# United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations

Vienna, Austria
18 February – 21 March 1986

Document:-
**A/CONF.129/C.1/SR.21**

**21st meeting of the Committee of the Whole**

Extract from Volume I of the *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

# 21st meeting

**Thursday, 6 March 1986, at 11.25 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 62* (Fundamental change of circumstances)

1. Mrs. OLIVEROS (Argentina), introducing her delegation's amendment (A/CONF.129/C.1/L.57), said that, in the introductory wording of the document, the words "replace the existing text of paragraph 2" should be corrected to read "replace the existing text of paragraphs 2 and 3".

2. Article 62 dealt with one of the most difficult problems of international law, namely, that of the *rebus sic stantibus* doctrine or principle. The problem of terminating or withdrawing from a treaty on the grounds of a fundamental change of circumstances was as old as the law of nations itself. As Macchiavelli put it, a prince "must not honour his word when it places him at a disadvantage and when the reasons for which he made his promise no longer exist". There had been a long history of attempts to place legal limitations on the non-fulfilment of international agreements on the ground of a fundamental change of circumstances. Article 62 of the 1969 Vienna Convention on the Law of Treaties[1] had achieved a delicate balance between the need to respect the binding character of treaties and that of permitting termination or withdrawal.

3. The International Law Commission had not hesitated to include a provision on fundamental change of circumstances in the form of article 62. It had established two exceptions to the basic rule: that of boundary treaties, set forth in paragraph 2, and the case where the fundamental change was the result of a breach by the party invoking it, set forth in paragraph 3.

4. The first purpose of her delegation's amendment was to merge paragraphs 2 and 3, so as to give the article the same presentation as it had in the 1969 Vienna Convention. That formulation was much clearer and avoided the confusion which paragraph 3 of the draft article created through its repetitiveness and the fact that it did not mention the subject of the right in question. The second purpose of the amendment was to deal with the problem of determining the meaning of the expression "if the treaty establishes a boundary". The use of the term "boundary" without any qualification meant that the expression covered not only treaties of mere delimitation of land territory but also treaties of cession or, in more general terms, treaties establishing or modifying the territory of States. Moreover, although the notion of "boundary" customarily denoted a land limit, it could also be taken more broadly to designate the spatial limits of the exercise of different powers, such as customs lines, the limits of the territorial sea, continental shelf and exclusive economic zone, and also certain armistice lines.

5. The present Conference was not called upon to define what was meant by a boundary, but it could examine whether international organizations could have boundaries. It could not properly be asserted that international organizations could have a territory. That being said, a second question arose, namely, whether an international organization could establish the boundary of a territory; the answer to that question was undoubtedly in the affirmative. Article 62 of the 1969 Vienna Convention had been worded from the traditional standpoint that only States could possess a territory and that only delimitations of territories of States constituted boundaries. The importance of defending the physical integrity of States and their survival as States, notwithstanding any fundamental change of circumstances, explained the emergence in international law of a rule which excluded the termination of treaties establishing a boundary.

6. In the commentary to article 62 (see A/CONF.129/4), the Commission had indicated the possibility that an international organization could have a territory. The delegation of Argentina believed it was conceivable for an international organization to possess a territory, but its position would be totally different from that of a State enjoying sovereignty over it; in particular, it would not be empowered to conclude treaties establishing boundaries for that territory. The present draft left open the possibility of an international organization party to a treaty establishing the boundaries of a territory acting in the name of that territory, in which case it did not seem appropriate for that treaty to enjoy the privilege of irremovability granted by article 62.

7. The considerations she had mentioned led to the conclusion that an international organization should not enjoy the same privileges as a State in the event of a fundamental change of circumstances. In order to make that clear, her delegation's amendment sought to introduce into the article the words "of a State" after the words "establishes a boundary". There would thus be no doubt that the boundaries to which article 62 referred were those intended by the letter and spirit of the corresponding provision of the 1969 Vienna Convention.

