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22nd meeting

Thursday, 6 March 1986, at 3.20 p.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11]

Article 62 (Fundamental change of circumstances) (*concluded*)

1. Mr. LUKASIK (Poland) said that his delegation attached the greatest importance to the principle established in article 62 of the 1969 Vienna Convention on the Law of Treaties[1] that no fundamental change of circumstance might be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary between States. He believed it might be concluded from the draft article prepared by the International Law Commission, and even more from the comments of some delegations, that treaties of a similar nature could be concluded between States and international organizations, or even between international organizations.

2. His delegation rejected the idea of allowing international organizations to establish boundaries, not only because they did not possess territory but because such a right was solely the attribute of sovereign States. Unfortunately, the possibility that international organizations might have the same right was envisaged in article 62. If, as had been suggested, the intention of the Commission had been to refer to agreements concluded by international organizations concerning other types of boundary, such as the limit of the continental shelf, economic zones, outer space, then the choice of the term "boundary", transplanted from the 1969 Vienna Convention, was misleading and subject to different interpretations. While his delegation rejected the idea that international organizations could conclude treaties establishing State boundaries, it had no objection to their concluding treaties concerned with the delimitation of areas other than State territories. In the latter case, it would perhaps be better to allow both States and international organizations to avail themselves of the right to invoke fundamental change of circumstances as a ground for termination or withdrawal from a treaty, since such changes often occurred in respect of non-State territories of the type he had mentioned. Such a possibility should, however, never be allowed in respect of State boundaries.

3. His delegation therefore considered both the proposed amendments very useful. The proposal by the Union of Soviet Socialist Republics (A/CONF.129/C.1/L.59) was a simpler one, and, if adopted as suggested by the representative of the German Democratic Republic at the previous meeting to read "if the States parties establish a boundary in this treaty", could remove different interpretations of the word "boundary". While his delegation did not accept the view that an international organization could participate in a treaty establishing a boundary on equal footing with States, it nevertheless felt that such an organization might be entrusted with a specific role with respect to boundaries thus established. The situation would in any case be fully governed by the relevant provisions of article 62.

4. Mrs. OLIVEROS (Argentina) said she believed there was a consensus in favour of maintaining the situation whereby a fundamental change of circumstance could not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary between States. However, there had been no response to her delegation's proposal that paragraphs 2 and 3 of the International Law Commission's article should be combined (see A/CONF.129/C.1/L.57 as orally revised). Her delegation could thus reduce its proposed amendment to only one point—based on its understanding that there was a consensus that in the present context "boundaries" meant the boundaries of States only—namely, that States alone, and not international organizations, could fix boundaries for themselves. Her delegation's revised amendment would thus involve simply adding the words "of a State" at the end of paragraph 2 of article 62.

5. Mr. RASOOL (Pakistan) said that the revised amendment just proposed by the representative of Argentina represented a substantive change. While stressing that at the present time boundaries could in practice be established only between States, the International Law Commission had left open the possibility that at some time in the future two States might conclude a treaty establishing an international organization under which that organization was given a separate territory. Thus, the possibility of future development of the law was retained, which was not the case under the Argentine amendment.

6. His delegation felt that the amendment of the Soviet Union introduced an element of contradiction. The article proposed by the Commission envisaged a treaty where both States and international organizations were equal parties in establishing a boundary, which was understood to be that of a State. By retaining the first part of paragraph 2, the Soviet amendment envisaged international organizations as parties to such a treaty, but with the question of the establishment of a boundary being left to the States. It appeared that in such a case an international organization would participate in the negotiations, thus becoming a party to the treaty,

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

but its sole purpose would be decided by others. In the light of those considerations, his delegation supported article 62 as drafted by the Commission.

