Document:-
A/CN.4/SR.1194

Summary record of the 1194th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1972, vol. I

42. In conclusion, he thought that, for the purposes of a first draft to be submitted to the General Assembly as a basis for discussion and as a means of eliciting the views of governments, it would be useful to include article 22. If a choice had to be made between alternatives A and B, he would choose alternative B; if, however, he had to choose between alternative B and the Special Rapporteur's original article 4 in his first report, he was not at all certain which of the two he would prefer.

43. Mr. RAMANGASOAVINA noted that most members of the Commission agreed that a treaty establishing a boundary should not be affected by a succession of States. As some members had pointed out, a State possessed "title" to a certain territory with well-defined boundaries. It was the same in private law, under which, when property was transferred, the change of ownership in no way affected the previously established boundaries.

44. The use of the expression "by reason only", in both alternative A and alternative B for article 22, clearly indicated that the article was to be considered solely from the viewpoint of State succession. It followed that a treaty could be revised for some other reason, in particular on the basis of the principle of self-determination.

45. As to the distinction between treaties settling boundary questions and those settling territorial questions, he pointed out that the ownership of a territory by one State rather than another necessarily entailed a boundary demarcation. A boundary was a line intended to demarcate the territories of two neighbouring States. Moreover, it should be noted that disputes over boundaries arose from the fact that certain portions of territory were claimed by several States. A frontier fixed on the basis of both the crest line and the watershed might give rise to disputes if, as the result of a landslide or other geological disturbance in the mountains or mountain ranges, those lines completely ceased to coincide.

The meeting rose at 6 p.m.

1194th MEETING

Tuesday, 4 July 1972, at 9.35 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Bilge, Mr. Castañeda, 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.

Statement by the Secretary-General

1. The CHAIRMAN said he had great pleasure in welcoming the Secretary-General who, in the six months since he had assumed his high office, had made a wide variety of efforts to deal with difficult problems throughout the world and had endeavoured to do so through measures based on equitable and legal principles.

2. The Secretary-General's devotion to legal principles was understandable, since he was a Doctor of Jurisprudence of Vienna University, which for centuries had been a centre for the study of international law. Austria was noted for the great contributions it had made to the development of international law; among its eminent scholars were Mr. Verdross, who had been for many years a highly esteemed member of the Commission, as well as Mr. Verosta and Mr. Zemanek, who were currently making important contributions in that field. The city of Vienna was, of course, very close to the Commission since three of its drafts had become conventions signed in that city in 1961, 1963 and 1969, and the series would probably continue.

3. The Secretary-General came to the Commission as a valued colleague, since he had contributed to the development of international law as a representative of his country, in particular as Chairman, from 1964 to 1968, of the Committee on the Peaceful Uses of Outer Space, which had broken new ground in international law by formulating a régime for the law of outer space.

4. His visit came at a time when the Commission was busily engaged on the production of two sets of draft articles, one on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, and the other on the complex problems of succession of States in respect of treaties. The Commission was doing its best with the limited time at its disposal and hoped to be able to submit those two sets of draft articles to the General Assembly at its forthcoming session.

5. He had pleasure in inviting the Secretary-General to address the Commission.

6. The SECRETARY-GENERAL thanked the Chairman for his kind words of welcome and said that, for a number of reasons, he was very glad to have an opportunity of addressing the Commission in such familiar surroundings. Many of its members had been his esteemed colleagues in various capacities, and on a previous occasion, as Foreign Minister of his own country, he had had the privilege of acting as host to many of them during the second session of the Vienna Conference on the Law of Treaties in 1969.

7. He had a very special appreciation of the work being done by the Commission, having personally participated in the codification and progressive development of international law in a new field of human activities, within the framework of the Committee on the Peaceful Uses of Outer Space, over which he had had the honour to preside for several years.

8. In November 1972, twenty-five years would have passed since the General Assembly, by resolution 174 (II) of 21 November 1947, had established the International Law Commission as a means of exercising one of the principal functions entrusted to the Assembly under Article 13, paragraph 1.a., of the Charter, namely, that of "encouraging the progressive development of international law and its codification".

