Document:-
**A/CN.4/SR.1672**

**Summary record of the 1672nd meeting**

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

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

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.*

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## 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.

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**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.

State debt was not covered by the words "property, rights and interests" in the definition of the term "State property" contained in article 5 of the draft.[2]

2. In that respect, it should be emphasized that the Commission had taken the expression "property, rights and interests" from important international treaties, including the Treaty of Versailles. The expression was to be understood in its broadest sense; the concept of interests covered any legal interest, such as a right of pre-emption, a right of option to buy, an interest in taking legal action, regardless of whether an existing or potential right or interest was involved. *A fortiori*, it could be understood in the narrow meaning and apply to a sum of money collected on an investment. If such interest, which was State property, was owned by the predecessor State, it formed part of its assets and could, in accordance with the draft articles, pass to the successor State in the same way as "property, rights and interests". The successor State was entitled to both the principal and the interest.

3. Mr. FRANCIS thanked the Special Rapporteur for his explanation and said that his position on article 16 was basically similar to that of Mr. Šahović (1671st meeting), as qualified, however, by the remarks made by Mr. Reuter (*ibid.*). Initially, he could have accepted the Special Rapporteur's suggestion to delete the phrase "or any other subject of international law" in subparagraph (*a*) of the article (A/CN.4/345 and Add.1 and 2, para. 159), but, having heard Mr. Reuter and Mr. Ushakov (1671st meeting), he would join in the general consensus emerging in favour of retention of the phrase.

4. With regard to subparagraph (*b*), he wished to state his position on behalf of the Caribbean region. He believed that it was no longer possible to deal with the question on the theoretical plane. It was necessary to get down to realities and to deal with the issues as seen in a national context. In view of the Special Rapporteur's remarks on the definition of State property contained in article 5, he would cite the hypothetical case of his own country having to sell its mission to the United Nations to one of the major New York banks. If, following an internal revolution, the country were divided into two successor States, the question would arise of how any debt outstanding in that respect would be treated so far as the new States were concerned.

5. During the current economic crisis, many developing countries, including the island States in the Caribbean region, had experienced great difficulties. When their lines of credit from the developed countries and from institutions such as the World Bank had dried up, they had managed to survive, in the first place, on direct loans from such friendly Arab countries as Algeria, Iraq, Kuwait and the Libyan Arab Jamahiriya; latterly Mexico and Venezuela had also arranged especially generous terms for the Caribbean countries in regard to their oil debts. Yet many Caribbean countries had also had to resort to private borrowing, both internal and external. It was extremely important, in his view, not to create the impression that the value of private external loan facilities, at times when all other avenues had failed, was being minimized. As a matter of principle, it would be wrong to provide for a situation whereby a State could benefit from the private loans or credits which fell due to it and totally ignore the other aspect of the matter. It had to be remembered that there were many small countries, and the smaller they were the more they would be affected if the Commission failed to codify the law in that respect.

6. He would find it difficult to endorse the suggestion to add a proviso to the effect that the articles were without prejudice to any obligations owing to private persons, particularly in view of the terms of article 23,[3] which dealt with the complete disappearance of the predecessor State. Not all of the debts payable by a predecessor State were connected with specific projects in a part of that State. A country with balance-of-payment problems might well secure a sizeable loan which would then be used throughout the country as a whole. If the predecessor State disappeared and no provision was made for the passing of the debt, as would occur if subparagraph (*b*) of article 16 was not retained, which national law would apply to that debt? The Commission should be alive to such problems in an endeavour to ensure that the draft took account of the interests of the developing countries, which had benefited in vital areas from private loans in recent years.

7. During the Commission's discussion, reference had been made to the "new" international law, which presumably meant the content of such law. In his submission, that new international law must take care of the basic needs of the developing countries and their obvious concern to ensure that the confidence of private investors was not undermined.

