deletion of that article in order to maintain a State-to-State obligation throughout the text would have the unfortunate effect of divesting it of any force.

33. He agreed of course with Mr. Ushakov that debts were only one of the issues with which the Commission had been faced in the development of the draft and that, ideally, the draft articles should deal with other obligations. He suspected, however, that the scope of the text had been limited to State property, archives and debts for very valid reasons; the fact that it had not been possible to include other kinds of obligations of the State did not mean that the one obligation that had actually been included should be limited to debts owed to other States or international organizations. If the Commission produced a text that purported to deal with the illegal effects of State succession and failed to deal with the legal effects which were of considerable potential importance to a great many investors, it would lay itself open to the charge of having produced a useless convention. That would be very unfortunate, given the work done by the Special Rapporteur and the years of effort on the part of the Commission. Therefore, it was important to display discernment so as to ensure that the Commission's work would not be prejudiced.

34. He experienced no particular difficulty regarding subparagraph (*a*) of article 16, and would be prepared to let the future resolve the question of who were subjects of international law. He agreed, however, with one of the comments in the Sixth Committee to the effect that subparagraph (*a*) was unnecessary because subparagraph (*b*) sufficed: the problem of subjects of international law could perhaps be dispensed with in that way.

35. He also thought it necessary to be cautious about the use of the consensus rule as suggested by the Special Rapporteur in the context of State debts. If such a rule were adopted, it would have to be applied uniformly, which would mean deleting not only subparagraph (*b*) of article 16 but also article 9, and would also raise questions, so far as he was concerned, regarding article 20, paragraph 2.

36. The draft articles would be of greater value to the international community if they were not confined to obligations among States alone. There was every practical reason for retaining a clear statement to the effect that a succession of States did not relieve the successor State of the debts of the predecessor State.

37. Mr. RIPHAGEN said that his approach differed somewhat from that of other members of the Commission.

38. The draft articles started by dealing with the legal aspects of the passing of territory from one State to another and then went on to deal with the incidental passing of State property, archives and debts. Viewed in that context, it seemed to him that the question of debts must be examined from the economic standpoint: in other words, the benefits of the passing of State property, rights and interests might well be accompanied by a corresponding financial burden. It would not be very helpful to limit the draft articles to the relatively few financial burdens that derived from the obligations owed by a State to a third State, an international organization, or another subject of international law, if any. Consequently, while he understood why the draft articles should be confined to the consequences of State succession as between the predecessor and successor States, he considered that article 16 had been rightly conceived and, in that connection, would remind members that subparagraph (*b*) had been included precisely because of the significance of the financial burdens for the successor State.

39. Mr. ŠAHOVIĆ said that he would prefer to retain article 16, subparagraph (*b*).

40. That provision had elicited many comments on the part of Governments, but they focused on matters which the Commission had duly taken into consideration before adopting its draft on first reading, and it would be pointless to reopen the discussion on second reading. Moreover, article 16 fitted well into the pattern of the draft. Articles 1, 4 and 15 were provisions which stated in a general way that the articles in the draft applied to the effects of succession of States in respect of matters other than treaties, and in particular to State property and State debts. It did not follow from those articles that the draft applied only to the effects of succession of States in the relations between the predecessor State and the successor State. Consequently, the Commission had attempted to settle all the questions to which a succession of States might give rise in respect of State debts, taking into consideration the various situations in which the States in question might find themselves. After defining the concepts of State property and State debt, it had found that it could not limit itself simply to

international relations in respect of financial obligations chargeable to a State and that it would have to take into account the repercussions that a succession could have on the situation of other foreign creditors.

41. Accordingly, he preferred the first solution mentioned by the Special Rapporteur (A/CN.4/345 and Add.1 and 2, para. 154), namely, to retain subparagraph (*b*) of article 16, since deletion of that provision was not likely to resolve the problems that could arise in the process of succession in respect of State debts. Another solution would be to attempt to alter the wording of subparagraph (*b*), but without going back on the position taken by the Commission.

42. Lastly, not only the general articles he had mentioned argued in favour of retention of subparagraph (*b*), but so did a number of special articles, such as article 18, paragraph 1 of which referred explicitly to "the rights and obligations of creditors", to be interpreted in the broadest sense of the term.

43. Mr. USHAKOV said that he did not deny the possible importance of the financial obligations of the predecessor State towards foreign private persons, and he recognized that such obligations were chargeable to the successor State following the succession of States. The only problem was that of the law that was applicable to those obligations. In the case of the obligations referred to in article 16, subparagraph (*a*), it was obviously public international law, and in the case of the obligations referred to in subparagraph (*b*) it was internal law or private international law. The Commission had drafted articles applicable to State property. In addition to the property of the State, there was property belonging to private persons that the Commission had deemed appropriate to take into consideration in subparagraph (*b*). If that private property was involved in a succession of States, its fate depended not on international law but on internal law. Hence, the rights of private, natural and juridical persons could not be protected by means of international law.

44. Mr. CALLE Y CALLE said that all States were, of course, heavily indebted. Article 16, however, did not deal, nor should it deal, with all the debts incurred by States. Rather, it defined a special type of debt, namely, a debt incurred by a State towards another party with which it had a relationship recognized under international law. In subparagraph (*a*) of the article, the word "international" could have been added before the words "financial obligation", and taken to mean "between States". On the other hand, subparagraph (*b*) was couched in extremely broad terms and covered types of relations other than those recognized under international law. To avoid confusion, therefore, it would be preferable to delete subparagraph (*b*) of article 16.

45. A provision should be included elsewhere in the draft, however, to safeguard the rights of private persons.

46. Mr. ALDRICH, referring to the comments by Mr. Ushakov, explained that he had indeed been talking about international law. The draft articles determined the legal consequences in international law of a succession of States, and subparagraph (*b*) of article 16 provided that one of those consequences was that the successor State would succeed to the debts of the predecessor State, including the debts owed to private persons. That was a matter of international law, and he wished to see it stated clearly in the text. If immediately following the succession of States a State expropriated property or repudiated a debt, the matter fell within the scope of international law. Mr. Ushakov and he might not agree about the State's right to take such action in regard to foreign nationals, but he thought that, for the moment, they should be able to agree that, under international law, State succession involved succession to debts, both public and private, of the predecessor State.

47. Mr. FRANCIS asked the Special Rapporteur whether the definition of State property covered only the entitlement of the predecessor State to its rights in relation to another State or whether it extended to interests vested in a party other than another State.

The meeting rose at 6 p.m.

1672nd MEETING

Tuesday, 16 June 1981, at 10 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta.

Succession of States in respect of matters other than treaties (*continued*) (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 15 (Scope of the articles in the present Part) *and*

ARTICLE 16 (State debt)[1] (*concluded*)

1. Mr. BEDJAOUI (Special Rapporteur) reminded members that at the end of the previous meeting Mr. Francis had drawn a parallel between the concepts of State debt and of interests, and had wondered whether

[1] For texts, see 1671st meeting, para. 1.