7. Mr. NEGREIROS (Peru) said that in his delegation's view the purpose of the present Conference was not to create new international legal institutions or to reform existing ones, but to adopt an instrument complementing the work of codification carried out in the 1969 Vienna Convention. His delegation therefore considered it dangerous to apply excessive innovative zeal only a decade and a half after that Convention had established a basis for relations between States, now that international organizations were being included in the ambit of those relations. The Conference was seeking to improve the involvement of international organizations in international affairs by granting them certain rights, but without making them entities comparable with States. While his delegation favoured the involvement of international organizations in inter-State affairs, it emphasized that they were not States or equivalent entities and must conform strictly to the rules governing relations between States. For those reasons, the new convention should keep as close as possible to the 1969 Vienna Convention. He thought that the revised form of the Argentine amendment was appropriate, since it would avoid future problems of interpretation.

8. Mr. SWINNEN (Belgium) said that his delegation had no difficulty with the International Law Commission's article 62. The doubts and reservations reflected in the amendments proposed by Argentina and the Soviet Union were, he felt, satisfactorily answered in the Commission's commentary to its text (see A/CONF.129/4). The draft article was in his view sufficiently precise, and he was afraid that modifications aimed at ensuring greater precision were not only superfluous but might lead to confusion or undermine established principles of general international law. The term "boundaries" could refer only to State boundaries. Only States, as subjects of international law, had the capacity to establish boundaries. His delegation therefore gave its full support to article 62 as drafted by the Commission. However, it was not opposed to that text and the proposed amendments being referred to the Drafting Committee.

9. Mr. BOUCETTA (Morocco) said that it was generally accepted in the practice of States that a fundamental change of circumstances was a ground for terminating or withdrawing from a treaty, subject to certain exceptions, such as illicit or unequal treaties or those based on a *fait accompli* or acquired rights. The International Law Commission had attached great importance in its work on the 1969 Vienna Convention to the need strictly to define the circumstances in which it was permissible to terminate or withdraw from a treaty. That was underlined by the negative formulation of article 62, paragraph 1, of that instrument. Paragraph 2 of that article indicated two cases where the article did not apply, the first relating to treaties establishing a boundary between States, an exclusion which the Commission had considered necessary in order to avoid a dangerous source of friction. The second exception, which was the subject also of paragraph 3 of the draft article, contained the impossibility of invoking a fundamental change of circumstances resulting from a breach by the party invoking it.

10. His delegation took the view that an international organization clearly could not establish State boundaries, let alone its own, although situations might arise where States parties to a treaty establishing a boundary between them desired the participation of an international organization for certain limited and defined functions. However, in no circumstances could an international organization conclude a treaty establishing a boundary on behalf of a State.

11. His delegation was in favour of maintaining article 62 in the form proposed by the International Law Commission. It might, however, wish to comment on the matter again after hearing the Expert Consultant's explanation of that text.

12. Mr. CORREIA (Angola) said that his delegation had no difficulty in accepting the Commission's draft, but believed it was necessary to make it clear that the term "boundary" meant only State boundaries and that only States had the capacity to conclude treaties establishing boundaries. It therefore had certain reservations in respect of paragraph 2. The term "boundary" was perhaps insufficiently clear, and the amendments proposed by Argentina, as orally revised, and the Soviet Union provided a basis for improving the paragraph. Those amendments, together with the text of the article proposed by the Commission, should therefore be referred to the Drafting Committee.

13. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that, as the International Law Commission had pointed out in paragraph (1) of its commentary to the text, article 62 established a delicate balance between respect for the binding nature of treaties and the need to be able to terminate or withdraw from them in the case of a fundamental change of circumstances. Under the 1969 Vienna Convention, fundamental change of circumstances was not a ground for so doing where the treaty was one establishing a boundary or where the change was due to a breach by the State invoking it. The fact that the basic subject of the present draft convention was relations between States and international organizations had led to the expression of certain reservations related to the differences between the present situation and that of the earlier Convention. His delegation was concerned about the rather hypothetical capacity of an organization to participate in a treaty for the establishment of a "boundary", a term which was already defined in international law and closely linked to States and their powers. Under such a hypothesis, the activities involved would be those arising from boundary-related questions rather than the actual establishment of boundaries. A codification which had regard to the future should certainly take account of those situations which, although unlikely, were nevertheless possible, but the hypothesis that a boundary could be established by a subject of international law which was not a State was an impossible one, since the term "boundary" itself was defined as relating exclusively to States. Although to his delegation it seemed superfluous, the precision contained in the amendment proposed by Argentina, as orally revised, might never-

theless be acceptable. A similar precision was contained in the Soviet Union amendment, which could probably be combined with the Argentine amendment. In the view of his delegation, both amendments should be referred to the Drafting Committee.