8. Mr. JAGOTA said that the main reason for the Special Rapporteur's proposal to delete subparagraph (*b*) of article 16, together with the phrase "or any other subject of international law" in subparagraph (*a*), was apparently to enable the Commission to take a second look at the definition of State debts and thus at the scope of the definition and the relevance of State debts to State succession. The Special Rapporteur had proposed that private individuals, private corporations and other institutions that were not international legal persons should be excluded from the definition of State debts in order to avoid any unnecessary broadening of the scope of State succession, and considered that the Commission might restrict the definition to debts owed to another State or to an international organization—something which would be consistent with the approach adopted in other parts of the draft and particularly in

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

[3] See 1658th meeting, footnote 3.

the part relating to State property. In addition, the Special Rapporteur had been mindful of the criticism voiced in the Sixth Committee in 1979 and 1980 regarding the extended scope of the concept of State debt. Lastly, the Special Rapporteur felt that a consensus on the point was lacking in the Commission, that it would be pointless to reopen the debate and that it would be better for the matter to be decided by a conference of plenipotentiaries on the basis of the various arguments advanced by the Commission.

9. It was difficult to recall any other occasion when, on a second reading, a set of draft articles had been the subject of substantive proposals for revision. The question which came to mind, therefore, was whether the Commission had considered the matter with all due reflection, particularly in terms of the consistency of the text and of State practice. A second question concerned the current situation regarding international law and State practice on the point. In that connection, he noted, from paragraph 149 of the Special Rapporteur's report (A/CN.4/345 and Add.1 and 2), that Italy had made some comments.

10. He would like to know whether debts to individuals, corporations or other juridical persons in private law had been treated, in State practice, as a part of State debts for the purposes of State succession. Was there, for instance, any precedent of which the Commission should take note? In that connection, Mr. Ushakov (1671st meeting) took the view that, in current international practice, private debts were not regarded as part of State debts for the purposes of State succession, since they were regulated under other branches of law, both internal and international, depending on who the creditor was.

11. State debts were a part of contemporary life, particularly for the developing countries which lacked the necessary funds for their economic development. If, for example, a State wishing to raise a loan of $100 million for the execution of a project secured $50 million from its own consolidated fund, a further $30 million from the World Bank and $20 million, for which it had to guarantee security, from private bankers, what would the position be in a case of succession of States? Of course, both the State debt and the debt owing to the World Bank would pass but would the residual $20 million, guaranteed by the State, be regarded as a private debt, and hence one that did not fall within the scope of article 16, or as a part of a State debt for the purposes of that article?

12. To find the answer, he had examined previous reports on the Commission's work to see whether a decision in the matter had already been reached. It appeared that there had been no direct discussion on the point, although paragraphs (38) and (39) of the commentary to article 16[4] did suggest that the phrase "any other financial obligation", in subparagraph (*b*) of article 16, covered private debts. However, the report was silent on the main question and on the criticism voiced in that respect in the Sixth Committee of the General Assembly, and it therefore seemed that the Commission had not in fact reached a decision advisedly. At the same time, he seemed to recollect a discussion of the matter in 1977 when the Commission had been keenly aware of the need to protect the interests not only of the predecessor and successor States but also of the creditor. The term "creditor" had not been defined, but it was understood to refer both to a State and to an international organization, something that would create problems regarding the application of article 18 to such an organization. His impression therefore was that a State debt could include debts other than those owed to another State or to an international organization: if a debt was owed by a State, for instance to a private bank or a private individual, then it was a State debt.

13. Given the sensitive nature of the problem, there appeared to be three main options. First, article 16 could be retained as drafted, the views of both sides being reflected in the commentary; secondly, article 16 could be amended as recommended by the Special Rapporteur, the reasons being indicated in the commentary; and, thirdly, the part of the article on which there was a difference of opinion could be placed between square brackets, an explanation being included in the commentary.

14. He would be unable to decide on his own preference without some evidence of whether, in State practice, private debts were included among State debts. If they were, he would favour the retention of the article in its existing form; otherwise, the better course would probably be to leave it to a plenipotentiary conference to settle the matter on the basis of the views expressed by members of the Commission.

15. Mr. USHAKOV pointed out that under article 16, subparagraph (*a*), the State was acting as a subject of international law, whereas under subparagraph (*b*) it was acting as a subject of private law. In the latter case, it renounced its State immunity in principle and consented to the application of a specific law to the contract to which it was a party; succession could also take place in such a case, but under a national law and not under international law.