9. He need not say much about the importance of international law and its role in modern life as one of the principal means of regulating orderly relations between nations. It was obvious that without clear and widely recognized rules of international law, and without strict observance of such rules and of the basic principles and norms of international law embodied in the United Nations Charter, it would be impossible in the nuclear age to ensure the strengthening of international security and of fruitful international co-operation, to safeguard peace or to promote the general welfare of nations. States, large and small, had come increasingly to realize that there was no viable long-term alternative to a policy of peaceful coexistence within a framework of international law. Differences in ideologies and in social systems should not be allowed to constitute obstacles to the development of normal international relations based on legal principles such as those solemnly proclaimed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the General Assembly on the occasion of the twenty-fifth anniversary of the United Nations, on 24 October 1970.

10. Over a period of twenty-three years, the Commission had accomplished much valuable work in significant areas of international law, such as the law of the sea, diplomatic and consular law and the law of treaties. Most of that work had culminated in international codification conventions concluded under the auspices of the United Nations.

11. He was sure that all the members of the Commission were responsive to the dynamic changes that were rapidly being brought about by developments in political, economic and social life and by the revolution in science and technology. As a result of those changes, urgent demands were being made on all the means which man had devised to achieve and maintain international order, not least among them international law.

12. It was against that background that the Commission had taken the decision, endorsed by the General Assembly, to review its long-term programme of work which had first been adopted in 1949. That decision had great significance, since the new programme would determine the direction and effectiveness of the Commission's further work on the codification and progressive development of international law. He was certain that the Commission would be able to take advantage of that opportunity to enhance the role of international law in the United Nations system. It would no doubt need to consider all aspects, both substantive and procedural, in deciding how to proceed. He had already indicated why, in his view, the codification and progressive development of international law should proceed even more energetically in the future than in the past. The Commission's recommendations would, he felt sure, receive careful and favourable consideration by the General Assembly and by Member States. The high standards of the Commission's work in the past had gained for it a well-deserved reputation and had facilitated the adoption by States of the codification conventions which had come to form so large a part of the corpus of modern international law.

13. The agenda for the present session gave priority to the topic of succession of States in respect of treaties and the question of the protection of diplomatic agents and other persons entitled to special protection under international law. The Commission's efforts to draft concrete recommendations on those two items, which were of such practical and doctrinal importance, would certainly contribute to a further degree of understanding of the problems involved and of the steps which should be taken. He was confident that the Commission, in its report to the General Assembly, would once again fulfil the high expectations placed on its work, as it had always done in the past.

14. The CHAIRMAN thanked the Secretary-General for his valuable statement. With regard to the review of the Commission's long-term programme of work, which was on the agenda for the present session as item 6 (*a*), he pointed out that the Commission had been so fully occupied with its current work at both its previous session and the present session that it had been unable to review the programme. Some thought would therefore have to be given, in connexion with that review, to devising suitable conditions and methods of work to enable the Commission to move forward more rapidly in its important task.

15. The Commission had so many topics on its agenda which demanded priority attention that it was impossible for it to deal with them all using its present resources and methods. If therefore the Commission were to make proposals in that connexion, he earnestly hoped that the Secretary-General would give them favourable consideration.

16. He thanked the Secretary-General on behalf of the members of the Commission for the interest he had taken in their work and for honouring them with his visit.

Co-operation with other bodies

[Item 8 of the agenda]

(resumed from the 1186th meeting)

Statement by the Observer for the Asian-African Legal Consultative Committee

17. The CHAIRMAN welcomed the Observer for the Asian-African Legal Consultative Committee and invited him to address the Commission.

18. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) said he wished to convey the Committee's greetings to the Commission and to express admiration for its outstanding work.

19. For the past two years, the Committee had been engaged in preparations for the third Conference on the Law of the Sea, and it was keenly aware of the difficulty of formulating proposals for submission to a diplomatic conference on a subject relating to international law, without the benefit of the Commission's objective and meticulous studies in the form of draft articles.

20. The codification conferences held in 1958, 1961, 1963 and 1968/69, on the law of the sea, diplomatic relations, consular relations and the law of treaties respectively, owed their success mainly, if not wholly, to the work of the Commission in providing not only the frame-

work for the conventions, but also substantive proposals which were acceptable, by and large, to the world community as a whole.

21. The States of Asia and Africa which had emerged as independent nations in recent years owed a particular debt of gratitude to the Commission for having adequately reflected their views in its work on the codification and progressive development of international law. The member countries of the Committee therefore attached the highest importance to maintaining close relations with the Commission. The growth of co-operation between the two bodies was shown by the fact that both the President and the Vice-President of the Committee for 1972 were members and former chairmen of the Commission. Those close links were a source of pride to the Committee, which earnestly hoped that the fruitful co-operation between the two bodies would continue for the benefit not only of the Asian and African States, but of the world community as a whole.

