Document:-

A/CN.4/SR.1195

Summary record of the 1195th meeting

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1972, vol. I

so, he would prefer the approach adopted in article 4 in the Special Rapporteur's first report. If that approach was rejected, he would prefer alternative B to alternative A, and would be prepared to accept alternative A only as a very last resort. Perhaps all three alternative formulations could be submitted to Governments for their comments.

83. He wished, in conclusion, to emphasize that the various kinds of treaty in question were so different from each other that, in his view, it would be impossible to cover them by a single rule, except for a very general reservation such as that contained in article 4 in the Special Rapporteur's first report.

84. Mr. USHAKOV said that it appeared from the Commission's discussions that the "clean slate" principle must apply to newly independent States and to States resulting from a separation, unless they expressed their consent to be bound by the treaty. In cases of unification or dissolution, on the other hand, it was the principle of *ipso jure* continuity that applied, subject to exceptions. Noting that article 22 *(bis)* would apply specifically to newly independent States and States resulting from a separation, he asked the Special Rapporteur what the effect of the article would be in the event of fusion or dissolution.

85. Mr. RAMANGASOAVINA said he had no difficulty in accepting the principle stated in article 22 *(bis)* and that he preferred alternative A. The principle on which the provision was based was the same as that of article 22: the occurrence of a succession of States did not *ipso jure* entail the disturbance of a previously existing situation resulting from a treaty. It was for the new State, and any State enjoying advantages or servitudes, to negotiate a new arrangement if they saw fit. It might happen, for example, that on the occurrence of a succession the new State could not accept certain servitudes with which the predecessor State had encumbered its territory.

86. The term "territory", as defined in paragraph 3, included the contiguous zone. In his view, the contiguous zone was part of the high seas, and the coastal State only had jurisdiction over it in such matters as Customs and health control. It was thus hardly conceivable that one State could grant another advantages or servitudes in the contiguous zone or in its airspace. That was only possible with respect to the continental shelf, where coastal States might enjoy an exclusive right to exploit natural resources.

87. Mr. THIAM said that he accepted the principle of article 22 *(bis)* and favoured alternative A. However, he would like a reservation to the rule of *ipso jure* continuity to be introduced in favour of newly independent States; for sometimes a colonial Power had concluded treaties more with an eye to its own interests than to those of the dependent territory.

88. Mr. ELIAS said he had a certain sympathy with the point made by Mr. Thiam. His own country, Nigeria, for example, had taken the unusual step of breaking off diplomatic relations with France in 1961, when France had insisted on carrying out atomic tests in the Sahara. Nigeria, together with other African countries, had protested, first through the United Kingdom before independence, and then directly to France after the attainment of independence. After relations had been broken off, Nigeria had forbidden French aircraft to land on Nigerian territory and French vessels to dock in Nigerian ports. France had then invoked a provision of a treaty concluded between France and Great Britain in 1923, by which Great Britain had given France the right in perpetuity to land aircraft on Nigerian territory and to use Nigerian ports. Nigeria had objected to the application of that treaty on the grounds of fundamental change of circumstances, non-representation in the treaty and non-consent, and had refused to be bound by it.That decision had been respected by France, although not necessarily for the legal reasons invoked. That kind of problem should be taken into account in the formation of article 22 *(bis)*.

89. While he favoured the approach in alternative A, he was not altogether happy with the wording. Paragraph 1 should be made less ponderous and more concise, and the scope of the definition in paragraph 3 should be narrowed by excluding the reference to the contiguous zone and the seabed, since both those terms were still extremely controversial.

90. Mr. USTOR asked whether the Special Rapporteur had thought of making a distinction, in the case of a localized or dispositive treaty affecting a newly independent State, between the situation where the treaty was localized on the territory of the newly independent State, thus constituting a burden on that State, and the situation where the treaty was localized elsewhere and gave rights to the newly independent State; and, in the latter case, whether a further distinction should be made, depending on whether or not the territory where the treaty was localized was itself a newly independent State.

The meeting rose at 1 p.m.