16. Mr. PINTO said that the Special Rapporteur's proposals regarding article 16 reflected two alternative approaches. In respect of the first proposal, namely to retain the existing text of the article, the Commission had sought to regulate succession to debts owed by a State to creditors which were not States or intergovernmental organizations, and thereby to offer a measure of confidence to those creditors that the process of succession would not itself constitute an additional risk to their capital. The second proposal was to recast the text so as to cover only debts owed by a State to another State or to an intergovernmental organization. He agreed with the Special Rapporteur

[4] *Yearbook ... 1979*, vol. II (Part Two), p. 46.

that, to restrict the scope of the article in that way, it was necessary to delete subparagraph (*b*) and also the phrase "or any other subject of international law" in subparagraph (*a*).

17. Those who advocated the broader approach believed that international law, and specifically the draft articles, should be seen to protect private creditors. According to the "Brandt Report",[5] State borrowing on the international private market had risen from 17 per cent of the outstanding debt of developing countries in 1970 to 40 per cent in 1979—a factor of considerable relevance in view of the increasing vulnerability of developing countries to the charge that they were no longer creditworthy.

18. Those who advocated the second, more restrictive, approach had stated they were in no way opposed to the protection of private creditor's rights, but considered that it was essentially a matter for the internal law of the successor State, and not for international law. In their opinion, the draft articles should do no more than acknowledge the existence of those rights, in a saving clause, and place them firmly outside the scope of the articles.

19. His own view was that whether or not a State borrowed from a foreign source was entirely a matter of the policy of that State. If the decision was to borrow, it was necessary from both the moral and the practical point of view for the money to be repaid as agreed, whether the creditor was a State, an intergovernmental organization or a private party. He was convinced that not a single modern State would like to have a choice in law as to whether or not to repay a debt related to its territory on the ground that a State succession had occurred and that it was no longer responsible. That was even more true in the case of debts owed to private creditors, who not only were more vulnerable but were more likely than State creditors to retaliate by withholding further credit. In the circumstances, he considered that there was no need to contemplate any distinction between the two types of debt so far as the effects of succession were concerned.

20. The question remained whether the regulation of debts owed by a State to a foreign private creditor fell within the scope of international law and, in particular, of the draft articles. So far as the obligation of a State to a foreign national was concerned, international law could, in his opinion, have a certain role to play. Such law might or might not govern directly the detailed obligations of performance, although such obligations might well be governed in whole or in part by the proper law applicable to the transaction. The draft articles, however, were not concerned with what law was applicable to the loan, but rather with whether the debt was affected by the succession and what law was applicable for the purpose of determining the effects of the succession: in other words, to which State a creditor could turn following the succession. In a process as fundamental as that dealt with in article 17, the matter was not one with which private law, or private law alone, was equipped to deal. The nearest concepts in private law involving the automatic passing of property and debts related to decease, and analogies could not be drawn with State succession.

21. It was therefore difficult to escape the conclusion that international law must have some role to play in determining which State was accountable for debts to private creditors following a succession. Under article 16, read in conjunction with article 17 in its existing form, responsibility passed to the successor. Once that passing had occurred, the successor State could rely on the full range of its rights in public and private international law in deciding how to deal with the obligation that had devolved upon it. That latter aspect was not to be covered by the draft articles. International law as reflected in the draft only had to ensure all those concerned that the financial obligation survived the succession. The process of succession was independent of the process of performance of financial obligations, which might be viewed differently.

22. If it was necessary to clarify the scope of the application of private law to the performance of financial obligations owed to private creditors following a succession, that could be done by making an appropriate addition to article 17 or to the commentary.

23. In view of the little time available to the Commission, he would be guided by the Special Rapporteur and the opinion of the majority of the Commission in the matter of excluding from or retaining in the draft articles State debts owed to private creditors.

24. He would have liked to pursue the question of "odious debts", but was prevented from doing so by lack of time. The question was one which raised so many problems of definition that he doubted whether it would be possible to complete the discussion at the present session.