22. In the past five years, the membership of the Committee had grown from seven to twenty-two. An attempt was being made to expand the African membership by removing the stumbling-block of language difficulties. The main working language of the Committee, for practical reasons, continued to be English, but a French translation unit had been established in the Committee's secretariat and it had been possible to provide simultaneous interpretation into French at the thirteenth session held at Lagos in January 1972.

23. At that session, the Committee had been glad to welcome observers not only from fifteen non-member States of the region, but also from twelve other States including Australia, the United States, the Union of Soviet Socialist Republics, the United Kingdom and a number of Latin American States. Valuable contributions had been made by those observers to the Committee's discussions on the law of the sea.

24. It was the Committee's task to render assistance to its member States in connexion with all international legal problems. Its secretariat had provided member States with compilations on such topics as the law of treaties and the law of the sea. In response to requests made by some of them, it had extended its activities relating to international trade law and was maintaining close co-operation with the United Nations Commission on International Trade Law, the International Institute for the Unification of Private Law and other bodies working in that field.

25. In furtherance of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, the Committee had introduced a training scheme for young officers of the foreign offices of Asian and African countries.

26. A number of topics on the Commission's agenda for the present session were of special interest to the Committee: succession of States, State responsibility, the question of the protection and inviolability of diplomatic agents, and the law of the non-navigational uses of international watercourses.

27. He had recently received communications from African countries which were not yet members of the Committee, urgently requesting that the principles concerning the rights and obligations of States arising out of State succession should be settled. Since the International Law Commission had been studying State succession for some time, the Committee considered that its own work on the subject should take a secondary place and that the best way it could assist would be by making suggestions and comments on the basis of the Commission's drafts. The Committee was eagerly looking forward to studying the Commission's work on succession of States.

28. Although the Committee had completed its work on the substantive rights and duties of aliens in 1961, it had postponed consideration of State responsibility until the International Law Commission submitted its final recommendations on the subject. The Committee had greatly valued the advice given by Mr. Ago, when he attended its Baghdad session as observer for the Commission, that the best way the Committee could assist in regard to topics under consideration by the Commission was to study the Commission's work and make suggestions on it, rather than attempt to draw up an independent set of draft articles.

29. Although the question of the protection of diplomats had not been referred to the Committee by any member State, the Committee would be able to study it, by virtue of article 3 of its Statutes, as a matter arising out of the International Law Commission's programme of work.

30. The Committee had been asked by two member States to study the law of the non-navigational uses of international watercourses and to make recommendations on that question, taking into account the agricultural uses of water and the peculiar problems of the Asian-African region. Proposals by the Governments of Iraq and Pakistan were being examined by a standing subcommittee, in preparation for their consideration by the Committee itself He hoped that the International Law Commission would be able to take up the subject soon and believed that the Committee could be of some assistance on a topic of such vital interest to the Asian-African community.

31. As soon as a firm decision had been taken on the date and place of the Committee's fourteenth session, he would inform the Commission's secretariat. He hoped that the Chairman of the Commission would honour the Committee by attending the session in person, as his predecessors had done.

32. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his kind invitation; he hoped to be able to attend the Committee's fourteenth session.

33. Mr. ELIAS said that, as Chairman of the Asian-African Legal Consultative Committee, he welcomed the opportunity to pay a tribute to the devoted work of Mr. Sen, its Secretary-General.

34. The Committee's method of work was to examine subjects at the request of the governments of its member States. In doing so, it kept the work of the International Law Commission closely under review, in order to keep itself informed on the progress made in the study of the various topics. That method was a sound one because it

ensured that the Committee did not submit, on any given topic, a set of draft articles which differed from those prepared by the Commission. By organizing its work in that way, the Committee was better able to clarify its own thoughts and could also make some contribution to the Commission's work.

35. He hoped that it would be possible to increase the African membership of the Committee. It was true that African non-member States received the Committee's documents, but it was highly desirable that they should become full members.

36. Mr. YASSEEN, after noting the importance of the work done by the Asian-African Legal Consultative Committee and the organic link between the Committee and the Commission, drew attention to the Committee's contribution to the progressive development and codification of international law. Its main task was to harmonize the views of its member countries, and it had thus enabled them on several occasions to present a united front at codification conferences. The Committee's conclusions were widely accepted, even by non-member countries, because they were based on a thorough study of the circumstances of African and Asian countries and of developing countries in general.