1195th MEETING

Tuesday, 4 July 1972, at 3.15 p.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Thiam, 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 and Add.1 to 4; A/CN.4/L.183 and Add.1 to 5; A/CN.4/L.184 and L.185)

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

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 22 *(bis)* (Succession in respect of certain treaties of a territorial character) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 22 *(bis)* (A/CN.4/256/Add.4).

2. Sir Humphrey WALDOCK (Special Rapporteur) said that Mr. Ushakov had asked whether the rule in article 22 *(bis)* would have any application in the case of a uniting of States or in that of the dissolution of a State.[1] The articles dealing with such cases contained provisions establishing exceptions to the rule of *ipso jure* continuity where continuance of the treaty would be incompatible with its object and purpose and where the effect of the uniting of the States or the dissolution of the State was radically to change the conditions for the operation of the treaty. In regard to a localized treaty it might be argued that the conditions were so different that the continuity rule ought not to be applied. Thus there was a general context for the rule in article 22 *(bis)*, even though its operation in the case of a uniting of States or the dissolution of a State might not be so wide as it would be in the other cases. It would therefore be necessary to have at least some kind of general reservation to cover such cases.

3. Several members of the Commission had raised the question whether former dependent territories should be bound by treaties of a territorial character concluded by the former administering Power. He had examined that question in the commentary [2] in his discussion of the so-called Belbase Agreements of 1921 and 1951. The case where an agreement in perpetuity had been made by a State which itself had a limited tenure of the territory was something that had to be taken into account, although it was difficult to fit into the rule under consideration. Since newly independent States were not necessarily former dependent territories, it was by no means obvious that any special exception should be made for such States.

4. Several members had also questioned the inclusion in paragraph 3 of the references to the contiguous zone and the seabed. Admittedly, it was not very likely in practice that dispositive arrangements would be made in respect of either the contiguous zone or the seabed, but it was clear that the notion of territory could not be restricted to land. It all depended on whether or not, from a theoretical standpoint, it was desired to make the definition as complete as possible.

5. Mr. EL-ERIAN said there was every indication of recognition by customary law that certain treaties of a territorial character constituted exceptions to the "clean slate" principle and that the régimes attached to territory by such treaties continued to be binding. It would therefore be useful to include that rule in the draft articles. The régimes he had in mind were not arrangements made by a colonial Power at the expense of the administered territory, nor were they arrangements of a political character involving restrictions on its sovereignty or inherent rights; they were, rather, arrangements of a practical character relating to geographical situations. The scope of the rule should therefore be limited by the kind of criterion clearly stated in the note from the French Government quoted by the Special Rapporteur in paragraph (32) of his commentary.

6. He had no very strong views as to whether the Commission should relate the rule to the treaty itself or to the effects of the treaty, or whether it should adopt the "saving clause" approach. However, in accordance with the position he had taken on article 22,[3] he had a slight preference for alternative B. He had originally thought that there was no need to define "territory", but in the light of what the Special Rapporteur had just said he thought that some definition would be useful; he suggested the formula "land, water and air space".

7. In paragraph (37) of his commentary, the Special Rapporteur had referred to the Nile Waters Agreement of 1929.[4] The measures codified in that Agreement had already been in effect at the time of conclusion of the treaty; thus the treaty had merely confirmed existing practice. It had also, to some extent, been a codification of general international law, since it was generally accepted that no State had the right to take measures affecting an international river that would be prejudicial to the interests of the other riparian States. Friendly consultations had subsequently been held among the States of the Nile river basin, and in 1958 a further agreement had been concluded between Egypt and the Sudan.

8. In paragraph (44) of his commentary, the Special Rapporteur, referring to the Suez Canal Convention of 1888,[5] had described Egypt as successor to the Ottoman Empire in the sovereignty of the territory. In fact, the Ottoman Empire had concluded the Convention on behalf of the Egyptian Government, so that Egypt could not be regarded as a successor. Egypt had been a vassal State at the time, but it had had international personality and treaty-making capacity, as was recognized in the London Treaty of 1841 and in a number of other international agreements concluded by Egypt in the nineteenth century.