25. Mr. VEROSTA said he was somewhat surprised that it should be necessary, on second reading, to decide whether to continue along the lines set out by the Special Rapporteur or to take a completely different course as a result of criticism by some Governments. In his view, it would be difficult to go back on the Commission's position. Personally, he had always considered that the draft applied to all debts, including those contracted by States with private natural or juridical persons. Not only article 17, which had already been mentioned, but also article 23, concerning the passing of State debt of the predecessor State when the latter was dissolved, referred to a regime of public international law. Consequently, the

[5] *North-South: a Programme for Survival—The Report of the Independent Commission on International Development Issues under the Chairmanship of Willy Brandt* (London, Pan Books, 1980).

current wording of article 16 should remain unchanged.

26. Mr. BEDJAOUI (Special Rapporteur) said he regretted that article 16 had been the subject of a further discussion, which merely served to emphasize the divergence of views among members of the Commission. The Drafting Committee would undoubtedly be concerned by the fact that no consensus was emerging on a solution. It was none the less generally accepted that the definition in article 16 should not have the effect of sacrificing the rights of private parties. The fact that no reference was made to such rights in the article did not mean that they were sacrificed, but that consideration of them did not fall within the purview of the draft. As Mr. Ushakov had pointed out at the previous meeting, protection of the rights of private natural or juridical persons was not governed by public international law but by private international law or internal law.

27. It was in no way absurd, in the context of the draft, to exclude the financial obligations assumed by a State towards an individual. At the outset, the Commission had set aside many public debts that might concern individuals, for example, debts contracted by local authorities with private individuals, and had confined itself to State debts. In that case too, the fact that such debts were not specifically mentioned did not mean that they were sacrificed. The Commission had therefore gradually narrowed the field of application of the draft, first by excluding public debts other than State debts and then by restricting its consideration of State debts to those which gave rise to relationships in public international law, namely, the debts of a State towards another State or an international organization. In doing so, it had simply set aside State debts contracted with private persons, but without thereby sacrificing them.

28. In connection with a comment by Mr. Jagota, he said that there was a State practice with regard to State debts contracted with other States or international organizations and debts contracted with private persons. For debts in the first category, the practice was based on international agreements or conventions such as the articles which the Commission was in the process of drafting, whereas for those in the second category, it was based on contracts, and, generally speaking, referral to the judicial authorities was not required. Public international law could indeed apply later on, if difficulties arose as a result of debts contracted with private persons; however, the matter was not one of succession of States, but of exhaustion of internal remedies and diplomatic protection. Similarly, the growing practice in international law of protecting private investments abroad was not a matter that fell under succession of States either.

29. In its draft articles, the Commission had taken into consideration three matters relating to succession, namely, State property, State debts and State archives, but its definitions were very different in each case. It referred to the internal law of the predecessor State only in respect of State property and State archives. If it had wished to define the term "State debt" along the same lines, article 16 ought to have been drafted to read:

> "For the purposes of the articles in the present Part, 'State debt' means any financial obligations of a State which, at the date of the succession of States, were, according to the internal law of the predecessor State, chargeable to that State."

The Commission had not opted for such a definition because it had wished to pinpoint certain aspects of international law on State debt. It had wished to take account of one relationship in purely public international law, in other words, the relationship between States or between a State and an international organization; thus, in order not to depart from that approach, anything relating to private international law or internal law had to be deleted from the definition.

30. It seemed difficult to reconcile the views of those who were in favour of deleting subparagraph (*b*) of article 16 and those for whom that provision was so general that it would in fact be more logical to delete subparagraph (*a*). Admittedly, subparagraph (*b*) was very general, but Mr. Ushakov had pointed out at the previous meeting that it did not afford the degree of protection for private creditors that the Commission had expected. Mr. Reuter (1671st meeting) had asked whether a financial obligation was an obligation of financial origin, as was the case for a debt resulting directly from a contract for a loan, or whether it was a secondary obligation resulting from another obligation expressed in financial terms. In that respect, it should be noted that subparagraph (*b*) of article 16, and particularly the words "any other financial obligation", when taken together with subparagraph (*a*), covered two types of financial obligations: on the one hand, those that were not assumed by a State "towards another State, international organizations or any other subject of international law" and which could therefore be assumed towards an individual, and on the other, those which differed from the obligations covered in subparagraph (*a*), either in their delictual nature, the way in which they were created or their modalities.

