Document:-

A/CN.4/SR.1163

Summary record of the 1163rd meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

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bound by obligations contracted by one of the merged States. But if there was a dominant State which had combined other States in its own international personality, as Sardinia had done in bringing Italy into existence, the basic principle was that the international legal obligations of that State subsisted after the merger. Thus the criterion was certainly whether the State in question was a new State or not.

49. Mr. USTOR said that the main problem concerning article 5 was whether it was to be construed as relating only to new States resulting from the process of decolonization or whether it was to be taken as relating to all other possible cases of the emergence of new States.

50. He himself would prefer the first alternative, since that would simplify matters, for the time being at least, and the Special Rapporteur could always make alterations at a later stage.

51. In his opinion, article 5 was not of a general character and should be included among the exceptional cases dealt with in a later part of Part I. In particular, he thought that the two situations provided for in paragraphs 1 and 2 did not differ too greatly and that the article might be simplified by combining the two paragraphs in a new draft.

52. The CHAIRMAN, speaking as a member of the Commission, said he could agree with the Special Rapporteur that article 5 was a relatively innocent article of general application. It was designed to meet a special type of case: that of a specific treaty clause to take care of a future change in conditions. To take a hypothetical case, if his own country and the States forming the European Economic Community should conclude a treaty on scientific collaboration, that treaty might conceivably include a clause to the effect that, if the members of the ECE decided to merge into a single State, the treaty would continue to apply in respect of that State *vis-à-vis* the United States of America. That would be a case of fusion, but there should be no difficulty in applying the clause.

53. There could be no possible confusion between articles 5 and 7, since article 5 applied only to the special case of a specific treaty clause and the limitations in article 7, particularly that expressed in sub-paragraph (*a*), could not possibly apply to a situation in which the treaty in question clearly contemplated continuity.

The meeting rose at 11.10 a.m.

1163rd MEETING

Tuesday, 23 May 1972, at 3.5 p.m.

Chairman: Mr. Richard D. KEARNEY

later: Mr. Endre USTOR

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

[Item 1 (*a*) of the agenda]

(continued)

ARTICLE 5 (Treaties providing for the participation of new States) *(continued)* [1]

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 5 (A/CN.4/224).

2. Sir Humphrey WALDOCK (Special Rapporteur) said that article 5 had been included because it was necessary to deal with the case of participation by a new State in a treaty by virtue of the provisions of the treaty itself, as distinct from the case in which the right of participation arose from the law of succession. It was true, as Mr. Yasseen had pointed out, that the rule set out in paragraph 1 belonged to the general law of treaties, but it still needed to be stated in the present draft. A distinction had to be drawn—in the case of multilateral treaties, for example—between that rule and the one stated in article 7, in which the legal nexus arose not from the treaty itself but from the fact that, prior to the succession, the treaty had applied to the territory of the new State.

3. The rule stated in article 5 applied to all treaties. It was true that the bulk of the practice related to multilateral treaties, but in paragraph (10) of his commentary [2] he had given at least one example of its application to a bilateral treaty—that of Guyana and the Geneva Agreement of 1966 between the United Kingdom and Venezuela—and other examples could no doubt be found. The rule was an appropriate one for both types of treaty and there was every advantage in stating it in general terms.

4. The question had also been raised whether article 5 applied only to "new States". Certainly all the practice that had come to his notice related to newly-independent States. As the title indicated, he had accordingly framed the provisions of article 5 with an eye to the "new States". That term was of course used with the meaning attached to it in sub-paragraph (*e*) of draft article 1 (Use of terms) and therefore excluded cases of fusion. Later, as the Commission proceeded with its work, it would finally decide whether to abide by the arrangement of dealing first with new States in a set of general rules and then stating the special rules relating to particular categories of succession.

5. Some members had raised the question of continuity in regard to the operation of article 5. Under paragraph 1 (*b*) of the article, the new State became a party to the party in its own name when it established its consent

[1] For text see previous meeting, para. 20.

