Document:-
A/CN.4/SR.1322

Summary record of the 1322nd meeting

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

Extract from the Yearbook of the International Law Commission:-
1975, vol. I

1322nd MEETING

Wednesday, 4 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Succession of States in respect of matters other than treaties

(A/CN.4/282) [1]

[Item 2 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 11

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 11, which read:

Article 11

State debt-claims

The successor State shall become the beneficiary of the (State) debt-claims of all kinds receivable by the predecessor State by virtue of the exercise of its sovereignty or its activity in the territory to which the succession of States relates.

2. Mr. BEDJAOUI (Special Rapporteur) explained that article 11 should be understood in the light of article 9 (A/CN.4/282), which stated the principle of the passing of State property from the predecessor State to the successor State. As in article 9, he had used the word "sovereignty" in article 11, but he would agree to its being replaced, for the reasons put forward in the discussion on article 9, by a reference to the exercise of governmental authority. The term "debt-claims" was used in the broadest sense: it denoted all sums of money due to the predecessor State by reason of its State activities or of the exercise of governmental authority in the territory to which the succession related. The term could apply to domanial resources, such as revenue from State forests and proceeds of the granting of hunting or fishing rights; to income from financial participation of the State in private enterprises, such as income from industrial and commercial operations and from industrial public services, where such income was represented by claims; to administrative charges and other remuneration of services rendered by the State to private persons; and, especially, to taxes and fiscal receipts in general, the collection of which was the expression *par excellence* of the predecessor State's sovereignty, for the threefold reason that they were required by authority, permanently and without any direct counterpart. Such debt-claims were incorporeal property of which the predecessor State was the holder by reason of the exercise of governmental authority and of its activities in the territory in question—in other words by reason of its *jus imperii* and its *jus gestionis*.

3. In the light of international jurisprudence and doctrine and of the practice of States, he believed that there was a customary rule of succession to taxation or to the claim representing it. Article 11 was thus in conformity with article 9, which confirmed the passing of State property to the successor State. Moreover, one writer, Daniel Bardonnet, considered that there was a presumption of succession to public property in general and that exceptions must be expressly provided for in treaties and strictly interpreted. [2] The idea of the passing of debt-claims from the predecessor State to the successor State was based on considerations of equity, common sense and the viability of the successor State, and likewise on the fact that the predecessor State could not be allowed to use its power of coercion to recover a debt in a territory over which it had lost all sovereignty. Besides, the territory to which the succession related must pass under the authority of the successor State in normal conditions of operation and viability of the administrative machinery, as it had previously existed. It was that idea which was expressed—although in terms reminiscent of commercial law—in a letter sent in 1962 by the British Ambassador at Addis Ababa to the Ethiopian Minister for Foreign Affairs. Referring to Eritrea, the Ambassador had specified that the transfer of power in the territory should take place on a "going concern" basis. [3]

4. The existence of a customary rule on the passing of debt-claims to the successor State having been established, the next question was whether the debt-claims must be legally determined at the time of the succession of States. Some devolution agreements and territorial treaties provided for the passing to the successor State of "all existing and future rights", which wording was not in conflict with the formula "property, rights and interests" used in article 5.

5. In order to pass to the successor State, debts must be due to the predecessor State and result from its activities or from its exercise of governmental authority in the territory in question; for not all debt claims of the predecessor State passed to the successor State. In the event of secession, decolonization or transfer of part of a territory, the predecessor State, which continued to exist, might retain debt-claims resulting from activities carried out elsewhere than in the territory to which the succession related. Thus article 11 was not applicable to debt-claims not directly connected with the territory. Admittedly, the territory might have contributed indirectly to the formation of the predecessor State's assets, and therefore be able to claim part of the debts owing to the State, but he had deliberately left that question aside.

6. The debt-claims need not necessarily be "located" in the territory to which the succession related. Since they were incorporeal assets, the claims could not, strictly speaking, have a location; only the debtor, the title to the debt and the pledged security, if any, could be located. For the purposes of article 11, it was sufficient that the debt-claims should result from the activity of the predeces-

[1] *Yearbook ... 1974*, vol. II, Part One, pp. 91-115.

[2] *Yearbook ... 1973*, vol. II, p. 29, foot-note 79.

[3] *Ibid.*, p. 29, foot-note 74.

sor State or from its exercise of the governmental authority in the territory in question. The precedents were quite clear on that point, and he referred members to a decision of the Supreme Court of Poland, cited in his fourth report. [4] The debt-claims covered by article 11 were those of the predecessor State only. Accordingly, claims proper to the territory itself, such as those of a colony which had become independent, of a secessionist province or of ceded territory, should be excluded. The holder of such debt-claims was the territory, and hence the successor State.