14. Mr. WANG Houli (China) said that while his delegation could accept the Commission's article 62, there was some problem of understanding. A border in international law determined the boundary line between States, and, traditionally, the decision to establish such a line was a matter between States. International organizations had no territory and therefore did not have to decide on their boundaries. However, the slight possibility of such an organization becoming a party to a treaty dealing with a boundary could not be excluded. On that understanding, his delegation could support paragraph 2 of the article as drafted, but it could not agree that "boundary" in that context also included the limit of economic zones or of the continental shelf. The amendments of the Soviet Union and Argentina were intended to clarify the content of the article, and his delegation did not object to their being referred to the Drafting Committee.

15. Mr. MIMOUNI (Algeria) said that the International Law Commission's draft, which was largely based on the 1969 Vienna Convention, raised two basic issues: the capacity of international organizations to conclude treaties establishing boundaries or to dispose of territory, and the concept of a boundary. The article had been drafted in accordance with the traditional idea that only States had territories and consequently only the delimitations of the territories of States were boundaries. The Commission in its commentary had indicated that the rule in paragraph 2 applied only to treaties establishing boundaries between at least two States to which one or more international organizations were parties. The Algerian delegation believed that only States could conclude treaties establishing boundaries and that international organizations could exercise only specific functions in that connection. It therefore could not support the first subparagraph in the amendment proposed by Argentina. While not objecting to the remainder of that proposal, it believed that the addition of the words "of a State" at the end of paragraph 2 was unnecessary, as the word "boundary", as used in that paragraph, referred to the boundary of a State. For these same reasons, and even if the Soviet amendment did try to bring in greater precision, the Algerian delegation preferred not to depart too much from the wording of the 1969 Vienna Convention. In conclusion, therefore, the Algerian delegation preferred the Commission's draft.

16. Mr. AL JARMAN (United Arab Emirates) said that, in his delegation's view, international organizations could not deal with matters of sovereignty, which were the domain of States. States alone were competent to determine the boundaries between them, and the treaties referred to in article 62 were those establishing boundaries between at least two States. International organizations could only be parties, but not determining parties to those treaties. The wording used by the International Law Commission was very general, and his delegation interpreted the reference to boundaries as meaning the boundaries of the entire State, including territorial waters, economic zones and the continental shelf. The original amendment proposed by Argentina was somewhat narrow in scope, since it referred only to territorial or State boundaries, and was therefore a fundamental departure from the Commission's draft. His delegation had not yet been able to study the revised version of the Argentine amendment. The Soviet proposal did not basically change the Commission's draft, which his delegation preferred as it stood.

17. Mr. ALMODÓVAR (Cuba)said that it appeared, in principle, unnecessary to introduce an exception to the rule in article 62. However, the International Law Commission had provided detailed explanations, and in paragraph (6) of its commentary had even gone so far as to make disclaimers concerning interpretation of the 1969 Vienna Convention and the Convention on the Law of the Sea. Paragraph (11) of the commentary, in its reference to treaties establishing a boundary between at least two States to which one or more international organizations were parties, contained an idea which needed closer study. The delegation of Argentina's attempt to clarify the expression "boundary of a State" was praiseworthy, but did not eliminate the problem of interpretation. The amendment of the Soviet Union was clearer. He felt that consultation between the two delegations might result in production of a text which could be referred to the Drafting Committee.