[2] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 31.

to be bound "in conformity with the provisions of the treaty and of the Vienna Convention". There could thus be a break in the continuity of application of the treaty. For example, some multilateral treaties specified that the new State became a party as from the date of notification of its intention to be bound; in such a case, there would be a period of non-application of the treaty to the territory in question prior to the notification. In all such cases, the provisions of the treaty itself prevailed. Hence, if any rule were to be laid down regarding continuity, it would necessarily have to be qualified by some such proviso as "Unless the provisions of the treaty itself otherwise provide ..."

6. Mr. AGO said that on the whole he was satisfied by the Special Rapporteur's explanations. He had, however, been surprised to hear that article 5 was intended to refer only to new States, excluding cases of fusion. For a new State might emerge from a fusion of States; there were many historical examples of that, notably the formation of the United States of America.

7. The Commission should be careful about the terminology it used, in order to avoid serious difficulties of interpretation. It could not, even as an expedient, adopt any notion of a new State which excluded the birth of a State as a result of fusion.

8. Sir Humphrey WALDOCK (Special Rapporteur) said he was preparing draft provisions on the problem of fusion for submission to the Commission. The problem was a difficult one; in some cases, such as that of the formation of a federation, a new State could undoubtedly be said to emerge with the constitution of a central authority to concentrate all the external relations of the component members of the federal union. It would, however, be a very different type of "new State" from the one envisaged in sub-paragraph (*e*) of article 1.

9. The practice in regard to fusions of States gave little indication of any clear rules in the matter, while the writers generally spoke of a rule of continuity, but did not make it clear whether, in their opinion, continuity operated in respect of the territory *ipso jure* or by agreement of the States concerned. As for the International Law Association's proposals on the subject, they were complex and not free from difficulty.

10. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 5 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

ARTICLE 6

11. *Article 6*

General rule regarding a new State's obligations in respect of its predecessor's treaties

Subject to the provisions of the present articles, a new State is not bound by any treaty by reason only of the fact that the treaty was concluded by its predecessor and was in force in respect of its territory at the date of the succession. Nor is it under obligation to become a party to such treaty.[4]

12. The CHAIRMAN invited the Special Rapporteur to introduce article 6 of this draft (A/CN.4/224).

13. Sir Humphrey WALDOCK (Special Rapporteur) said that article 6 embodied a general rule which was implemented in further detail in the separate sets of subsequent articles dealing with multilateral and bilateral treaties respectively. The rule in question had been called by some the "clean slate" rule, but that description was misleading. Admittedly, a new State had no obligation to continue to apply, in respect of its territory, the treaties of the predecessor State, but there was an enormous volume of practice to show that the fact of the previous application of the treaty to the territory had certain consequences, in particular, it created a right for the new State to participate in a multilateral treaty.

14. In his commentary, he had given his reasons for stating the principle formulated in article 6, which was based on the modern practice with respect to new States. He would like to know whether the other members of the Commission accepted that general idea.

15. Mr. TSURUOKA said that, within the limits indicated by the Special Rapporteur, the rule in article 6 certainly had its place in the draft. It was widely recognized both in practice and in the literature.

16. Mr. USHAKOV said it was interesting to compare article 5 with article 6; both were based on the "clean slate" principle, but the former dealt only with treaties providing for the participation of new States, whereas the latter was more general and covered any treaty.

17. According to the Special Rapporteur, the term "new State" applied solely to newly-independent States, so that article 6 did not cover cases of fusion, partition, or the emergence of several States on the territory of a single State; in those special cases it was not possible to lay down that none of the treaties of the predecessor State were binding on the new State or States.

18. Furthermore, article 6 did not make it clear whether third States were no longer bound by earlier treaties. The question arose, in particular, in the case of restricted multilateral treaties: was it conceivable that a State ceased to be bound by a tripartite treaty because one of the other two States parties to the treaty had been partitioned?