7. The expression "debt-claims of all kinds" was intended to cover all the debts receivable by the predecessor State by reason of its activity in the territory, regardless of their geographical location. He had preferred the term "receivable" to the words "actually owed", because it had a broader meaning. The words "of all kinds" meant that it was immaterial what was the origin of the claim, the status of the debtor—who might be a natural or a legal person, a national of the predecessor State or a foreigner—or the legal nature of the claim, which could relate to a mortgage debt, a stock, a bond, a share, a government bond or a tax. State practice confirmed the existence of a customary rule, as was shown by the three examples cited in his fourth report, namely, the cession of the French Establishments in India in 1954, the cession of the southern Dobruja by Romania to Bulgaria in 1940 and the Belgo-Congolese Convention of 1965. [5]

8. So far as tax claims were concerned, there was a customary rule of succession to all taxes and, in general, to all debt-claims appertaining to the prerogatives of sovereignty. The change of sovereignty did not dispense anyone from payment of taxes and duties payable under the previous laws, so long as they had not been repealed or amended by the successor State. In France, for example, the *Cour de Cassation* had ruled that the annexation of Savoy to France in 1860 did not release a petitioner from the registration taxes he had owed under Sardinian law. [6] When Alsace-Lorraine had been annexed by the German Empire in 1871, a distinction had been made by treaty between private debt-claims of the French Treasury against industrialists established in Alsace-Lorraine, which could be recovered by the French Treasury, and debt-claims relating to taxes and other levies, which had passed to the German State. [7] In the case of the first category of debt-claims, the so-called private debt-claims which could arise from loans, there had been a change of attitude after the First World War. Under the Treaty of Saint-Germain-en-Laye and the Treaty of Trianon, funds advanced by the ceding States to private persons or local authorities could not be claimed by those States, especially as private persons and administrative authorities of the ceded States had had large claims against the ceding States arising out of their compulsory war loans.

9. A question of date could arise in connexion with taxes, for it sometimes happened that between the date of the agreement on the cession of a territory and the date of the actual succession, the predecessor State levied taxes in the territory. The fact that claims for tax refunds had been submitted to the predecessor State by private persons from whom the successor State claimed the same taxes, proved the existence of the customary rule stated in article 11. If the tax had been paid to the predecessor State, the claim of the successor State was not considered to be extinguished. In 1871, a dispute between France and Germany, which had arisen in consequence of war, had been settled in accordance with the customary rule. [8]

10. The situation varied according to the type of succession. In the case of transfer of part of a territory, tax claims should not pass to the successor State until the date of the succession, since before that date the proceeds of taxation could have been used for the territory to which the succession related, as well as for the rest of the territory of the predecessor State. In some cases, tax claims which had by law arisen and accrued to the predecessor State before the date of the succession agreement, and which had been paid before the date of the actual succession, had been successfully enforced by the successor State. In that connexion, he referred to the judgements of the Supreme Administrative Court of Czechoslovakia and the Supreme Court of Poland, cited in his fourth report. [9] Cases of decolonization should not give rise to any difficulties, since both before and after the succession of States taxes were collected by a territorial authority possessing a legal personality, at least from the fiscal point of view. Those tax claims were therefore debt-claims attaching to the territory. Complications might arise when there were transfers of population, as had occurred in Algeria. In that country, the disorders which had preceded independence, had made it impossible to collect taxes in full for two or three years. After independence, the Algerian Government had sought the help of the French Government and had proposed—without success—the establishment of a fund for the settlement of unpaid debts. The Algerian authorities had subsequently required French nationals finally leaving Algeria to produce, at the frontier post, a "tax clearance certificate", which had later been replaced by a simple unsworn declaration countersigned by the French Embassy at Algiers. That had been a kind of subrogation or guarantee by the French Government, but it had not proved to be a very satisfactory solution. In 1969, a tax agreement had been signed by the two countries, under which the Algerian and French Treasuries were required to recover, on each other's behalf, any tax owed by private persons in their respective territories. Nevertheless, taxes owing from the past had been very difficult to recover.

11. Draft article 11 also applied to cases in which more than one successor State was involved, such as those cited

[4] See *Yearbook ... 1971*, vol. II, Part One, p. 186, paras. (5) and (6).

[5] *Ibid.*, pp. 187-188, paras. (13) and (14).

[6] *Ibid.*, p. 188 para. (15).

[7] *Ibid.*

[8] *Ibid.*, para. (17) and p. 189, para. (18).