31. Mr. Aldrich (*ibid.*) had considered that the Commission should take care not to reopen the discussion on article 16, that the consensus reached on first reading meant that subparagraph (*b*) should be retained, and that further debate would ensue precisely if it was deleted. However, it should not be forgotten, as Mr. Jagota had pointed out, that the deletion of the word "international", which had qualified the term "financial obligation" in the original version of the text which became article 16,[6] had led to a new split within the Commission.

[6] See, for example, *Yearbook ... 1979*, vol. II (Part One), p. 70, document A/CN.4/322 and Add.1 and 2, art. 18.

32. With regard to article 16, subparagraph (*a*), in its work on the draft articles on treaties concluded between States and international organizations or between international organizations, the Commission had hesitated between the expressions "subject of international law" and "entity in international law".[7] The expression "entity in international law" could be used in subparagraph (*a*), provided that it was stated in the commentary, as Mr. Francis had stressed, that international personality was not recognized for multinational companies, so that the arbitral award of 1977 concerning the nationalization of Libyan oil[8] did not set a precedent.

33. In view of the diversity of views expressed, the Commission could either maintain the current wording of article 16, which would undoubtedly give rise to reservations, or delete subparagraph (*b*), although the members of the Commission were extremely divided on that point, or replace the subparagraph with a safeguard clause stating that the definition in the article did not affect the rights and obligations of private natural or juridical persons. That was the solution proposed by Mr. Ushakov. Mr. Reuter proposed that the difficulty caused by the word "international" should be circumvented by referring to "any other financial obligation recognized by a rule of international law as chargeable to a State" (1671st meeting, para. 27).

34. For his own part, he would be prepared to propose a definition for odious debts. In his ninth report, he had proposed two articles, one containing a definition of odious debts and the other referring to their non-transferability.[9] It was not correct to consider, as did Mr. Ushakov, that odious debts were largely a matter of succession of governments and that it was not therefore necessary to refer to them in the draft. In his ninth report, he had in fact given numerous examples of odious debts, such as war debts, subjection debts and regime debts, which did not concern succession of governments alone.

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer articles 15 and 16 to the Drafting Committee.

*It was so decided.*[10]

ARTICLE 17 (Obligations of the successor State in respect of State debts passing to it),

ARTICLE 17 *bis* (Date of the passing of State debts),

ARTICLE 18 (Effects of the passing of State debts with regard to creditors), *and*

ARTICLE 19 (Transfer of part of the territory of a State)

36. The CHAIRMAN invited the Commission to consider the last articles in section 1 of Part III of the draft articles, namely, articles 17, 17 *bis* (A/CN.4/345 and Add.1 and 2, para. 164) and 18, and the first article of section 2 (Provisions relating to each type of succession of States): article 19. Those four articles read:

***Article 17. Obligations of the successor State in respect of State debts passing to it***

**A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.**

***Article 17* bis. *Date of the passing of State debts***

**Unless otherwise agreed or decided, the date of the passing of State debts is that of the succession of States.**

***Article 18. Effects of the passing of State debts with regard to creditors***

**1. A succession of States does not as such affect the rights and obligations of creditors.**

**2. An agreement between the predecessor State and the successor State or, as the case may be, between successor States, concerning the respective part or parts of the State debts of the predecessor State that pass, cannot be invoked by the predecessor State or by the successor State or States, as the case may be, against a third State or an international organization asserting a claim unless:**

**(*a*) the consequences of that agreement are in accordance with the other applicable rules of the articles in the present Part; or**

**(*b*) the agreement has been accepted by that third State or international organization.**

***Article 19. Transfer of part of the territory of a State***

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

**2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.**

37. Mr. BEDJAOUI (Special Rapporteur) said that article 17 enunciated a rule for State debts that was equivalent to the one contained in article 6, concerning State property. Article 17 had not given rise to any particular comments, except for that by the German Democratic Republic (A/CN.4/338), which had said that the mechanism of the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State should apply only to debts contracted in accordance with international law.