19. The scope of article 6 was thus very narrow. Moreover, the examples cited by the Special Rapporteur in paragraphs (10) to (14) of his commentary related only to newly-independent States. Thus, despite its title, the rule in article 6 was not general at all. It was most important that the definition of a "new State" should cover every possible case of the birth of a State. He must therefore urge once again that the different cases of the birth of a State be dealt with separately in the draft, though general rules might be deduced subsequently.

20. The expression "by reason only of the fact", in the first sentence of article 6, might give the impression that the rule was not the same if there were other facts.

21. Sir Humphrey WALDOCK (Special Rapporteur) said he could assure Mr. Ushakov that he would in due course submit draft articles on the cases of dissolution, dismemberment or separation, fusion and federation. The fact of the matter was that the whole subject had

[3] For resumption of the discussion see 1181st meeting, para. 55.

[4] For commentary see *Yearbook of the International Law Commission, 1970*, vol. II, pp. 31 *et seq.*

not been very fully explored from the point of view of codification. It had therefore seemed to him that the best approach was to frame the general rules by reference to new States as defined in sub-paragraph (*e*) of article 1.

22. That concept, as Mr. Ushakov understood it, included former mandates and trust territories. "New States", as envisaged in sub-paragraph (*e*) of article 1, in fact covered nine-tenths of the cases of succession that had occurred in the past twenty years or so. It might well be that, with the completion of the process of decolonization, other types of succession would become more frequent. Nevertheless, the Commission would no doubt find it convenient to begin the draft with a set of general rules on new States, to which the bulk of the existing practice referred, and then deal with other cases of succession afterwards. At the conclusion of its work, the Commission could consider whether or not to alter that general arrangement.

23. Mr. YASSEEN said that article 6 sanctioned the theory of the "clean slate"—that a successor State was not considered a party to treaties concluded by the predecessor State and was not under any obligation to become a party to those treaties. In his opinion, the Commission should broadly endorse both elements of that rule.

24. Article 6 was based directly on State practice. It was true that some eminent writers had argued for a rather different rule for law-making treaties. Jenks, for instance, believed that new States succeeded, or should succeed, to law-making treaties concluded by their predecessors.[5] Such a position, however, could only be interpreted as a generous appeal by the writer to new States to respect the continuity of international work for the codification and progressive development of international law; there could be no question of any legal obligation. If those States had to respect certain rules of law-making treaties it was for a different reason; in particular, because they were rules of customary law. As drafted, article 6 faithfully reflected the general practice, and it would not even be possible to provide for an exception in the case of law-making treaties.

25. He would reserve his comments on localized or dispositive treaties until the relevant draft articles came up for consideration.

26. Mr. BARTOŠ said he did not think the positions of the Special Rapporteur and Mr. Ushakov were in conflict. Under article 6, a new State was, in normal cases, able to make use of the treaties concluded by the predecessor State. That rule was consistent with the "clean slate" doctrine, but did not preclude the possibility of special cases requiring special provisions, as was clear from the use of the expression "Subject to the provisions of the present articles" at the beginning of article 6. Thus the Special Rapporteur had in no way excluded the special cases mentioned by Mr. Ushakov.

27. The proposed rule had, however, the defect of not stating the position of third States. The draft articles were based, on the one hand, on the "clean slate" principle, and on the other hand, on the rule that there must be some reciprocity between the parties in the acceptance of obligations. A third State which had been bound to the predecessor State should not, by reason of that fact, also be bound to the new State. Thus, in the case of partition of a State, the position of a third State in relation to the new States would not necessarily be what it had been in relation to the predecessor State. A treaty had not only legal force, but also a practical value, for instance, in economic matters. If one of the territories which had become a new State did not offer sufficient economic value for the third State, the third State should be obliged to maintain gratuitous contractual relations with it. But the proposed article did not offer any solution for the third State; it stipulated that a new State was not under any obligation to become a party to the treaty, but is was silent on the question of any right to remain a party to the treaty.