9. Mr. TSURUOKA proposed that articles 22 and 22 *(bis)* should be replaced by a provision on the lines of article 4 in the Special Rapporteur's first report.[6] Such a provision would cover all the cases envisaged in the two articles. There was, undoubtedly, a category of treaties which automatically bound the successor State, but the treaties falling within that category must be very precisely defined and the criteria proposed by the Special Rapporteur, although very learned, were not satisfactory. The application of the rules laid down in articles 22 and 22 *(bis)* might thus prove more confusing than enlightening. State practice showed no consistency and seemed to indicate that political considerations prevailed over purely legal considerations. The settlement of succession to boundary treaties and treaties of a territorial character had hitherto been left to the will of the parties and might be a matter which it would be wise to leave to their judgment and to the free play of customary law, rather than try to impose strict rules. The problems raised and views expressed in the Commission would form an excellent commentary for the future guidance of States.

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[1] See previous meeting, para. 84.

[2] See paras. (33) and (34).

[3] See 1193rd meeting, para. 42.

[4] League of Nations, *Treaty Series*, vol. XCIII, p. 44.

[5] See *British and Foreign State Papers*, vol. LXXIX, p. 18.

[6] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 92.

10. Mr. USHAKOV said that article 22 *(bis)* raised many problems. The first was whether an article on localized treaties or treaties of a territorial character was really necessary. The general hypothesis adopted by the Commission was that the "clean slate" principle was applicable to newly independent States and in cases of separation, where the State emerging from the separation was in the position of a newly independent State as defined by the Drafting Committee in article 1, paragraph 1 (*f*) (A/CN.4/L.183/Add.5), and that the principle of *ipso jure* continuity was, with a few exceptions, applicable in cases of fusion and division. He doubted that there was any justification for excepting localized treaties or treaties of a territorial character from the "clean slate" principle, and thus forcing newly independent States to maintain a situation whose lawfulness was not proved and which had been created by treaties concluded by the former metropolitan State. He did not see why such an exception should be made in the case of newly independent States or States emerging from a separation, whereas in cases of fusion or division, the principle of *ipso jure* continuity was maintained, possibly with exceptions, even for those treaties. The Commission should consider whether it would not be better to allow the articles governing newly independent States and States emerging from a separation to stand, without adding any special provisions concerning localized treaties.

11. If the Commission nevertheless decided to draft such special provisions, it would have to settle a number of questions. It should first of all define the expressions "treaties of a territorial character", "dispositive treaties" and "localized treaties". He did not think it was sufficient to say, as the Special Rapporteur had done in paragraph 1 of alternative A, that such treaties created "obligations and rights relating to the user or enjoyment of territory of a party"—not to mention that the words "user" and "enjoyment" also needed defining. But it seemed practically impossible to define the treaties in question; there were too many factors to be taken into consideration at the same time and, in the words of the Commonwealth Relations Office, "international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be".[7]

12. The French Government had expressed the view that conventions which were completely non-political in character constituted an important exception to the "moving treaty-frontiers" rule.[8] In other words, whether or not that rule applied depended on whether or not the localized treaty was political in character. Political obligations could not be imposed on a successor State merely because they derived from a treaty which had been applicable to part of the predecessor State's territory. Thus a successor State was not required to fulfil obligations deriving from localized treaties authorizing the presence in its territory of the foreign armed forces and military bases of a military and political alliance to which the predecessor State had belonged. That showed how difficult it would be to give a precise and comprehensive definition of localized treaties.

13. Another question arose concerning the nature of localized treaties. Hitherto the Commission had distinguished between general multilateral treaties, restricted multilateral treaties and bilateral treaties, but no such distinction was made in the provisions proposed for treaties of a territorial character. He wondered whether the Special Rapporteur regarded the definition of those treaties he had given in paragraph 1 of alternative A as applicable to all three types of treaty, and whether localized treaties were always bilateral or could be multilateral. Even the condition laid down in paragraph 1 (*b*) of alternative A, that the parties intended the rights "to be accorded to a group of States or to States generally", did not indicate whether the treaty in question was multilateral or bilateral.