[9] *Ibid.*, p. 189, para. (20).

in his fourth report.[10] Those cases had given rise to an equitable distribution of debt-claims between the successor States—a solution with which article 11 was not incompatible, since it merely provided that each successor State would become the beneficiary of the debt-claims of the predecessor State. After the succession of India and Pakistan to the United Kingdom, the two successor States had continued to levy taxes in accordance with the previous laws and on their respective territorial bases.

12. Mr. TAMMES said that article 11 was a useful article in the draft: it served to specify that incorporeal State property, especially in the form of debt-claims, was part of the assets which passed from one sovereign to the other. That rule had to be stated expressly, because there had been some controversy in the past regarding the extent to which the transfer of title took place. The article was in its right context among the general provisions applicable to all types of succession of States. It was backed by a very thorough study which went back to the Special Rapporteur's fourth report.

13. That being said, he still had some doubts about the scope of article 11. The text as it stood would not have the clear effect of making all the predecessor State's debt-claims pass to the successor State. The words "debt-claims ... receivable by the predecessor State by virtue of the exercise of its sovereignty" would cover tax claims, since taxes were imposed by virtue of sovereignty. The reference to the predecessor State's "activity in the territory to which the succession of States relates" would cover outstanding administrative fees or amounts due for services rendered. There remained, however, a third category of debt-claims which fell outside those two definitions: for example, claims arising from the possession of real estate or from financial holdings of the State in commercial enterprises. Those claims did not arise from acts of sovereignty; not could they be said to be receivable by virtue of the predecessor State's activity in the territory to which the succession of States related. He did not intend to reintroduce into the discussion the distinction between the public domain and the private domain of the State, or that between acts performed *jure gestionis* and acts performed *jure imperii*, but the thought the text of article 11 needed clarification. As it stood, it could be interpreted as excluding certain debt-claims like those specifically excluded by agreements between States in the past, a number of examples of which were given in the Special Rapporteur's reports.

14. Mr. KEARNEY said that article 11 dealt with problems which, to a large extent, fell within the scope of private international law. It should be noted that there was a great difference between conventions of private international law and conventions relating to matters of public international law. To give but one example, the 1974 Convention on the Limitation Period in the International Sale of Goods, which had been adopted as a result of the work of UNCITRAL,[11] contained some 40 articles dealing with the period within which legal actions on claims arising from international sales must be brought. The present draft attempted to cover problems of at least equal complexity in a single article. His concern was similar to that expressed by Mr. Tammes, but somewhat broader. The text of article 11 seemed to him neither sufficiently clear nor sufficiently precise to achieve the desired result; he agreed, of course, that the object was desirable.

15. He was afraid that the provisions of article 11 would give rise to difficulties of interpretation. He understood that the Special Rapporteur had used the term "beneficiary" in order to allow some latitude in the application of the provisions; but the use of that term raised the important question whether the successor State became the actual creditor with regard to the debts in question or whether the predecessor State remained the creditor against whom the successor State had a right. The point was of considerable practical importance at a time when a great deal of trade was channelled through State trading organizations. An illustrative example would be that of goods produced in the territory to which the succession related and sold by the predecessor State before the succession, but which were being shipped at the time of the succession. The predecessor State would have certain rights under the negotiable bill of lading and other documents; the provisions of article 11, as proposed, would purport to substitute the successor State for the predecessor State in those rights. Such a result could not be achieved in practice under the existing rules and usages governing trade.

16. It was clear that article 11 needed improvement. A clearer and more precise rule was necessary to enable States whose system required it to enact appropriate legislation. In the absence of such clarification, each State would interpret the article in its own way and the solutions adopted would vary. Clarity was equally necessary for States in which international conventions that had been ratified were deemed to form part of internal law; it was necessary to avoid divergent interpretations of the same text in different States.

17. With regard to the scope of draft article 11, Mr. Tammes had construed the term "activity" very narrowly. For his part, he thought it could be given a very broad meaning. A problem of timing would arise, however. As an example, he mentioned the case of a twenty-year loan originally made, at least in part, from tax revenues of the territory to which the succession of States related. If, at the date of succession, eighteen annual instalments had been paid and two remained outstanding, would the successor State share in the last two amortization payments? If so, on what basis?

18. A further problem was that of mixed claims by the successor State and the predecessor State that antedated the succession; article 11 provided no guidance on how to deal with such claims. The respective rights of the predecessor State and the successor State would have to be determined. He had no specific wording to propose, but wished to draw attention to the need for fuller study of that aspect of the question.

19. Mr. ELIAS said that the principle underlying article 11 was acceptable; it supplemented the general

[10] *Ibid.*, p. 190, para. (24).