18. The CHAIRMAN, summing up, said that many views had been expressed both for and against the Commission's article 62 and the two amendments thereto, and the Committee would have to decide whether those amendments related to matters of substance. In his view the article was in no way concerned with the creation or establishment of rights for international organizations, and the Conference was codifying the law of treaties and not the rights of international organizations.

19. As he understood them, the Argentine amendment, as orally revised, meant that "boundaries" were the boundaries of a State in the context of the draft article, while the Soviet amendment meant that only States could establish the boundaries of States. If there was no objection, therefore, he would take it that the Committee of the Whole approved the International Law Commission's text, approved the two proposed amendments as drafting amendments and agreed to refer them to the Drafting Committee.

It was so decided.

Article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty)

Paragraph 3

20. Mr. ISAK (Austria), introducing the amendment proposed by his own delegation and that of Egypt (A/CONF.129/C.1/L.58/Rev.1), said that, generally speaking, article 65 as drafted by the International Law Commission was satisfactory. However, the opening

clause of paragraph 3 of the Commission's draft differed from that of article 65, paragraph 3, of the 1969 Vienna Convention, which read: "If, however, objection has been raised by any other party, . . .". The idea behind that formulation was to link paragraph 3 of the article to paragraph 2, particularly in respect of the time-limit imposed on the right to raise an objection to a notification made under paragraph 1 of the article. In wording paragraph 3 of the present draft article, the Commission had departed from that formulation in order to disconnect the paragraph from paragraph 2, the reason being, as it had observed in paragraph (4) of its commentary to the article, that in the case of the treaties which were the subject of the draft articles, it would be advisable not to provide for loss of the right to raise an objection to a notification designed to dissolve or suspend a treaty. But the new wording set up a contradiction, since paragraph 2 of the article did impose a time-limit on that right, whereas paragraph 3 did not. Irrespective of the question of the admissibility of an objection raised beyond the time-limit established in paragraph 2, his delegation considered that the opening clause of paragraph 3 could not confer on such an objection the legal effects contemplated in paragraph 2. The new wording would only widen the scope for the objections which were subject to the dispute settlement procedure provided for in paragraph 3.

21. His delegation was well aware of the legal problems which the formulation in the 1969 Vienna Convention could not solve—particularly that of prescription—and which remained unsolved with the new formulation. However, the new wording in paragraph 3 created a new régime which differed from that of the 1969 Vienna Convention. In order to avoid the existence of a double régime, which would certainly not contribute to the predictability, precision and certainty of international relations under international law, the Austrian and Egyptian delegations proposed the reinstatement of the formulation used in the 1969 Vienna Convention. That would certainly improve the wording of the article and facilitate the future application and interpretation of its provisions.

22. Mr. RIPHAGEN (Netherlands) said that the International Law Commission had given a reason for changing the wording of paragraph 3. If the Conference decided to revert to the old formulation, it would give the impression that it rejected the idea that the time-limit of not less than three months established in paragraph 2, in other words a minimum period, should not be applicable in paragraph 3, which dealt implicitly with a maximum period. He would prefer the matter to be referred to the Drafting Committee, which would decide whether a matter of substance was involved.

23. Mr. STEFANINI (France) said that his delegation had certain doubts about the scope of article 65 and reserved the right to speak on the subject at a later stage. However, it was prepared to accept the Commission's text provisionally and had no objection to the proposed amendment. He suggested that in the French version of the amendment the word "*cependant*" should be replaced by the word "*toutefois*".

24. Mr. FOROUTAN (Islamic Republic of Iran) said that his delegation found the change introduced by the International Law Commission at the beginning of paragraph 3 unsatisfactory, because the paragraph no longer had its place in the succession of steps which had to be followed in cases of dispute. Taking into consideration the time-limit stipulated in paragraph 2, it would normally be the case that after its expiry the notifying party would be free to carry out the measure it had proposed, in the manner provided in article 67. Paragraph 3 represented a step which was out of line with the preceding paragraph. It was unnecessary to depart from the language of the 1969 Vienna Convention at that point. His delegation therefore approved the amendment proposed by Austria and Egypt and suggested that it should be referred to the Drafting Committee.