14. A further question was whether obligations such as the obligation of the riparian States on an international river, for example the Danube or the Rhine, to grant the right of free navigation to other riparian States, came under the rules on State succession or under general international law, treaty law or customary law. Such cases were not a mere question of succession to a localized treaty; the situations, which were genuinely international in character, were governed by the principles of general international law.

15. It was clear that neither of the alternative texts proposed by the Special Rapporteur for article 22 *(bis)*, nor the proposals made by other members of the Commission, settled the many questions raised by succession to treaties of a territorial character. It would therefore be more prudent merely to say that the rules formulated for newly independent States and States emerging from a separation, as well as those formulated for cases of fusion and division, were also applicable to localized treaties.

16. There was an inconsistency in the Special Rapporteur's alternative A. In paragraph 1, the words "The continuance in force of a treaty is not affected by reason only of the occurrence of a succession" implied that it could be affected by something else, but paragraph 2 did not provide for that possibility.

17. Mr. AGO said he thought the draft articles should include a clause on treaties of a territorial character, particularly if it was decided to retain a provision on boundary settlements. The drawing of a boundary between two countries was often accompanied by a whole series of provisions, in the treaty setting the boundary or in other treaties, which created special situations for certain territories. Once again, it was a matter of partial real rights, analogous, at the international level, to the right of way through an estate or a servitude, at the local level. The fundamental international real right was sovereignty. In cases of succession, it was the "clean slate" principle which generally applied to newly independent States, but it would be a mistake to infer that that principle admitted of no exceptions. To preclude that error, it was essential to specify the exceptions.

18. Alternative A was unacceptable for the following reasons. First, the opening phrase, "The continuance in

[7] See commentary, para. (31).

[8] *Ibid.*, para. (32).

force of a treaty", was inappropriate. The question was not whether a treaty continued in force, but whether there was State succession to a treaty. For example, if a boundary between Cameroon and Nigeria had been established by an agreement between France and the United Kingdom, the question arising when Cameroon and Nigeria had acceded to independence would not have been whether the agreement remained in force, but whether a new agreement with the same content came into effect between Nigeria and Cameroon. In reality the succession was not to treaties, but to the real situations created by their execution. Consequently, alternative B was preferable, subject to some revision in matters of detail. But it would be better to adopt for article 22 *(bis)* whatever criteria were adopted for article 22, so as to have two logically symmetrical articles.

19. The essential need, however, was to formulate a saving clause, which should be so drafted as to be applicable to all cases of succession, not only to those involving the creation of a new State. He would illustrate that point by giving two examples, one of cession and the other of fusion.

20. The free zones of Upper Savoy and the District of Gex had been established, in the interests of the Republic of Geneva, by a treaty concluded between that Republic and the Kingdom of Sardinia.[9] When Sardinia had ceded those territories to France, the latter had not become a party to the treaty, but had inherited the régime established by it. In that case, territories of an existing State had been ceded to another existing State.

21. As an example of fusion, under the Lateran Treaties, certain buildings of the Vatican situated in the city of Rome had been placed under an exterritorial régime; if the United States of Europe, embracing Italy, were established one day, they would inherit that régime.

22. Mr. YASSEEN said that localized treaties met a need based either on major principles of international law, such as freedom of navigation on a river, or on human considerations, such as free access to border territories for grazing purposes, on the basis of which the States concerned laid down the details of a particular régime. Hence the concern of the international community to safeguard the existence of such undeniably useful régimes, which were often essential for good neighbourly relations between two or more States, or were in the interests of all or part of the international community. Hence also the need to formulate a general rule designed to safeguard situations which had been hard to establish. If a localized régime had been imposed by force or was incompatible with rules of *jus cogens*, its validity could be challenged, but generally speaking the mere occurrence of a succession of States should not unsettle a régime based on considerations of logic, utility and humanity. The interests of newly independent States were safeguarded by the words "by reason only of" used in both alternative texts.