[7] See *Yearbook ... 1974*, vol. II (Part One), p. 295, document A/9610/Rev.1, chap. IV, sect. B, art. 3, para. (6) of the commentary.

[8] See 1666th meeting, para. 24.

[9] *Yearbook ... 1977*, vol. II (Part One), pp. 70 and 74, document A/CN.4/301 and Add.1, paras. 140 and 173.

[10] For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 85 and 86–104.

Article 17 therefore seemed to command tacit general support.

38. Article 17 *bis* sought to establish the date of the passing of State debts in cases where the date had not been settled by agreement between the predecessor State and the successor State or by a decision of an arbitral tribunal or any other international body. He was proposing that the Commission should use the same formula as for State property, and he had drafted article 17 *bis* purely and simply as a counterpart to article 7, concerning the date of the passing of State property.

39. The rule enunciated in article 17 *bis* was only of theoretical value, since it was possible, in practice, to choose a date other than that of the succession of States. Experience showed that there was always a transitional period during which the predecessor State continued, for example, to service the debt and during which the successor State did not directly discharge its obligations to its creditors. The Commission did not have to deal with that matter, but must make it clear that, for all the debts passing to the successor State and the interest that began to accrue as of the date of succession, the real debtor was the successor State.

40. Article 18 had given rise to problems in the Sixth Committee and had elicited written comments from the Governments of Italy and Czechoslovakia, which were summarized in paragraphs 173 to 175 of his thirteenth report (A/CN.4/345 and Add.1 and 2).

41. Paragraph 1 of article 18 was a general safeguard clause. It had been stated that it created more problems than it solved, and that, in particular, it would be a disservice to the creditors which it sought in principle to protect, since such creditors might be deprived of any recourse against the successor State. It had also been pointed out that the word "creditors" was not sufficiently precise, and that it could apply just as well to third States or the successor State as to natural or juridical persons under the jurisdiction of a foreign State or even the successor State. Paragraph 2 also contained an imprecise definition of creditors, which was not properly in keeping with the terms of paragraph 1, for it applied only to third States and international organizations, whereas paragraph 1 related to creditors in general and was primarily aimed at providing guarantees for private creditors.

42. At the previous meeting, Mr. Ushakov had expressed the view that article 18, paragraph 1, afforded inadequate protection and had proposed the elaboration of a general safeguard clause. For his own part, he suggested that article 18, paragraph 1, should be deleted if the wording could not be improved.

43. The purpose of paragraph 2 of article 18 was to determine when an agreement between the predecessor State and the successor State could be invoked against third States or international organizations. Although subparagraph (*b*) seemed to be generally acceptable, subparagraph (*a*) gave rise to considerable difficulties.

44. First of all, the meaning of the words "the consequences of that agreement" and the words "in accordance with the other applicable rules" had to be clarified. Subparagraph (*a*) had elicited comments in the Sixth Committee as well as written comments by the Government of Czechoslovakia (A/CN.4/388/Add.2), which had, for example, pointed out that there were two categories of third States: those which would accede to the future draft convention and would thus be bound by its provisions, which could be invoked against them, and those which would not accede to the future convention and could not possibly be bound by such a rule, which was, moreover, incompatible with article 34 of the 1969 Vienna Convention.[11]

45. He regarded those difficulties as a drafting problem which the Drafting Committee would have to solve. Nevertheless, one problem would subsist as far as relations with international organizations were concerned, for the future convention would most probably not be open to participation by international organizations and it was therefore difficult to see how its provisions could apply to them. Moreover, the inclusion in the draft of an article providing for special treatment for third States that were parties to the convention might also deter States from acceding to the instrument.

46. Article 19 had not given rise to any comments, other than the statement by one representative in the Sixth Committee that the words "taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt" were incompatible with the words "taking into account all relevant circumstances" used in articles 22 and 23. That difference could, however, be explained by the fact that article 19 covered a very specific case, namely, the transfer of part of the territory of a State, which took place freely, by agreement, and involved a small portion of territory (for example, a frontier adjustment), whereas the separation of part or parts of the territory of a State, covered by article 22, and the dissolution of a State, covered by article 23, often involved violence, took place without any agreement and affected large areas of territory, and account should therefore be taken of all the most general circumstances.