25. Mr. BERMAN (United Kingdom) said that paragraph 3 represented a substantive and unjustified departure from the 1969 Vienna Convention. It should be amended to reinstate the wording of that instrument. Consequently, his delegation fully supported the amendment put forward by Austria and Egypt and suggested that the article as thus amended should be referred to the Drafting Committee.

26. Mr. NGUAYILA (Zaire) said that his delegation could accept the draft article prepared by the International Law Commission. In general, the article took its inspiration from the corresponding article of the 1969 Vienna Convention. The amendment proposed by Austria and Egypt seemed to involve a drafting change.

27. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that article 65 established a suitable mechanism for ensuring stability and legal certainty in treaty relations. The requirement of notification prevented a party to a treaty from taking arbitrary measures unilaterally to dissolve it or suspend it. The article reflected article 65 of the 1969 Vienna Convention, which had been debated thoroughly and at length. Paragraph 3 concerned objections to proposals for the dissolution or suspension of a treaty, as well as the obligation of States to solve their differences peacefully, which was a fundamental principle of the Charter of the United Nations. The reference to Article 33 of the Charter expressed the well-established principle that States had a choice of means for settling disputes. The amendment proposed by Austria and Egypt brought the text into line with that of the 1969 Vienna Convention. His delegation could therefore accept it, and agreed that it should be referred to the Drafting Committee.

28. Mr. AENA (Iraq) said that in general his delegation found article 65 as prepared by the International Law Commission acceptable, since it laid down a procedure that ensured justice for all parties to a dispute relating to the dissolution or suspension of a treaty. The achievement of a solution through the means indicated in Article 33 of the Charter of the United Nations was appropriate. His delegation supported the proposal by Austria and Egypt and agreed that it should be referred to the Drafting Committee.

29. Mr. RASOOL (Pakistan) said that his delegation approved the wording of article 65 proposed by the International Law Commission. The amendment of Austria and Egypt seemed to introduce a change of

substance, and his delegation therefore opposed it. However, if the Committee clearly understood the proposal as involving only a matter of drafting, his delegation would not object to it being referred to the Drafting Committee on that understanding.

30. Mr. HERRON (Australia) said that in his view the International Law Commission had not necessarily made a change of substance; what it had done was to decide between two possible interpretations of the words "if, however, objection has been raised" in article 65, paragraph 3, of the 1969 Vienna Convention, which were ambiguous. Not to accept the change proposed by the Commission would be tantamount to choosing deliberately to retain the ambiguity. His delegation preferred the future convention not to contain a known ambiguity, and therefore agreed with the Commission's decision to make it clear that article 65, paragraph 3, did not prescribe loss of the right to raise an objection to a notification concerning the dissolution or suspension of a treaty. Accordingly, it approved the Commission's wording.

31. With regard to the possible effect of the change introduced by the Commission on the interpretation of the corresponding article of the 1969 Vienna Convention, the ambiguity of the article would remain, but the international community would probably interpret it in accordance with subsequent practice.

32. Mr. MORELLI (Peru) said that his delegation supported the proposals by Austria and Egypt. However, in the Spanish version of the amendment, the words "*no obstante*" should be replaced by the words "*por el contrario*", which were the ones used in article 65, paragraph 3, of the 1969 Vienna Convention.

33. Mr. DENG (Sudan) said that his delegation found the language of paragraph 3 incompatible with that of paragraph 2. The wording proposed by Austria and Egypt would therefore be acceptable, provided it implied the continuance of the right of objection, as advocated by the International Law Commission.