37. He paid a tribute to the ability and devotion of Mr. Sen, which had led to his unanimous re-election for a new term as Secretary-General of the Asian-African Legal Consultative Committee.

38. Mr. EL-ERIAN said he was gratified by the growing number of African countries which were members of the Committee and hoped that their number would continue to increase.

39. He also appreciated the increasingly large place being given to international law in the work of the Committee, whose mandate covered legal co-operation generally.

40. He had two suggestions to make in connexion with the valuable oral report just made by the Observer. The first was that the Committee should consider appointing a sub-committee with the task of making its proceedings fully bilingual, so as to secure the participation of French-speaking African States. The second was that some means should be found of providing financial grants for one or two participants from Asia and Africa in the annual Seminar on International Law held at Geneva in conjunction with the Commission's annual session.

41. Mr. THIAM warmly thanked the Observer for the Asian-African Legal Consultative Committee for his statement, which had shown how the Committee's activities were growing. The Committee helped the Commission in its work by giving it a better understanding of the problems of the Afro-Asian world. Noting that French-speaking countries had sent a larger number of observers to the Committee's last session and that efforts had been made to solve the language problem, he expressed the hope that the observers would soon become members.

42. Mr. TSURUOKA said that the collaboration established between the Asian-African Legal Consultative Committee and the International Law Commission was beneficial not only to those two bodies themselves, but also to the whole world, since it helped to promote the progressive development and codification of international law. As an essentially regional body, the Committee concerned itself with the special problems of Asian and African countries, but its work was nevertheless of universal importance, because countries all over the world sent observers to its meetings and the range of subjects it studied covered problems which were world wide. It must therefore be acknowledged that the Committee's work was bound to help the cause of international law.

43. He hoped that the French-speaking countries would become members of the Committee and that it would receive increased financial aid from all concerned, including observers.

44. Mr. USHAKOV congratulated the Asian-African Legal Consultative Committee and its Secretary-General, Mr. Sen, on the growing importance and value of its work.

45. Mr. RAMANGASOAVINA associated himself with the words of gratitude and appreciation addressed to the Observer for the Asian-African Legal Consultative Committee regarding the Committe's work. The role of the Committee was to stress the importance of local problems, which were often obscured by more general problems in world assemblies, by explaining its point of view and making suggestions. There was every reason to welcome the constant collaboration established between the Committee and the International Law Commission, which participated actively in the Committee's work through members who also sat on the Committee. The aims of the Commission and the Committee coincided in several respects. There could be no doubt that the Committee's contribution to the progressive development of international law would continue to increase, thanks to the increase in its membership, which should be facilitated by the elimination of language problems.

46. Mr. SETTE CÂMARA, speaking also on behalf of the other Latin American members of the Commission, thanked the Observer for his interesting oral report. The close co-operation which the Committee maintained with the Commission was an example of how two bodies dedicated to the same purpose should work together.

47. He welcomed the wide participation of observers from Latin American countries in the Committee's meetings. Those countries had common problems with the countries of Asia and Africa, and a common approach to those problems, so that it was natural for them to seek common solutions.

48. Sir Humphrey WALDOCK said he wished to stress the great interest taken in the Committee's work by lawyers outside Asia and Africa. He had been greatly impressed by the thoroughness and balance of the Committee's drafts on a number of subjects other than those which had been considered by the Commission.

49. Mr. USTOR associated himself with the tributes paid to the Observer for the Asian-African Legal Consultative Committee for his enlightening oral report and expressed his sincere wishes for the continued success of the Committee's work. He was confident that the fruitful co-operation between the Committee and the Commission

would continue to grow. He hoped that it would be possible for the Committee to institutionalize its system of dealing with topics on the Commission's agenda, since such an arrangement would be of great assistance to the Commission, and particularly to its special rapporteurs.

50. Mr. AGO, speaking on behalf of the European members of the Commission, thanked the Observer for the Asian-African Legal Consultative Committee for his clear and comprehensive statement. He had been glad to hear that the few remarks and recommendations he had made when attending the session at Baghdad a few years previously had given the Committee food for thought and encouragement in its subsequent work. There was every reason to welcome the fact that the Committee and the Commission were collaborating more and more closely and that the Committee took the Commission's work as the central point of reference for its own activities. He hoped that the Committee would be able to revert to the topic of State responsibility when it had finished its work on the law of the sea.