23. The example given by Mr. Ago of two States succeeding two other States was an extreme case. Where only one State succeeded to another State, part of whose territory was the subject of a localized treaty, it was certainly a question of succession: was the new State bound to abide by the arrangement made by an agreement between the predecessor State and another State? The Commission should state the principles to be applied in such a case, the key expression being "by reason only of the occurrence of a succession", since the arrangements in question could be challenged by virtue of other basic principles of international law.

24. In his view article 22 *(bis)* was essential. Alternative A, which indicated more clearly the fate of a treaty establishing a localized régime, seemed preferable, but he agreed with Mr. Ago that for reasons of symmetry article 22 *(bis)* should follow whatever model was adopted for article 22.

25. Mr. ELIAS said that Cameroon had had a common boundary with Nigeria when the former was a German colony, and in 1913 a boundary treaty had been concluded between Germany, on the one hand, and the United Kingdom on behalf of Nigeria, on the other.[10] After the establishment of the mandate in 1922 and the division of the former German protectorate of Kamerun into two parts, a new boundary agreement had been concluded between France and the United Kingdom, the two mandatories.[11] During the last twelve months consultations had been held between Nigeria and Cameroon, and both countries had signed a declaration maintaining the boundaries fixed in those two boundary treaties. The only part of the boundary not yet properly drawn was in the maritime area, and a joint commission had been set up to complete the task. The whole boundary issue had thus been settled on the basis of State succession.

26. Mr. QUENTIN-BAXTER pointed out that, if the Commission adopted the text proposed by the Drafting Committee for articles 19 to 21 (A/CN.4/L.183/Add.5), the principle of *ipso jure* continuity would be established for States which merged or united and for States which divided or separated. Thus the question of continuity of the dispositive element of treaties primarily concerned new States or States which seceded In his view, however, the distinction between *ipso jure* continuity and the "clean slate" principle did not in itself provide any solution to the problem of dispositive treaties. Apart from the question of boundaries, there were plenty of instances of objective régimes whose maintenance was of vital importance to the international community and which, under one head or another, must be regarded as continuing to bind even new States, or seceding States to which the same rules applied. States should not be induced to believe that, on the grounds of succession, they could escape the burden of real obligations that would otherwise be binding on them.

27. Nor did he think it was sufficient to base the proposed rule on the predecessor State's intention. It was not enough to say that, in a treaty concluded by the predecessor State, it appeared that there was an intention to entrench the conditions and make them run with the

[9] *Ibid.*, para. (14).

[10] See *British and Foreign State Papers*, vol. XVI, p. 782.

[11] Op. cit., vol. XCVI, p. 817 *et seq.*, and vol. CXXXIV, p. 238 *et seq.*

land, since that would give the predecessor State's intentions lasting control. The most satisfactory criteria seemed to be those reflected in previous judicial or arbitral decisions. In such decisions there was a sense that the situation either formed part of a general settlement which was in the interests of the international community, or that it was of such a fundamental nature as to give rise to a local custom which ran with the land. All those cases had at least a geographical element, but the geographical element in itself was not a criterion that helped to narrow the field.

28. It could be argued that those were very uncertain criteria, but in other parts of the draft the Commission had not hesitated to use criteria requiring a margin of appreciation. In practice there were many situations in which the parties neither conceded that there was an objective régime, nor denied that there was an objective element which needed somehow to be satisfied. General criteria of that kind left more room for manoeuvre, particularly in cases where treaties needed renegotiating because they were unequal and a new balance between rights and obligations was required.

29. He had no very strong views as to which approach the Commission should adopt in formulating the rule. There was clearly general agreement that in some situations real obligations had to be protected, and the rule could either relate to the treaty itself or to the obligations independently of the treaty. In the simplest and most general case—that of boundaries—he favoured the simplest possible rule, on the lines of article 4 in the Special Rapporteur's first report, which left no doubt that boundaries survived. Such a rule was possible, however, only if provision was made for such other real elements as a settlement might contain; and so simple a rule on boundaries implied the further rule laid down in article 22 *(bis)*.