28. As Mr. Yasseen had observed, third States might be obliged to accept certain general international obligations because they were part of international custom. Similarly, Jenks considered that the ILO conventions were a part of the international public order and were binding, not *ipso jure*, but because they entailed a duty of States to comply with humanitarian international obligations.[6]

29. He approved the general rule stated in article 6, on the understanding that the Special Rapporteur would deal separately with the cases mentioned by Mr. Ushakov.

30. Mr. ROSSIDES said that there was a similarity between the provisions of article 5 and those of article 6. Article 5 provided that, even where a treaty itself made provision for the participation of a new State, it was necessary for that State to express its consent to be bound by the treaty. Article 6 laid down the rule that, in a case of succession, no obligation existed for the new State without its consent. For his part, he fully agreed with the "clean slate" principle as expressed in article 6.

31. Like Mr. Yasseen, he could not accept the idea that, in the case of a multilateral treaty of a so-called legislative character, a new State should be regarded as being automatically bound because the predecessor State had been a party. He understood the anxiety to promote the development of international law, but it was not possible to depart from the basic principle that a new State had the right to decide whether or not to become a party to a treaty.

32. His own suggestion would be to adopt a very practical formula such as had been put forward by the International Law Association's Committee on the Succession of new States at its Buenos Aires Conference in 1968.[7] That formula would state the law in terms of a presumption of continuity: the treaty would be considered as being internationally in force for the new State unless a declaration to the contrary was made by that

[5] See commentary, para. (8).

[6] C. W. Jenks, *State Succession in respect of Law-making Treaties*, *The British Yearbook of International Law, 1952*, pp. 105-144.

[7] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, para. 15.

State "within a reasonable time after the attaining of independence".

33. A rule of that kind would give the new State a reasonable period in which to contract out of the treaty. If applied to multilateral treaties of a so-called legislative character, such as the 1899 and 1907 Hague Conventions, it would further the interests of the development of international law without detracting from the prerogatives of the new State. It would amount to a "clean slate" rule, but without creating a vacuum; and it would be consistent with modern trends towards internationalism and away from the concept of absolute sovereignty.

Mr. Ustor took the Chair.

34. Mr. USHAKOV said it could not be laid down as a principle that cases of decolonization and secession of part of the territory of an existing State were general cases of succession, whereas cases of separation and fusion were special cases. All cases should be treated on the same footing. Every case was a particular case which required particular rules; there could be no so-called "basic" rules applicable to general cases, since there were no general cases. Different groups or sets or rules should be drawn up to cover the different cases of succession.

35. Mr. REUTER said that he agreed with Mr. Ushakov. The term "new State" was ambiguous because it covered two different cases: new States formed by secession and new States formed by fusion. The rule stated in article 6 was certainly applicable to cases of secession, but it was open to question whether it also applied to cases of fusion. If the intention had been to cover cases other than cases of secession, the article should have spoken not of a treaty "in force in respect of its territory at the date of the succession", but of a treaty "in force, in whole or in part, in respect of its territory at the date of the succession". The rule would then have been truly general, even though wrong.

36. He could accept article 6 for cases of secession, but its structure was open to criticism, and he could not accept that what was in fact a special rule should be called a general rule. That was tantamount to saying that other principles would be formulated subsequently for cases of fusion, considered in some sort as an exception. But it was not on that head that a different rule for cases of fusion was justified. One good reason was that nowadays fusion could not be brought about by conquest, but only by treaty. That brought in the whole dialectic of the law of treaties, in particular, that treaties produced no effects for third parties. Consequently, if two States merged by treaty, it was not the fact of the creation of the new State that nullified a treaty which had previously united one of the States to a third State, it was the relative effect of the treaties that mattered. The Commission would have to bear that point in mind when it came to rearrange the draft articles.