51. Mr. QUENTIN-BAXTER said he wished to take the opportunity of thanking the Committee and its secretariat for its courtesy to New Zealand and in particular for making all its documents available to his country. New Zealand had very close associations with many countries of the region served by the Committee.

52. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his very interesting oral report on the Committee's activities. There was not time to comment on that report in detail, but he wished to draw attention to the common interest of the two bodies in the law of the non-navigational uses of international watercourses, a subject on which the Commission had requested the Secretariat to make certain studies, with special reference to pollution. The Committee's work on that subject would be of great assistance.

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 4; A/CN.4/L.184 and L.185)

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

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 22 (Succession of States in respect of boundary settlements) *(continued)*

53. The CHAIRMAN invited the Commission to resume consideration of article 22 in the Special Rapporteur's fifth report (A/CN.4/256/Add.4).

54. Mr. ALCÍVAR said that, when the Commission had discussed the Special Rapporteur's second report at the twenty-second session, he had supported article 6, but had expressed the hope that an exception relating to boundary treaties would be included in the draft;[1] he therefore welcomed article 22.

55. As to the rules to be embodied in the article, he was inclined to favour alternative A, which made it clearer that the exception related to the boundary treaty and not to the situation created by that treaty.

56. He did not, however, agree with the Special Rapporteur's explanation that the exception was derived from the rule stated in article 62 of the 1969 Vienna Convention on the Law of Treaties.[2] Although that rule had been expressed in terms of a "fundamental change of circumstances", the article in fact embodied the *clausula rebus sic stantibus*. What had until then been considered as an implied clause in a treaty had been transformed by the Vienna Convention into an objective rule of the law of treaties. His country's delegation had strongly opposed the inclusion of the exception relating to boundary treaties, set out in article 62, paragraph 2 (*a*) of that Convention. He himself still thought that the inclusion of that exception had been unfortunate, but it was, of course, now part of the Vienna Convention. The point he wished to make was that the provisions of article 62, paragraph 2 (*a*) of the Vienna Convention did not constitute the basis of the rules embodied in article 22 and 22 *(bis)*.

57. On the whole, he preferred alternative A for both those articles.

58. Mr. QUENTIN-BAXTER said he fully agreed that boundaries should not be subjected to any kind of uncertainty as a result of the operation of any instrument which might result from the draft articles under discussion. There was ample authority for the proposition, put forward during the Commission's 1970 discussions, that the duty of a State to respect boundaries was coincidental with its duty to respect the sovereignty of other States.

59. Questions of boundaries, as indeed all questions relating to territorial and objective régimes, were matters of status rather than of treaty law. It was therefore not surprising that at the United Nations Conference on the Law of Treaties, the majority of States had regarded objective régimes as not being primarily a matter of treaty law. It was significant that, in article 62 of the 1969 Vienna Convention, an exception had been made only in respect of boundary treaties and not in respect of treaties laying down other kinds of real obligations.

60. He himself was much attracted by the formula submitted by the Special Rapporteur as article 4 in his first report.[3] He thought that the adoption of either alternative A or alternative B for article 22 would lead to serious difficulties. For example, the rule embodied in alternative A, that the continuance in force of a boundary treaty was not affected by reason only of the occurrence of a succession of States, could be regarded as a logical extension of the rule stated in article 62 of the Vienna Convention. A boundary treaty, however, could also contain a wide variety of other provisions and there was a danger that it might be used to entrench them. There

[1] See *Yearbook of the International Law Commission, 1970*, vol. I, p. 161, para. 62.

[2] 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. 297.

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

was some analogy with the phenomenon, well known in domestic parliamentary practice, of extraneous provisions being introduced into a bill, such as a finance bill, which could not be rejected by a legislative body, because of its main purpose.

61. The Commission might perhaps find that the best solution to the problem of boundaries was to formulate the simplest possible rule on the lines of the original article 4. In any case, a provision such as article 22 *(bis)* was necessary in the draft.

62. Mr. HAMBRO asked the Special Rapporteur whether he would give some thought to the possibility of re-introducing a provision on the lines of article 4 in his first report.