47. Mr. PINTO said that article 7, which dealt with the date of the passing of State property, was readily understandable in the context of article 16, but article 17 *bis*, which dealt with the date of the passing of State debts, almost automatically introduced the idea of third-party interests, whether State or private. The use of the words "Unless otherwise agreed or decided" at the beginning of article 17 *bis* made him wonder who could agree or decide on another date. Again, article 18, paragraph 2, did cover some aspects of an agreement, but it did not deal with the question of acceptance of the agreement by third party private

[11] See 1659th meeting, footnote 7.

creditors, to whom the safeguard clause in article 18, paragraph 1, nevertheless applied.

48. He would therefore like the Special Rapporteur to explain whether the phrase "Unless otherwise agreed or decided" in article 17 *bis* was to be interpreted as meaning that all the types of creditors contemplated in the draft could be parties to the agreement or the decision in question.

49. Mr. ŠAHOVIĆ said that, in his opinion, the Commission could refer articles 17, 17 *bis* and 19 to the Drafting Committee. However, article 18 gave rise to serious problems in the context of article 16, which contained a definition of State debt that was not yet sufficiently clear.

50. Mr. USHAKOV said he thought that the four articles under consideration could be referred to the Drafting Committee.

51. Mr. ALDRICH said that, subject to the Special Rapporteur's answer to Mr. Pinto's question, he could agree that articles 17 and 17 *bis* should be referred to the Drafting Committee.

52. Mr. BEDJAOUI (Special Rapporteur), replying to the point raised by Mr. Pinto, said that article 17 *bis* was concerned exclusively with the date of the passing of State debts to the successor State, which it determined was the date of the succession of States. Accordingly, the agreement or decision in question related only to the matter of the date, and its purpose was not to solve the problem of the different types of creditors. The rule enunciated in article 17 *bis* was thus a residual one, since the predecessor State and the successor State could agree on another date.

53. Mr. REUTER said that there was still some doubt in his mind, and that the words "agreed or decided" gave rise to something more than a drafting problem, because the word "decided" obviously covered a unilateral act that could be the result of arbitration. If that was in fact the case, the Commission should say so in the commentary; otherwise, only the word "agreed" should be retained.

54. Mr. JAGOTA said he would like the Special Rapporteur to explain whether, as far as agreement was concerned, there was any relationship between article 17 *bis* and article 18, paragraph 2. In other words, did the agreement referred to in article 17 *bis* relate only to the date of the passing of State debts, and did the agreement referred to in article 18, paragraph 2, relate only to matters other than the date of the passing of State debts or did it also refer to that date? If article 18, paragraph 2, also related to the date of the passing of State debts, the answer to Mr. Pinto's question would be that the words "Unless otherwise agreed or decided" implied that an agreement by the predecessor State and the successor State could fix the date of succession, but if a third party creditor was not a party to that agreement, then article 18, paragraph 2, would apply.

55. In view of the point raised by Mr. Reuter, the word "decided" would have to have the same meaning both in article 7 and in article 17 *bis*.

56. Mr. BEDJAOUI (Special Rapporteur) said that the words "Unless otherwise agreed or decided" used in article 17 *bis* were the formula that the Commission had used previously in the draft to refer both to what could be agreed by the predecessor State and the successor State and to what might be decided by an arbitral tribunal or an international organization, as had already been indicated in the commentary to article 7.[12]

57. With regard to article 17 *bis* and article 18, paragraph 2, Mr. Jagota had established a relationship that did not exist. The former provision indicated, in the absence of any agreement on the matter, the date of the passing of debts; the latter provision related to the agreement that settled the substance of the problem and governed the manner and proportions in which the passing of debts took place. Thus, there did not seem to be any possible confusion.