30. The Special Rapporteur had argued convincingly that States would find it artificial to divorce the obligation from the treaty in which it was enunciated. There were, moreover, certain precedents. Article 62 of the Vienna Convention did suggest that the treaty itself, and not merely the régime it established, had to be protected from the "fundamental change of circumstances" rule. The implication was surely that not to defend the treaty might be to undermine the régime. Moreover, since in many situations of succession the rule of *ipso jure* continuity was applied, so that a governing instrument would continue in force, there was a certain logic in applying the same kind of régime to other cases.

31. Lastly, if the problem was not dealt with in the draft articles it would have to be dealt with elsewhere, and its omission might be misunderstood by governments. In the case of article 22 *(bis)*, therefore, there seemed to be more reasons for favouring a solution framed in terms of treaty continuance than there were in the case of article 22.

32. Mr. BARTOŠ, referring to Mr. Ushakov's remarks, said that it was very important to distinguish between the general principles of international law and the treaty rules governing certain territories. The distinction was very difficult to draw, because the treaties were partly based on the general principles; it was therefore important to determine how far they departed from them. Rules deriving from general international law should not be affected by the occurrence of a succession of States. That applied, for example, to the general principles governing the right of free passage through certain straits.

33. There was, however, a link between general principles and treaty rules. If those rules were not contrary to general principles, they could be the object of a succession. In that case they did not derive from general international law, but supplemented it. They could nevertheless be of great importance. For instance, navigation on international rivers was governed by principles of general international law which had to be respected, but they were supplemented by important rules laying down navigation procedure which were embodied in treaties concluded by the riparian States.

34. It was essential that that distinction should be reflected in article 22 *(bis)*, and for that reason he favoured alternative A. He accordingly shared the views of Mr. Ushakov and Mr. Ago as well as those of Mr. Yasseen, who had even maintained that a territorial régime based on general principles of international law could not be modified by treaties concluded between certain interested States if that régime was of world-wide importance: for instance, the régime applicable to the Suez Canal could not be modified by the riparian States alone.

35. He hoped that not only treaties as such, but also the general principles on which they were based, would be taken into consideration in article 22 *(bis)*.

36. Mr. USTOR said he agreed with Mr. Ushakov that, since the draft articles applied the rule of *ipso jure* continuity in the case of the uniting of States and in that of the dissolution of a State, the problem of localized treaties did not really arise in those cases. That problem related mainly to newly independent States and cases of separation. It had been argued that, if no rule on localized treaties was laid down in the draft articles, the rules already adopted would provide a solution to the problem, because under those rules it was, essentially, for the newly independent State to decide whether or not it wished to continue its predecessor's treaties.

37. There were, however, two types of situations based on localized treaties. In the first, the successor State carried the burden; in the second the successor State was the beneficiary and would enjoy certain rights under its predecessor's treaty in the territory of another State. Those situations could be based on multilateral treaties, restricted multilateral treaties or bilateral treaties. Under the rules laid down in the draft articles, the successor State could itself decide to continue, by notification of succession, multilateral treaties concluded by its predecessor. The situations in question, however, derived mainly from restricted multilateral treaties and bilateral treaties, and in those cases the agreement of the other party or parties was necessary for continuance of the treaty. Consequently the other party had an opportunity of divesting itself of certain burdens or obligations which would give rights to the successor State.

38. Thus the mere application of the rules already adopted would not satisfy the requirements of a newly

independent State in cases where the situation gave it certain rights and the burden was carried by the other State party to the treaty. Some kind of express provision was needed. His preference would be for the kind of general saving clause proposed by Mr. Ago, on the lines of the Special Rapporteur's original article 4. He was well aware that, because of its general nature, such a provision would not afford a fully satisfactory solution to the problem. However, it was impossible for the Commission to prepare an elaborate provision at the present stage, and the solution should be regarded as a provisional one to be submitted to governments for their consideration. A more elaborate rule on special situations based on localized or territorial treaties could be formulated at a later stage of the Commission's work.

39. Mr. BILGE said he found it as difficult to take a final position on article 22 *(bis)* as on article 22. No consensus seemed to emerge either from the literature or from judicial decisions. It was obvious, however, that the question dealt with in article 22 *(bis)* could not be ignored.