37. Mr. AGO said be endorsed Mr. Reuter's view. It was quite clear that the rule stated in article 6 applied to cases of secession in general, not just to decolonization. It applied in all cases where a new State was formed by the secession of part of an existing State or of a dependent territory of an existing State. Whether what seceded was a former colony or a metropolitan province of the State itself made no difference.

38. On the other hand, in relation to the purpose of the article, fusion was a different case and should be considered separately, even if the Commission came to an identical conclusion. The formation of a new State by fusion was not a special case; in a few years time, it might be the most frequent one. In any event, it could not be ignored in the context of the draft articles.

39. He agreed with Mr. Yasseen that, in substance, the rule in article 6 held good for all rules, including those deriving from universal treaties, general treaties or codification treaties. He appreciated, however, that other members of the Commission were concerned to ensure the continuity of such treaties and he would be prepared to consider the possibility of adopting modifications, for example, in the form of certain presumptions, provided that the principle that a new State was born free of all contractual obligations was strictly observed.

40. In the case to which it related, the rule stated in article 6 was beyond dispute and he could support it.

41. Mr. SETTE CÂMARA said he accepted the rule stated in article 6, which followed logically from the Special Rapporteur's approach to the problem. Once it had been agreed to take the general law of treaties as a basis, it was clear that treaty obligations could be binding only on a State which had expressed its will to be so bound.

42. He also, however, gladly accepted the Special Rapporteur's reservations concerning the meaning of the "clean slate" principle. The term should be considered constructively and not construed as an encouragement to new States to reject the observance of all international conventions. Mr. Yasseen had suggested that the international community could do no more than appeal to new States to consider themselves bound by what Jenks had described as "legislative" instruments. Surely Mr. Ago and Mr. Rossides were right to recommend that the articles should contain a warning to new States not to discard treaties which were in the general interest of the international community.

43. With regard to the arrangement of the draft, he agreed with Mr. Ushakov and Mr. Reuter that different cases would have to be treated in different ways. He was sure the Special Rapporteur would not fail to do so when he came to re-arrange the articles.

44. Mr. HAMBRO said he supported the view of those speakers who had advocated that the draft articles should contain some sort of warning to new States not to deny all obligations deriving from treaties concluded by predecessor States. The Special Rapporteur had rightly stressed the danger of attaching too much importance to the "clean slate". A way must be found of encouraging new States to continue the observance of certain treaties. There was a danger that the Commission might overemphasize the freedom of new States in regard to treaty obligations.

45. Mr. BEDJAOUI said that he unreservedly accepted the rule formulated by the Special Rapporteur in article 6, which he regarded as a basic article of the draft.

46. No type of succession took precedence over any other type. The Commission should derive, from a number of existing cases, a composite formula which would enable it to draft a general rule. Article 6 was fundamental, because in international law there was no obligation for any State, old or new, to consider itself bound without its express consent.

47. Mr. Rossides had expressed the view that there should be some sort of presumption that a new State was bound until it denounced the obligation binding it. He did not share that view. To begin with, there was no case in which such a rule had been followed. Further, the expression of the will of a new State in rejecting an obligation after a number of years could only be assimilated to the denunciation of a treaty by which it had been presumed to be bound, so that was no solution.

48. The formula once adopted by the International Law Association, that a State was presumed to be bound unless it declared the contrary within a reasonable time, would have been preferable. But that formula had not attracted the unanimous support of the members of the Association. It would therefore be better to keep to the rule proposed by the Special Rapporteur, which restated a principle that was one of the cornerstones of international law—that no State could be bound without its express consent.

49. He fully endorsed the Special Rapporteur's analysis of custom. It was one thing to feel governed by a customary rule, but quite another thing to consider oneself bound by a treaty, even if the treaty expressed a customary rule.