8. Mr. AVAKOV (Union of Soviet Socialist Republics), introducing his delegation's amendment

[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.

(A/CONF.129/C.1/L.59), said that article 62 was a particularly complicated and delicate provision. It reflected the clash between two principles: the fundamental rule of treaty law *pacta sunt servanda* and the important exception to it represented by the *rebus sic stantibus* principle, which made it possible to depart from that basic legal norm on the ground of a fundamental change of circumstances. The *rebus sic stantibus* principle had the merit of recognizing that economic and social developments could justify the unilateral repudiation of a *status quo*. It thus tended to make legal norms flexible, and from that point of view was a positive element.

9. He stressed that, in the context of the rule embodied in article 62, it would be mistaken to think only in terms of terminating or withdrawing from a treaty. The fundamental change of circumstances could have more limited results, such as a revision of the treaty or its adaptation to the new circumstances.

10. He recalled that at the 1968-1969 Vienna Conference on the Law of Treaties there had been considerable controversy between the adherents of the *pacta sunt servanda* rule and those of the *rebus sic stantibus* principle. In actual fact there was no real contradiction between the two principles, because they were different in nature. The *pacta sunt servanda* rule was an inalienable principle of international law, whereas the *rebus sic stantibus* principle was an exception which related only to rare cases. The difficulty which arose was that of determining the cases to which the exception applied. As his delegation saw it, the *rebus sic stantibus* principle constituted a strong medicine which should only be used in homoeopathic doses; if abused, it could have undesirable consequences.

11. At the 1968-1969 Conference his delegation had therefore supported article 62 as a well-balanced article which reflected the practice that had developed in the matter. Paragraph 2 of the article was particularly important because it related to the integrity of boundaries. While the wording of the present article 62 was acceptable to his delegation, it had submitted its proposal to amend it by replacing the words "if the treaty establishes a boundary" at the end of paragraph 2 by the words "if the States parties to the treaty establish a boundary on the basis of the treaty". That change of wording would, it believed, improve the article by excluding the possibility of interpreting paragraph 2 as enabling an international organization to be a full-fledged party to a boundary treaty. It would also make it clear that paragraph 2 dealt with State boundaries. His delegation attached great importance to article 62, which dealt with matters of both practical and theoretical interest.

12. Mr. RAMADAN (Egypt) said that article 62 was a delicate and important article. Its provisions were based on the corresponding article 62 of the 1969 Vienna Convention. Paragraph 1 contained the main rule, but his delegation felt that its wording was not sufficiently clear. Paragraph 4 dealt with the possibility of suspending the operation of a treaty in the event of a fundamental change of circumstances. The party invoking that suspension could then endeavour to establish a new balance by renegotiating the treaty with its partners, and this weakened the argument about the objectivity of the rule as a cause of termination of treaties.

13. Paragraph 2 of article 62 contained a new element by comparison with the 1969 text in that it referred to international organizations as well as to States. The text of the paragraph needed to be modified so as to rule out any idea that an international organization could have the capacity to establish boundaries for States. Obviously, an international organization could not exercise sovereign rights over the territory of States; the International Law Commission pointed out in paragraph (8) of its commentary to the article that not a single example could yet be given of such a situation. Clearly, only States could establish boundaries, and the only treaties to which paragraph 2 of the article could refer were those which established a boundary between at least two States.

14. That being so, the question arose whether a treaty establishing a boundary should be excluded from the operation of the *rebus sic stantibus* principle. Two situations could arise. The first was that of a treaty establishing a boundary between States and covered by the 1969 Vienna Convention on the Law of Treaties. In that connection, he reminded the Committee that Egypt had ratified the Convention without making any reservation to article 62.