63. Sir Humphrey WALDOCK (Special Rapporteur) said that if the Commission were to adopt for article 22 a provision on the lines of alternative B, which treated the matter more as a situation created by a treaty than as a treaty question, he could see the attraction of his original article 4. That negative formulation had been his first approach, but at the previous sessions of the Commission, when the topic had been discussed, much had been said about boundary treaties and other territorial treaties being an exception to the "moving treaty-frontiers" rule. It had therefore become necessary for him to approach the question in a more positive manner. The fact of the matter was that the so-called territorial régimes, which created such rights as transit rights and special rights connected with airports, were of a mixed character and partook of both treaty law and custom.

64. Mr. BILGE said that he had not yet come to a definite conclusion on article 22 and reserved his position.

65. The CHAIRMAN, speaking as a member of the Commission, said that he too found it very difficult to reach any final conclusion on article 22. He shared the basic approach adopted by all members of the Commission, namely, that it was desirable to adopt a formula that would avoid unsettling boundaries, or reopening or exacerbating boundary disputes.

66. He was inclined to favour either the original article 4 proposed by the Special Rapporteur in his first report or alternative B for article 22. There did not seem to be any very substantial difference between those two formulations with regard to approach, although there might be with regard to their effect. One advantage of alternative B was that it referred to a boundary settlement rather than to a boundary as such, because in many cases a boundary was not settled once and for all at the time when the treaty defining the boundary entered into force. For example, the Rio Grande river constituted the boundary between part of the state of Texas and Mexico, but it was a very uncertain boundary because the river had shifted its bed on many occasions and thus given rise to many disputes. It was therefore preferable to refer to a boundary settlement, which might be designed to maintain a boundary in effect, rather than to the boundary itself.

67. He found it difficult to understand the distinction drawn by Mr. Ushakov between a boundary settlement and a territorial settlement when referring to boundaries. It was true that it was possible to have a territorial settlement that did not affect boundaries, for example, in the case of islands; but where a boundary separated the territory of one State from that of another, boundary settlements were inevitably both boundary and territorial settlements. He was unable to see that the difference between the two types of settlement could have any bearing on the use of the term "boundary settlement" in the present case.

68. To sum up, he would prefer a general reservation on the lines of the article 4 proposed by the Special Rapporteur in his first report, using the term "boundary settlement" instead of "boundary". He would also prefer a somewhat more positive wording and would suggest that the words "shall be understood as affecting" should be replaced by the words "shall affect". He did not favour the clause proposed by Mr. Ushakov,[4] since he would prefer as simple a formulation as possible in order to avoid problems of interpretation.

69. Mr. USHAKOV pointed out that the expression "treaty [which] establishes a boundary" was already to be found in article 62, paragraph 2 (*a*), of the Vienna Convention on the Law of Treaties, whereas the expression "boundary settlement" was new. The Commission should avoid introducing a new expression, the meaning of which would have to be explained.

70. Mr. AGO said it would be simpler to speak of a "boundary established by treaty" than of a "boundary settlement", although the latter expression was intended to reflect the fact that a treaty was not usually confined to establishing a demarcation line, but also laid down the procedure for applying the régime thus established. In that respect the expression "boundary settlement" might, indeed, be preferable, but it would require further explanation. The expression "a treaty which establishes a boundary" should not be used, because article 22 dealt with the consequences of a treaty and not with the treaty itself. It was the régime established by the treaty that was the object of the succession, not the rights and obligations stated in the treaty. For example, if one State concluded with another State a treaty ceding a frontier area of one of its colonial possessions, which became independent before the treaty entered into force, it was the existing boundary that would be inherited by the successor State, not the treaty and not the new boundary it provided for.

71. Sir Humphrey WALDOCK (Special Rapporteur) said it was clear that the Commission was somewhat divided in its approach. It was generally agreed that there must be some kind of article establishing that the mere occurrence of a succession of States would not reopen the question of boundaries because, in general, treaties were not binding on a successor State under the "moving treaty-frontiers" rule or the "clean slate" principle. The point to be determined was whether the rule should relate to the treaty or to the situation created by the treaty. Slightly more of the Commission's members were in favour of the more negative version in the article 4 proposed in his first report, but several members took the opposite position.

---

[4] See previous meeting, para. 12.

72. Personally, he thought there was some artificiality in restricting the rule to the situation created by the treaty and he doubted whether States approached the problem in that way. After all, a boundary treaty constituted the title to the boundary situation and, if the validity of the treaty was challenged, the problem of the validity of the boundary situation inevitably arose. There was also the case of the possible termination of a treaty where the treaty contained a termination clause. He found it difficult to believe that, in practice, it was possible to depart altogether from the contractual aspect of the treaty.