[11] See *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods* (United Nations publication, Sales No. E.74.V.8) document A/CONF.63/15.

principle of the passing of all State property from the predecessor State to the successor State, which was laid down in article 9.

20. He was not satisfied, however, with the use of the term "debt-claim" which he found ambiguous. The term would have to be carefully defined or, better still, replaced by a different one. In his opinion, the passing of all assets from the predecessor State to the successor State necessarily implied the passing of all corresponding liabilities. Hence provision should be made not only for the passing of all claims, but also for the passing of all debts, and there appeared to be no justification for limiting the scope of the rule in article 11 to claims receivable. For example, a transferee of property took the property with the obligations attached to it; if the property was subject to a mortgage, the new owner would be liable for the mortgage debt. Clearly, the successor State could not succeed by virtue of article 9 to all State property in the territory to which the succession related and at the same time renounce all debts owed by the predecessor State. He had examined the series of articles in the section entitled "Property of third States" (A/CN.4/282, chapter IV.D) and had found that the provisions contained in them, particularly article Z (Treatment of the property of a third State), apparently did not cover the matter to which he had drawn attention.

21. Although the principle embodied in article 11 was generally acceptable, subject to adoption of some of the suggestions made by Mr. Tammes and Mr. Kearney, and his own suggestions, he thought the article should be framed as a residual rule and begin with the proviso "Unless otherwise agreed". Many of the matters mentioned by Mr. Tammes and Mr. Kearney, particularly the question of timing, were matters which States usually settled by agreement. The States concerned would always be anxious to remove those questions from the area of controversy, but a residual rule was necessary to deal with cases in which no provision was made on the subject in the devolution agreement or other instrument.

22. Mr. HAMBRO said that the principle of succession in regard to debts, as stated in draft article 11, was acceptable, but might be difficult to apply in the particular cases that were likely to arise. While he agreed that article 11 should be considered in conjunction with article 9, he was not sure that—as had been claimed—article 11 was a natural consequence of article 9. The provision that State property necessary for the exercise of sovereignty should pass to the successor State did not necessarily mean that debts which had accrued to that property would also be taken over by the successor State. If that was the intention, it should be made clear by amending the wording of either article 9 or article 11. Although both articles referred to sovereignty, two different aspects of sovereignty were involved, and they should be differentiated. In the light of the State practice cited by the Special Rapporteur, the term "beneficiary" appeared to mean that the successor State became a creditor in the place of the predecessor State. That point should also be made clear. As Mr. Elias had pointed out, draft article 11 was a residual article, but so were most of the articles on State succession.

23. The French text of draft article 11 used the terminology of French public international law and French administrative law, and had clearly been difficult to render into correct legal English. For example, he did not know the precise meaning of the term "State debt-claims" or to what branch of law it belonged. It had often been suggested that the meaning of texts could be clarified in the Commission's commentary, but that was a dangerous practice, as the commentary was not normally read by government officials, diplomats or the legal staff of ministries of foreign affairs. Texts to be used by governments must be clear, simple and self-sufficient. Draft article 11 dealt with a complicated matter, and its wording would have to be very carefully considered. That difficult task could be left to the Drafting Committee.

24. Mr. USHAKOV said that, in his opinion, article 11 did not concern the question of State property, which the Commission was considering at the moment. A State debt-claim, in the event of a succession of States, was a public debt contracted by a third State to the predecessor State. But could the debt-claim be said to be receivable by the predecessor State "by virtue of the exercise of its sovereignty ... in the territory to which the succession of States relates"? He did not think so, because the debt was due to the State as a whole, and not to only a part of its territory. Nor could the successor State be said to be the beneficiary of debt-claims receivable by the predecessor State by virtue of the exercise of its sovereignty in the territory to which the succession of States related. After the succession of States, the predecessor State could no longer collect taxes in the territory to which the succession related, for that part of its territory had passed under the sovereignty of the successor State. Hence the successor State could not become the beneficiary of the proceeds of the taxes of the predecessor State, because those taxes no longer existed.

25. Exceptions to that rule could, of course, be found in practice. For example, during the transitional period when Czechoslovakia had existed *de jure* but not yet *de facto*, the Austro-Hungarian monarchy had still exercised governmental authority *de facto* in Czechoslovak territory and had accordingly collected the taxes which ought to have been collected *de jure* by Czechoslovakia. But that had been a transitional period and an exceptional case: normally, the successor State could not become the beneficiary of the tax revenue of the predecessor State in the territory to which the succession of States related, because that tax revenue ceased to exist after the transfer of the territory. The successor State could only become the beneficiary of its own taxes, under its internal law. Thus, the successor State could not, as provided in article 11, become the beneficiary of the debt-claims receivable by the predecessor State by virtue of the exercise of its sovereignty in the territory to which the succession of States related.