15. The second case was that of a treaty establishing a boundary between States to which an international organization was a party because the treaty contained provisions concerning functions which the organization was to perform, such as guaranteeing a boundary or performing certain duties in boundary areas. He could think of the example of a war or a frontier dispute between two States; such a conflict might be terminated by a treaty establishing a boundary and containing provisions on a guarantee or inspection of the boundary by an international organization. It might afterwards happen that the organization ran into budgetary difficulties and its competent organs refused to vote the necessary appropriations to meet those commitments, and, at the same time, that a fundamental change of circumstances occurred in that relations between the signatory States improved. Could it be said that the international organization was not entitled to invoke that fundamental change of circumstances in order to withdraw from the treaty? In his delegation's view it should be able to do so.

16. The Egyptian delegation would be grateful if the Expert Consultant would furnish a reply to that question. His own feeling was that the reply would be in the affirmative. It therefore seemed important to amend paragraph 2 of article 62 in order to make it clear that it concerned only the rights and obligations actually related to establishing boundaries between States.

17. The Expert Consultant's opinion would also be welcome on the following hypothesis: a number of States members of a customs union might each yield part of its territory to the union for the purpose of certain operations, and a subsequent change of political circumstances might necessitate the withdrawal of one of those States from the union. Would the exception provided for in article 62, paragraph 2, have the effect

of preventing the State in question from regaining jurisdiction over that part of its territory?

18. In the light of what he had said, the Egyptian delegation, while appreciating the purpose of the Argentine amendment, found difficulty in supporting it because it would permit an international organization to enter into a treaty with only one State which established a boundary of a State. He likewise sympathized with the intention underlying the Soviet amendment, but considered that its wording should be reviewed and clarified, as it opened the way to confusing the boundaries of States and boundaries in the wider sense of limits of place for exercising authority. Futhermore, it did not avoid his delegation's criticism of paragraph 2 of the same article.

19. Mr. CRUZ FABRES (Chile) called attention to the risks to the stability of treaty relations inherent in the doctrine of *rebus sic stantibus*, which, in the opinion of most jurists, should be treated with particular caution. His delegation was especially concerned at the absence of a binding system for the settlement of treaty disputes. Chile had therefore entered a reservation directly affecting article 62 of the Vienna Convention on the Law of Treaties at the time of ratifying the Convention. His comments on the present draft should be understood as being without prejudice to that reservation.

20. The International Law Commission's Special Rapporteur on the topic had explained in his ninth report why it had not been possible to duplicate in the present text the provisions of article 62, subparagraph 2 (*a*), of the 1969 Vienna Convention. To have done so would have been to imply what was unacceptable, namely, that international organizations could dispose of territory. It was the Chilean delegation's view that the Argentine amendment was unacceptable for the same reason. On the other hand, the Commission's present draft of paragraph 2 reflected situations where, for purposes other than that of establishing the boundary itself, international organizations might be parties to a treaty between States establishing a boundary. The term "boundary" should be understood as having exactly the same significance in the present draft as it did in the Vienna Convention.

21. Mr. SOMDA (Burkina Faso) said that, notwithstanding the useful clarification provided by the International Law Commission's commentary to article 62, there still seemed room for improvement in paragraph 2 of the draft, which failed to establish clearly which bodies were entitled to conclude the treaties in question and what boundaries were involved.

22. The Argentine amendment could be said to provide some additional precision in so far as it specified, in subparagraph 2 (*a*), that the boundary in question must be that of a State; on the other hand, the provisions of subparagraph 2 (*b*) of the amendment reintroduced uncertainty by being open to different interpretations. His delegation considered that it posed more questions than it solved, and therefore should not be accepted.

23. The Soviet Union proposal seemed to take better account of the Commission's idea, besides making two points clear rather than one: first, that it was States which were entitled to conclude treaties establishing boundaries; and secondly, that the boundaries in question were those established between States.

24. His delegation supported that amendment. If it was not adopted, it could approve the Commission's draft provided that the words "of a State" were added at the end of paragraph 2.

25. Mr. GAUTIER (France) said that the issue of fundamental change of circumstances should be considered in close connection with that of supervening impossibility of performance—the subject of article 61, which had been accepted without debate.