50. On the question of determining the utility of a treaty from the dual standpoint of international co-operation and the interests of the new State, practice varied, whether the depositary was the Secretary-General of the United Nations, the International Labour Office or a government; but all depositaries were always anxious to remove any possible uncertainty as to whether a new State was or was not bound by a treaty. The express consent of the new State was always required; there was no automatic continuity. Thus, as the depositary of the 1949 Geneva Conventions, the Swiss Federal Council had seen fit to sound the Algerian Government, after independence, as to its intentions with regard to those Conventions, although they had been ratified in their time by France and by the Provisional Government of the Algerian Republic.

51. The question was whether the expression of the new State's will was entirely optional or whether the new State was obliged sooner or later to declare its intentions. In his view, the idea could safely be accepted that the new State was bound by the expression of its will, in particular with regard to legislative or law-making treaties, on which new States had been very quick to take a decision. There was no need for a rider referring to the right of a new State to be bound by a treaty. Article 6 should be read in conjunction with article 7, which referred to that right.

52. Article 6 might be considered as applicable in the majority of cases. When the Commission came to consider cases of fusion, it might perhaps find that they were governed by a rule analogous to that which the Special Rapporteur had adopted in article 6. Without establishing a hierarchy of types of succession, that rule could be taken as the starting point, in other words, as the basic rule. The Special Rapporteur had, moreover, made a reservation to cover other cases right at the start of article 6. The Commission might invite him to propose one or more further articles applicable to certain types of treaty that were really special cases, such as localized treaties.

53. Mr. QUENTIN-BAXTER said that article 6 had the great advantage of establishing a connexion between the old law and United Nations doctrine, and he accepted the provision on the terms on which it was offered, in other words, without prejudice to the way in which the Commission might later decide to treat cases of fusion or territorial obligations, or to the distinction which it might later draw between universal and limited treaties.

54. He was, however, concerned about the problem of language: the rule should be stated in such a way as not to diminish the dynamism of United Nations practice, or the impetus to continuity which was so evident in that practice. He was encouraged by the tenor of the discussion on that point.

55. As a matter of law, he had some difficulty with the concept of a new agreement as the means of continuing an old one. That difficulty was, however, less formidable when article 4 and article 6 were considered together. Article 4 agreed with State practice in the matter of the temporary continuance of treaties; it stressed the factor of continuity and therefore reduced whatever anxieties he might still have concerning article 6.

56. Mr. ROSSIDES, replying to Mr. Bebjaoui, said that when he had advocated a provision which would presume continuance of a treaty unless a successor State declared within a reasonable time that it did not wish to be bound by that treaty, he had been under the impression that he was quoting a recommendation made by the International Law Association at the Buenos Aires Conference in 1968. The declaration would have to be made "within a reasonable time" so that no State could be bound indefinitely. Such as provision would be a great encouragement to new States. It should be remembered that many new countries had not signified their intentions with regard to the Hague Conventions, and one country had declared that it did not consider itself bound by them.

57. Mr. BARTOŠ said that, although he was a former President of the International Law Association and a life Vice-President, he did not consider himself bound by the resolution of the Association's General Conference, to which Mr. Bedjaoui had referred, because he did not approve of it. He supported the view stated by the Special Rapporteur that a new State was born free of all treaty obligations, unless it accepted such obligations.

58. It was unfortunate that, in the name of the continuity of treaties, it should have to be asked whether it was more important to safeguard the security of a third State or the freedom of a new State. He would choose the latter, particularly in the case of economic treaties. Contemporary international law laid down the principle

that no treaty obligation existed without the express consent of the State concerned, which would not be freed from the vestiges of colonialism if it had to consider itself bound, even provisionally, by a treaty it had had no part in concluding.

59. Mr. AGO said he had changed his previous position on the subject of measures to ensure the continuity of treaties of a general character. On second thoughts, he found it impossible to adopt a rule such as that envisaged by the International Law Association. In reality accession to a treaty, even a general treaty, was regulated in the constitutional law of all countries by strict provisions which left no room for presumed or tacit accession. Accession to a general international treaty required a formal act.