58. Mr. ALDRICH said the Special Rapporteur had made it clear that the problem involved in the use of the words "Unless otherwise agreed or decided" in article 17 *bis* was of a drafting nature. The Drafting Committee should obviously examine articles 7 and 17 *bis* at the same time, and find a way of showing that what was being dealt with in both articles was an agreement between the predecessor State and the successor State, or a decision taken in accordance with an agreement between those two States.

59. The CHAIRMAN, speaking first as a member of the Commission, said that, unless his recollection was entirely wrong, the Commission had included the words "or decided" in article 7[13] in order to cover the case of newly independent States, a case in which the determining factor might be a decision or resolution of an international organization rather than an agreement between the predecessor State and the successor State.

60. If there were no objections, he would take it that the Commission agreed to refer articles 17 and 17 *bis* to the Drafting Committee.

*It was so decided.*[14]

61. The CHAIRMAN asked whether the members of the Commission were of the view that further substantive discussion was required before article 18 could be referred to the Drafting Committee.

62. Mr. USHAKOV said that article 18 was closely connected with the wording of a possible general safeguard clause. A more thorough discussion of the article might therefore be held in the Drafting Committee, which had already been requested to

[12] See *Yearbook ... 1979*, vol. II (Part Two), pp. 19–20.

[13] *Ibid.*, art. 7, para. (4) of the commentary.

[14] For consideration of the texts proposed by the Drafting Committee, see 1692nd meeting, paras. 105–106 and 107–108.

consider the possibility of preparing such a clause, and whose work would certainly make it easier for the Commission to adopt a decision later on.

63. Mr. REUTER pointed out that article 16 had been referred to the Drafting Committee even though everyone was aware that it gave rise to problems of substance rather than form. The same was true of article 18, and it could therefore be referred to the Drafting Committee, since experience tended to show that the work of that body was not confined to drafting problems.

64. Mr. JAGOTA said that, if article 18 was referred to the Drafting Committee without first being discussed by the Commission, the Drafting Committee would probably refer it back to the Commission. The article should therefore form the subject of further discussion by the Commission.

65. Mr. ALDRICH said that, as a new member of the Commission, he would certainly profit from a discussion of article 18.

66. Mr. BARBOZA said that, from the methodological point of view, it would obviously be better for the Commission to discuss article 18 and then refer it to the Drafting Committee.

67. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to continue its consideration of article 18 during the second half of its 1675th meeting, on Friday, 19 June.

*It was so decided.*

*The meeting rose at 1.05 p.m.*

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## 1673rd MEETING

*Wednesday, 17 June 1981, at 10.05 a.m.*

*Chairman:* Mr. Robert Q. QUENTIN-BAXTER

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

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**Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/339 and Add.1–7, A/CN.4/341 and Add.1)**

[Item 3 of the agenda]

* Resumed from the 1652nd meeting.

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

ARTICLE 26 (*Pacta sunt servanda*)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 26, in section 1 (Observance of treaties) of Part III of the draft articles, entitled "Observance, application and interpretation of treaties". The article read:

***Article 26.* Pacta sunt servanda**

**Every treaty in force is binding upon the parties to it and must be performed by them in good faith.**

2. Mr. REUTER (Special Rapporteur) said that article 26, which was identical with article 26 of the Vienna Convention,[1] did not call for any special comment.

3. He proposed that the Commission should refer the title of Part III, that of section 1 and the text of article 26 to the Drafting Committee.

*It was so decided.*[2]

ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

4. The CHAIRMAN invited the Special Rapporteur to introduce article 27, which read:

***Article 27.* Internal law of a State, rules of an international organization and observance of treaties**

**1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.**

**2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.**

**3. The preceding paragraphs are without prejudice to [article 46].**

5. Mr. REUTER (Special Rapporteur) recalled that the version of article 27 adopted on first reading was the result of a lengthy exchange of views in the Commission, which, moreover, had expressed its intention of examining the article carefully at the second reading. It had also been the subject of an important debate in the Sixth Committee and of written comments by Governments and international organizations, which on the whole had adopted a fairly favourable attitude towards the text approved on first reading, although some had considered that its provisions called for reconsideration.

[1] See 1644th meeting, footnote 3.

[2] For consideration of the article by the Drafting Committee, see 1692nd meeting, para. 46.