26. It might also be asked what was the nature of the "activity" referred to in article 11 as being carried on by the predecessor State in the territory to which the succession of States related. It could no longer be public activity, because the territory in question had passed under the sovereignty of another State. Hence, in the case of capitalist countries, it must be private activity,

and in the case of socialist countries, activity by a legal person in civil law in the territory which had belonged to the predecessor State and to which the succession of States related. For example, if a State had invested capital abroad in a civil-law company, could that capital be regarded as State property? Certainly not, for in that case, the State had not acted as a State, but as a legal person under its own civil law. The capital invested by a State in a civil-law company could not, therefore, be transferred to the successor State as State property, since it was not State property. Thus, if the successor State decided to nationalize a private enterprise, the capital invested in that enterprise by the predecessor State as a legal person in civil law could be nationalized without any compensation. It followed that the question of State debt-claims referred to in article 11 did not really belong to the topic of succession of States.

27. For the time being, he thought the Commission should keep to the question of State property in the strict sense; it should wait until it had disposed of that question before trying to settle the matter of State debt-claims. He agreed with Mr. Hambro that the French term "*créances d'Etat*" was much broader than the English expression "State debt-claims".

28. Mr. TSURUOKA said he shared most of the doubts expressed about article 11. As in the case of article 10, he urged the Commission to defer its decision on the question whether article 11 should be retained as one of the general provisions and, if so, in what form. He wondered whether what was to be said in article 11 had not already been said in the previous articles, in particular in article 9, as amended by the Drafting Committee [12] in the light of the proposal by Mr. Elias and the comments by Mr. Kearney and Sir Francis Vallat.

29. Most members of the Commission had taken the view that article 9 should refer only to the passing of State property in general, without touching on the question of the substitution of sovereignties. The Special Rapporteur himself had said that article 11 was only an application of the general rule in article 9. As it stood, therefore, article 11 was not justified, since it related not only to *lex gestionis*, but also to *lex imperialis*. In the second case, what was involved was not the effects of the succession of States, but the succession of States as such—in other words, the substitution of one sovereignty for another. But article 11 was meant to deal with State property, not with sovereignty itself. Consequently, everything pertaining to *lex imperialis* should be excluded from the article, and only what pertained to *lex gestionis* should be retained.

30. He recognized, if not the necessity, at least the practical advantage of formulating a general rule on State debt-claims; but he thought that such a general rule could not be worked out until the many problems it raised had been examined and settled one by one. The Commission should therefore defer its decision on article 11.

31. Sir Francis VALLAT said that most questions arising in connexion with State succession in general, and with succession to State property in particular, would be settled by agreement or by the exercise of sovereign powers, and the Commission was really trying to make provision for the exceptional cases. It was drafting residual rules, and the fact that draft article 11 would apply only to exceptional cases was no reason for omitting it. He agreed with its underlying principle, which should be expressed somewhere in the draft articles. Whether it should be left in article 11, subsumed under article 9, or placed elsewhere, was a drafting question. The Commission should not be afraid to deal with particular concrete problems, but should resist the tendency to present governments with abstract rules that would be difficult to understand and apply.

32. Draft article 11 was clearly related to article 5 and to article 9. It also had links with articles yet to be considered, especially articles 13, 17, 21 and 29 (A/CN.4/282). For example, it would be difficult to invest funds, as contemplated in article 13, without creating a debt-claim in some form. When draft article 13 came to be considered, its terms would have to be brought into line with those of draft article 11 or vice versa; at the moment, the two articles applied to quite different situations, inasmuch as one referred to sovereignty and activities in the transferred territory, and the other to funds situated in, or allocated to, the transferred territory. Paragraph 2 of article 13 also introduced the question of costs and liabilities. References to assets, rights and debt-claims might create the impression that only the positive side of succession to State property was considered important and that such property could be taken over free of all obligations attaching to it. Such an emphasis could have unfortunate implications regarding the negative side of succession.

33. He shared Mr. Ushakov's doubts about the equivalence of the terms "*créances d'Etat*" and "State debt-claims". The latter was not an English legal term: English lawyers would speak of "liquidated" or "unliquidated" claims. He was not sure whether the term "debt-claims" would include unpaid claims for damages, for example. If article 11 was retained, it should not give the impression that certain kinds of claim would pass to the successor State while others, equally justified in principle, would not. That point should be considered by the Drafting Committee.

The meeting rose at 1 p.m.

1323rd MEETING

Thursday, 5 June 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

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[12] See 1329th meeting, para. 2.