60. Mr. BEDJAOUI said that, when applied to the case under consideration, the solution contemplated by the International Law Association gave a different meaning to the silence of new States. In a first phase, that silence constituted a sort of "pause of reflection", but without any presumption of the immediate application of the treaty. It was after a reasonable period of time that the silence of the State, if it continued, was interpreted as meaning that the new State accepted the treaty in question.

61. Mr. ROSSIDES said he fully agreed with Mr. Bartoš and Mr. Bedjaoui as to what decolonization ought to mean with respect to freedom from treaty obligations. It was not his idea that new States should take over irksome financial or economic obligations, but they could surely be expected to continue observance of humanitarian instruments, such as the Hague and Geneva Conventions. A new State was, of course, quite free to repudiate all treaties of the predecessor State the day after independence; but in a spirit of internationalism, continuity of agreements of that kind should be encouraged.

The meeting rose at 6 p.m.

1164th MEETING

Wednesday, 24 May 1972, at 10.5 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Castañeda, Mr. El-Erian, Mr. Hambro, Mr. Nagendra Singh, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Rossides, Mr. Ruda, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

Succession of States in respect of treaties

(A/CN.4/202; A/CN.4/214 and Add.1 and 2; A/CN.4/224 and Add.1; A/CN.4/249; A/CN.4/256)

Item 1 (*a*) of the agenda]

(continued)

ARTICLE 6 (General rule regarding a new State's obligations in respect of its predecessor's treaties) *(continued)* [1]

1. The CHAIRMAN invited the Commission to continue consideration of article 6 of the Special Rapporteur's draft (A/CN.4/224).

2. Mr. EL-ERIAN said he would like to comment on three points: first, the nature of the rule contained in article 6; secondly, the position of the rule in the draft as a whole; and, thirdly, the presumption of the new State's tacit consent to assume obligations under its predecessor's treaties.

3. The general rule laid down in the article had been lucidly explained in the Special Rapporteur's very scholarly commentary [2] and it was safe to say that not only was it in conformity with customary international law, but it also reflected the views of the majority of writers and of the Commission itself.

4. With regard to the position of the rule in the draft, Mr. Ushakov had drawn attention to a number of cases which the Commission should bear in mind when considering article 6, but the Special Rapporteur had assured the Commission that those cases would be dealt with in due course. Being a general rule, therefore, article 6 could remain in its present position, particularly as it contained the safeguard clause "Subject to the provisions of the present articles". It might be useful, however, if the commentary contained some reference to the statements of Mr. Ushakov and Mr. Reuter, and to the view of McNair quoted by the Special Rapporteur in paragraph (2) of his commentary.

5. Mr. Rossides and Mr. Yasseen had raised the question whether a new State could be presumed to have accepted its predecessor's obligations if it failed to express any objection. He himself, while favouring the principle of continuity for multilateral treaties, especially those of a law-making character, considered it equally important to bear in mind the principle that a State could not be bound without its explicit consent. In the present case, the Commission was dealing not only with law-making or normative treaties, but also with other treaties concerning administrative arrangements which a new State might wish to replace. He therefore supported article 6 as it stood.

6. Mr. RUDA said that according to the definition of a "new State" in article 1, sub-paragraph (*e*), such a State constituted a new legal person in international law and should be treated as a third State in relation to its predecessor's treaties. The general rule *pacta tertiis nec nocent nec prosunt* would therefore apply and it followed that no obligations could be imposed on a third State, whether old or new, without its consent.

7. Article 35 of the 1969 Vienna Convention on the Law of Treaties [3] had gone even further by providing that no obligation could arise for a third State unless it "expressly accepts that obligation in writing". At that time, the international community had clearly been in agreement about the need to proceed with the utmost

[1] For text see previous meeting, para. 11.

[2] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 31 *et seq.*

[3] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 294.