26. Paragraph 2 of the International Law Commission's text perhaps suffered from the consequences of attempting both to deal with existing situations and to foresee others that might occur with the evolution of the law related to international organizations. It was based on the traditional concept that only States disposed of territory and that only the limits of territories constituted boundaries. His delegation approved the Commission's approach. The paragraph applied basically to treaties between States to which international organizations might, because they were attributed certain functions, also become parties. The Commission had not wished, however, to prejudge the future, and had expressed in very general terms the notion of establishment of boundaries by treaty. Under the circumstances it might be wise to leave well alone. His delegation therefore preferred the text presented by the Commission to the versions which would result from either of the amendments.

27. Mr. ULLRICH (German Democratic Republic) expressed his delegation's acceptance of article 62 in principle; the Soviet Union amendment reflected international practice and seemed likely to make the text clearer, although the English version of the wording of that amendment might be improved. The Argentine amendment had the merit of reflecting the wording used in the Vienna Convention on the Law of Treaties. He suggested that the Committee should approve the Commission's draft in one of two forms: either as amended by the Soviet Union proposal, or as amended along the lines proposed by Argentina, with a modification which took account of the Soviet Union proposal. As far as the Argentine amendment was concerned, he assumed that the conclusion of a treaty establishing a boundary would be performed by at least two States. His delegation would not object to the draft article being transmitted to the Drafting Comittee with the two amendments.

28. Mr. FOROUTAN (Islamic Republic of Iran) concurred with the International Law Commission's view, expressed in paragraph (1) of the commentary to article 62, that article 62 of the 1969 Vienna Convention achieved "a delicate balance . . . between respect for the binding force of treaties and the need to terminate or withdraw from treaties which have become inapplicable as a result of a radical change in the circumstances which existed when they were concluded". The article was to be welcomed for its division of the wording of article 62, paragraph 2, of the 1969 Vienna

Convention into two separate paragraphs. His delegation approved the text presented by the Commission, but would have no objection if the words "of a State" were added at the end of paragraph 2, or, alternatively, if the concluding clause read ". . . if the treaty establishes a State boundary".

29. Mr. SANYAOLU (Nigeria) emphasized the importance for the law of treaties of the principle of *rebus sic stantibus*. The question before the Committee was whether a provision on the subject similar to that in the 1969 Vienna Convention should be made in respect of international organizations. In the Nigerian delegation's view, the answer to that question was in the affirmative.

30. The International Law Commission had pointed out that much consideration had been given to the issue of the capacity of international organizations to be parties to treaties establishing boundaries. The outcome of its deliberations was reflected in the wording of paragraph 2 of the article. His delegation agreed with the Commission that it was possible for an organization to be a party to a treaty establishing a boundary between two or more States. For example, if the United Nations was empowered to administer a territory, it might participate in the conclusion of a treaty with two or more States to delimit the boundary of such a territory.

31. It was his delegation's reading of the amendments by Argentina and the Soviet Union that they excluded such a possibility. It consequently found them unacceptable, and would favour the adoption of the International Law Commission's draft.

32. Mrs. THAKORE (India) said that draft article 62 followed article 62 of the 1969 Vienna Convention in defining strictly the conditions in which recourse could properly be had to the principle of fundamental change of circumstances. Paragraph 2 of the draft article had been worded to express the idea that only States could possess territory and that only a delimitation of territory between States constituted a boundary. Thus, the rule in subparagraph 2 (*a*) of article 62 of the 1969 Convention would apply solely to treaties that established the boundary between at least two States to which one or more international organizations were parties. The International Law Commission had interpreted the word "boundary" in a broad sense as including maritime boundaries.

33. Notwithstanding the doubts expressed regarding the utility of paragraph 2, her delegation considered that it could apply to certain situations that had arisen as a result of the new concepts that had emerged at the Third United Nations Conference on the Law of the Sea. For instance, the International Sea-Bed Authority might be required to conclude agreements establishing lines, some of which might be treated as boundaries. If it did, in addition to boundaries between States there would be boundaries between States and international organizations—in the case in point, between States and the International Sea-Bed Authority. In such a case, paragraph 2 of the article could prove useful.