34. Mr. SZASZ (United Nations) said that his delegation was of two minds regarding the proposal by Austria and Egypt to reinstate the language of the 1969 Vienna Convention. Any deviation from that Convention was undesirable unless the special nature and requirements of international orgnizations in relation to the draft convention justified it. In his view, the justification in the present case would be that international organizations, because of their international structure, might not react as fast as States to a notification under article 65, paragraph 1. For organizations such as the United Nations which had executive heads empowered to act on behalf of the organization, the time-limit of three months should not present a problem. Smaller international organizations possessing treaty-making capacity might, however, not be able to react within that period, and consideration should therefore be given to wording the article so as to cater to them.

35. The International Law Commission had decided to make no distinction between States and international organizations in paragraph 2; indeed, such a distinction would have created a problem because it would not have been clear, if there had been prescribed for organizations either a longer period than for States or no period at all, what would be the position of a party making a notification pursuant to paragraph 1. If the wording of article 65, paragraph 3, of the 1969 Vienna Convention could be interpreted as prescribing a time-limit for an objection to a notification, it would be inadequate for use in the present draft in respect of international organizations. That might therefore be a reason for deviating from the 1969 wording.

36. In the view of his delegation, either choice involved interpreting article 65, paragraph 3, of the 1969 Vienna Convention, which strictly speaking was something that this Conference could not do. Accordingly, if the proposal by Austria and Egypt was rejected, the Conference should place it on record that, in rejecting it, it did not thereby mean to give a restrictive interpretation to the Vienna Convention on the Law of Treaties. If on the other hand the proposal was adopted, the Conference should place on record its intention that article 65, paragraph 3, of the future convention should not be given a restrictive interpretation.

37. Mr. MONNIER (Switzerland) said that it was clear from the discussion that article 65 involved closely interrelated considerations of substance and form. The real difficulty was that the International Law Commission's wording aimed at a change of substance but did not make that change of substance clear. His delegation saw no fundamental difference in meaning between the words "when an objection is raised" and the words "if, however, objection has been raised". The substantive point which the Commission had sought to make was that it was inappropriate that the draft convention should provide for loss of the right to raise objections to a notification designed to dissolve or suspend a treaty. His delegation was not convinced of the need for the new instrument to diverge from the 1969 Vienna Convention on that point of substance. Secondly, if that Convention did contain an ambiguity, he doubted the wisdom of adding to that ambiguity by adopting an article which aimed at a change of substance but whose language failed to achieve one. In his view, the need for certainty in legal relations required the Committee to choose the wording of the 1969 Vienna Convention for article 65, paragraph 3. His delegation therefore supported the proposal by Austria and Egypt. The Committee must realize that the choice between the two alternatives was a matter of substance, not of drafting, and needed to be fully debated before the article could be sent to the Drafting Committee.

38. Mr. WIBOWO (Indonesia) said that the International Law Commission had stated in paragraph (4) of its commentary to article 65 that the new wording of paragraph 3 indicated that an objection to a notification under the article could be raised at any time. His delegation felt that view to be incompatible with the reference to the three-month period which paragraph 2 contained. It did not consider that paragraph 3 needed to depart from the 1969 Vienna Convention, and it would therefore support the proposal by Austria and Egypt.

39. Mr. UNAL (Turkey) said that his delegation considered that the Austrian-Egyptian amendment improved the Commission's text and would facilitate the interpretation and application of article 65, paragraph 3.

40. Mr. RIPHAGEN (Netherlands) observed that the statements by the United Nations and Australia had made it clear where the difficulty lay. While paragraph 2 dealt with a time-limit for the party notifying its intent not to perform a treaty, that was not the same period as the one which governed the right to raise an objection to the notification. Most of the matters pertaining to loss of the right to raise an objection related to article 45, to which there was a reference in paragraph 6 of article 65. The interpretation of the 1969 Vienna Convention was quite clear, and the wording used in that instrument would therefore be satisfactory for article 65, paragraph 3. The Conference should make it clear, however, that the reason for reinstating the wording of the 1969 Convention was not that the period allowed for raising an objection was too short.