40. The present discussion was really concerned with the formulation of a reservation rather than a rule, and article 22 *(bis)* could be regarded as a much more detailed reservation than that contained in article 4 in the Special Rapporteur's first report. For that reason he preferred alternative A, which laid more stress on treaties than did the former article 4. The situations created by treaties were not immutable and could be changed by other treaties. The régime of the Turkish straits, for example, had first been established by the Lausanne Convention,[12] then by the Montreux Convention.[13] It was preferable to stress the treaties rather than the situations, since the draft articles dealt with succession of States in respect of treaties.

41. In his commentary, the Special Rapporteur had given some examples of demilitarized territories. Neither of the alternatives proposed appeared to cover cases of demilitarization, since they did not come under either "user" or "enjoyment" of territory; they implied, rather, a limitation of State sovereignty. The Drafting Committee should therefore decide whether or not it wished to include cases of demilitarization in article 22 *(bis)*.

42. The CHAIRMAN, speaking as a member of the Commission, said that in considering specific examples of the kind of treaties that would be covered by paragraph 1, he had come to the conclusion that it would be highly undesirable for the "clean slate" principle to apply to the situations arising from such treaties, since a new State was just as likely to be injured as to be helped by the application of that principle. There was, for example, an agreement between the United States and Mexico under which the United States guaranteed Mexico 1.5 million acre-feet of water each year, for the purpose of irrigating a specific area. If that area ever separated from the rest of Mexico, it was hardly desirable that the United States should be permitted to cancel its obligation, because the entire economy of the area was dependent on the agreement, and without the water it would revert to desert.

43. It was admittedly difficult to formulate a precise definition of territorial régimes, but there were sufficient examples of such arrangements, and the definition given by the Special Rapporteur in article 22 *(bis)*, paragraph 1, was fairly successful. Sub-paragraph (*a*) needed some clarification in order to convey explicitly the connexion between the effects of succession on the one party and its effects on the other party.

44. On the whole he thought it better to opt for a reservation, as suggested by Mr. Ago and others, than to leave situations of the type under consideration to be dealt with by the other rules in the draft articles, which were designed to take care of a different set of problems. Since many of the régimes in question were closely bound up with the continuing operation of the treaties establishing them, the rule needed to be tied more closely to treaties than in the case of boundary situations. He agreed that, at the present stage, the most that could be done was to draft a fairly clear statement of a rule that would show governments what the problems were. The rule could then be amplified and clarified in the light of their comments.

45. Sir Humphrey WALDOCK (Special Rapporteur) said that, during the discussion on article 22 *(bis)*, he had been struck by the contrast between the views expressed and the rather confident statements made in the Commission two or three years earlier to the effect that localized treaties should be an exception to the "moving treaty-frontiers" rule as well as to the "clean slate" principle.

46. He had deliberately made articles 22 and 22 *(bis)* more positive than the article 4, dealing with boundaries, proposed in his first report, because he thought it essential that the Commission should come to grips with that difficult problem. There was clearly a general feeling that a very important range of treaties, or treaty situations, should be regarded as a special case. In the discussion on article 22 *(bis)* a majority of the members of the Commission had been in favour of relating the rule to the treaty rather than to the situations, whereas the converse had been true in the case of article 22. He had thought that the Commission should be consistent in its approach to the two cases.

47. He agreed with the last speaker that the Commission could not arrive at a full definition of the problem at the present session. Formulating even a general reservation would not, however, be an easy task, since it would be essential at least to outline what treaties were covered by the reservation. The best course would be to refer the article to the Drafting Committee, and he would produce new texts of both articles 22 and 22 *(bis)*, as a basis for the Committee's discussions.

48. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer article 22 *(bis)* to the Drafting Committee.

It was so agreed.[14]

The meeting rose at 6.15 p.m.

[12] League of Nations, *Treaty Series*, vol. XXVIII, p. 117.

[13] Op. cit., vol. CLXXIII, p. 215.

[14] For resumption of the discussion see 1197th meeting, para. 4.