73. The fact that the Vienna Convention on the Law of Treaties related the exception to the rule on fundamental change of circumstances to the treaty itself was not a conclusive argument, since in that case the rule had been formulated in respect of the termination and suspension of the operation of treaties and it was essential to relate the exception to the treaty itself. However, if it was argued that a boundary treaty had dispositive effects, there would be no need for concern about the exception to the rule, since the boundary would then be a legal effect that existed in its own right.

74. Where there seemed to be a slight majority in the Commission in favour of expressing the matter in terms of a boundary settlement, the evidence would justify either approach. In the circumstances, it would perhaps be best to refer article 22 to the Drafting Committee and see what emerged.

75. The CHAIRMAN suggested that article 22 should be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 22 *(bis)* (Succession in respect of certain treaties of a territorial character) *(resumed from the 1192nd meeting)*

76. The CHAIRMAN invited the Commission to resume consideration of article 22 *(bis)* in the Special Rapporteur's fifth report (A/CN.4/256/Add.4).

77. Sir Humphrey WALDOCK (Special Rapporteur) said he had had to base his commentary on the material in the Secretariat studies and on the literature on the subject, which tended to deal with cases that had raised problems or in which succession had been questioned. There were probably even more cases where no questions had been raised and where the continuance in force of the treaty had been taken for granted. There was a mass of other material on territorial treaties, especially in books devoted to so-called international servitudes, which did not deal with the question of succession, but was useful for illustrating the kind of problems that might arise. He had, however, confined himself in the commentary to the question of succession.

78. To revert to the question put by Mr. Hambro earlier in the meeting,[6] the short answer was that it was possible to provide the same kind of solution for article 22 *(bis)*, if a formulation to cover the kinds of situation involved could be found. It could be argued, certainly in regard to the so-called objective régimes, that it was really the dispositive effects of a treaty, combined with the establishment of the situation by custom, which created a legal situation that was independent of a treaty; he had referred to the case concerning *Right of Passage over Indian Territory* in paragraph (19) of the commentary to show that such an approach was possible. The special rights relating to fisheries could also be treated in the same way as a treaty régime. Whatever approach was adopted, the main difficulty lay in the formulation of the rule.

79. Mr. SETTE CÂMARA said that, as with article 22, he had no hesitation in preferring alternative A. He did not see how the Commission could avoid relating the rule to the treaty itself, and he agreed with the Special Rapporteur that it was somewhat artificial to refer only to the situation created by the treaty. Nor did he see how the situation could survive without a legal basis if the treaty itself lapsed with a succession of States in accordance with the "clean slate" principle of the "moving treaty-frontiers" rule. Localized and dispositive treaties survived because they impressed the territory which was the object of succession. The validity of such treaties could be denounced and challenged, but always for reasons other than mere succession. Tanganyika, for example, had challenged the right of the former mandatory to grant a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma, on the basis of an *ultra vires* engagement, because the rights of the mandatory were of limited duration.

80. In his view, the rule in alternative A for article 22 *(bis)* concerning both treaties of a territorial character in general—paragraph 1 (*a*)—and treaties establishing the so-called "objective régime"—paragraph 1 (*b*)—was correctly formulated and deserved support. There were many details which required further consideration, such as the inclusion of the term "contiguous zone" in the definition of territory in paragraph 3, but the Commission did not really have sufficient time to go into them. What mattered was to determine the Commission's basic view on the kind of solution to be adopted. Once that had been done, the Drafting Committee could include some version of the article in the draft, so that the Commission could have the benefit of the Sixth Committee's comments for its second reading.

81. Mr. HAMBRO said that his reaction to article 22 *(bis)* was the same as to article 22. The important thing to bear in mind was that a certain status had been created, which had a binding effect on a certain territory, and it was because of that special status that an exception was being made to the general rules. If that interpretation was correct, it would be better to refer to the status than to the treaty. If the Commission did adopt the treaty approach, it was essential also to make a distinction between succession in the case of the separation of part of a territory and succession in the case of the creation of a new State. There was some point in keeping a treaty régime in force for part of the territory, but not for a new State.

82. Consequently, he would prefer not to include such an article in the draft. If the Commission decided to do

[5] For resumption of the discussion see 1197th meeting.
[6] See para. 62 above.

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).