41. The CHAIRMAN said that the main point seemed to be whether there were any considerations in the article which would justify using a different formulation for it from the one in the 1969 Vienna Convention. The actual interpretation of that Convention was not at issue. Since widespread support had been expressed for the amendment proposed by Austria and Egypt, he would take it, if he heard no objection, that the Committee adopted it and referred article 65, paragraph 3, as amended, to the Drafting Committee.

It was so decided.

Organization of work

42. Mr. BERMAN (United Kingdom) said that as a member of the Drafting Committee, he wished to raise a general question about the relationship between the work of the Drafting Committee and that of the Committee of the Whole. His delegation and other delegations were concerned about the terms in which the Committee of the Whole referred some articles to the Drafting Committee. Although the line between substance and drafting was often uncertain, they felt that the Committee of the Whole was leaving too much responsibility for matters of substance to the Drafting Committee.

43. Taking article 62 as an illustration of his point, the discussion had revealed general support for the International Law Commission's text, support from some delegations for both of the proposals to amend it and support from other delegations for one or other of those proposals, as well as disagreement on whether the points at issue were matters of substance or of drafting. Following the discussions, however, the Committee had apparently adopted both the Commission's text and the two amendments and had referred them all to the Drafting Committee. Since his own delegation had not expressed support for either amendment it had been surprised to hear that the amendments had been adopted. He asked the Chairman for guidance as to how the Drafting Committee should proceed in such cases.

44. The CHAIRMAN said that in summing up the discussion on article 62, he had given the Committee of the Whole his understanding of both amendments and had asked whether there were any objections to that understanding. Since there had been none, that understanding had formed the basis of the Committee's decision to refer both amendments to the Drafting Committee as generally acceptable, together with the International Law Commission's text.

45. Mr. BERMAN (United Kingdom) agreed that the Chairman had given an interpretation of the intent underlying the amendments proposed by Argentina and the Soviet Union and that no objection had been voiced to that interpretation. It was wrong, however, to say that the Committee had accepted the use of their wording. That was for the Drafting Committee to decide, and it would not be bound by the decision of the Committee of the Whole because that Committee had not adopted a particular wording.

46. Mr. MONNIER (Switzerland) said that the representative of the United Kingdom had raised a very important question. The amendment by Argentina to article 62 (A/CONF.129/C.1/L.57) was an illustration of the difference between substance and form: on the one hand, it proposed a substantive change by adding the words "of a State" to a new subparagraph 2 and, on the other, a change of form by combining paragraphs 2 and 3. The debate on the Soviet Union amendment (A/CONF.129/C.1/L.59) had shown that all delegations were agreed on the substantive point that only States could have boundaries and that only States could determine them. It was clear, therefore, that the changes sought by the two amendments touched on the substance of the article. The Committee should be aware that action of the kind it had taken in regard to article 62 could complicate the work of the Drafting Committee.

47. Mr. STEFANINI (France) endorsed the views expressed by the representatives of the United Kingdom and Switzerland. His delegation could not agree to the transmission of the International Law Commission's text of article 62 to the Drafting Committee together with two amendments which partly contradicted each other. The Drafting Committee was not a negotiating body; it could adapt a text, but it could not be expected to combine two amendments with opposing points of view. If amendments which involved substantive differences were referred to the Drafting Committee, his delegation might well be obliged to refuse to examine them there. Articles on which there was disagreement should be regarded as pending and negotiated elsewhere than in the Drafting Committee.

48. Mr. NASCIMENTO e SILVA (Brazil) said that paragraph 2 of rule 48 of the rules of procedure provided that the Drafting Committee should consider any draft articles referred to it by the Committee of the Whole after initial consideration by that Committee. It was also empowered to prepare draft and give advice on drafting as requested by the Committee of the Whole. Accordingly, the Drafting Committee could send articles back to the Committee of the Whole for further consideration. As he understood it, after initial consideration of a draft article, the Committee of the Whole was entitled to send amendments to that article to the Drafting Committee for an opinion.

49. Mr. MÜTZELBURG (Federal Republic of Germany) said that it was clear from the rules of procedure that the Drafting Committee was not a negotiating body; it should be remembered that international or-

ganizations were entitled to participate in reaching a consensus on matters of substance—in other words, to negotiate—but not to participate in the work of the Drafting Committee.

50. The CHAIRMAN said that it was generally agreed that the Drafting Committee should concentrate on drafting. If discussions which had already taken place in the Committee of the Whole were repeated in the Drafting Committee, the latter should send the article back to the former for further consideration.

The meeting rose at 5.20 p.m.

23rd meeting

Friday, 7 March 1986, at 10.50 a.m.

Chairman: Mr. SHASH (Egypt)

Consideration of the question of the law of treaties between States and international organizations or between international organizations, in accordance with General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985 (A/CONF.129/4)

[Agenda item 11] (*continued*)

Article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization)

1. Mr. HAFNER (Austria), introducing his delegation's amendment to paragraph 1 of article 73 (A/CONF.129/C.1/L.63), said that the article touched on very delicate matters. One of the guiding principles of the present Conference was that, as far as possible, each article should be in line with the corresponding article of the 1969 Vienna Convention on the Law of Treaties.[1] However, paragraph 1 of the International Law Commission's draft of article 73 referred to "the outbreak of hostilities between States parties to that treaty", whereas article 73 of the 1969 Vienna Convention referred only to "the outbreak of hostilities between States".

2. The final wording of that provision of the 1969 Convention had been formulated at the Conference on the Law of Treaties itself, as a result of negotiation: the International Law Commission having decided that the draft articles on the law of treaties should not refer to hostilities at all, two proposals on the point had been submitted, respectively by Hungary and Poland and by Switzerland (A/CONF.39/C.1/L.279 and L.359),[2] and had led the Conference to include the words "outbreak of hostilities between States" in the article.

3. It was clear from the Official Records of the Conference on the Law of Treaties that the reference it had made to hostilities between States, without further qualification, had been deliberate and added in full knowledge of the legal consequences of that formulation. Paragraph (5) of the commentary to the present draft article (see A/CONF.129/4) indicated why the International Law Commission had decided to retain the words "hostilities between States", but gave no reason for the addition of the words "parties to that treaty", notwithstanding the fact that those words could conceivably create a new régime for the administration of treaties which differed not only in wording but also in substance from that of the 1969 Convention, with unforeseeable but possibly far-reaching legal and practical consequences.

4. The present Conference was certainly not the right place to embark, without due preparation, on formulating rules to determine the effect of events such as hostilities on treaties. Since there was no reason to depart from the text of the 1969 Vienna Convention, his delegation proposed that the wording of article 73 of that instrument should be adhered to.

5. Mr. SZASZ (United Nations), introducing the amendment proposed by the International Labour Organisation, the International Monetary Fund and the United Nations (A/CONF.129/C.1/L.65), reminded the Committee that although those organizations had submitted an amendment to article 36 *bis* (A/CONF.129/C.1/L.56), when introducing it (see 19th meeting, para. 23), they had indicated that their real preference was for the deletion of that article, as proposed by the Austrian-Brazilian amendment to article 36 *bis* (A/CONF.129/C.1/L.49).

6. Powerful arguments had been adduced against the deletion of the article, particularly by the Netherlands representative (19th meeting), the most trenchant of them being that, in its absence, the matter with which it dealt would fall under articles 34, 35 and 36. While he did not necessarily agree with that interpretation, it was certainly a possible outcome and had dangerous implications. It would be most undesirable if, in the situations contemplated in article 36 *bis*, States members of international organizations could be regarded as third parties to a treaty. The three international organizations proposing the amendment were therefore submitting it as the appropriate wording for the Committee to adopt if it decided to delete article 36 *bis*, so as to make it clear that the entire subject with which that article dealt was left out of the purview of the draft convention.

[1] See *Official Records of the United Nations Conference on the Law of Treaties* (United Nations publication, Sales No. E.70.V.5), p. 287.

[2] *Ibid.*, document A/CONF.39/14, par. 636.