34. With regard to the Argentine amendment to the article, the addition of the words "of a State" in its subparagraph 2 (*a*) involved a substantive change and would give rise to difficulties; she was therefore unable to accept it. The Soviet Union amendment did not clarify the article to any appreciable extent. She therefore supported the Commission's draft of paragraph 2 of article 62, subject to such drafting changes as might be required.

35. Mr. TEPAVICHAROV (Bulgaria) observed that paragraph 1 of article 62 was sufficiently flexible to accommodate a situation that might arise in the future, since the rule it stated was based on the practice of States. He noted, however, that although the text of the 1969 Vienna Convention had been adapted to suit the requirements of the draft, there were substantital differences in regard to the scope of application of the draft article by States on the one hand and international organizations on the other. That difference stemmed from the distinction that existed between States and international organizations as subjects of international law, and involved three elements of particular importance: the difference in the extent to which the responsibility of an international organization could be engaged without engaging the responsibility of its member States; the capacity of an international organization to be a party to a treaty establishing boundaries; and the practice of international organizations.

36. He agreed with the view that an international organization did not have territory and could not negotiate treaties establishing boundaries, and that it was not for the Conference, but for States, to define what was a boundary. As matters stood, an international organization could delineate a boundary if so requested and empowered by the States concerned, but it could not establish one. Admittedly, as the International Law Commission had pointed out in the commentary to the article, practice in the matter was not conclusive; however, what was needed in the case of article 62 was clarity. His delegation therefore understood the rule stated in paragraph 2 to apply only to treaties establishing boundaries between at least two States to which one or more international organizations were parties. For that reason, it could support the Commission's draft if it was amended in accordance with the Soviet Union proposal and if the English version of the wording proposed by the Soviet Union was corrected to read: "if the States parties have established a boundary by this treaty". His delegation could not support the Argentine amendment because the words "a treaty between one or more States and one or more international organizations" seemed to contemplate a situation in which a State and an international organization could conclude a treaty concerning boundaries.

37. Mr. PISK (Czechoslovakia) said that paragraph 2 of article 62 expressed the principle embodied in the 1969 Vienna Convention that a fundamental change of circumstances could not be invoked in the case of a treaty establishing a boundary. His delegation approved the transposition of that principle to the draft articles. He noted that article 62 had been worded to take account of the traditional view that only States possessed territory and that only a delimitation of the territory of States constituted a boundary. Thus, the only treaties to which the rule laid down in paragraph 2 could apply were treaties establishing boundaries between at least two States where the parties to the treaty

included one or more international organizations. The paragraph implied that an international organization could be a party to such a treaty if it was empowered under the treaty to perform certain functions.

38. A more complex question was whether, given developments in international law, the term "boundary" should be interpreted more broadly than before. On that point it was necessary to proceed on the basis of general consideration about the nature of the principle concerning a fundamental change of circumstances. The exceptions to that basic principle had been defined narrowly because, if a fundamental change of circumstances could be invoked too broadly as a ground for invalidating a treaty, the principle *pacta sunt servanda* would be directly contradicted and the security of treaty relations would be endangered. The exceptional nature of the rule about a fundamental change of circumstances was emphasized by the negative formulation of article 62: "a fundamental change of circumstances . . . may not be invoked . . . unless . . .". The stabilizing effect, and the object, of article 62, paragraph 2, called for adherence to what the 1969 Vienna Convention meant by the term "boundary". In his delegation's view, therefore, it would not be appropriate to extend that term to include, for example, the limits of the continental shelf or the exclusive economic zone.

39. The fact that the exception established in article 62, paragraph 2, applied to treaties in which States established boundaries between themselves would be spelt out more emphatically if it was expressed clearly in the wording of the paragraph. His delegation therefore supported the Soviet Union proposal, which was in keeping with the intention underlying paragraph 2 of the Commission's draft. The condition for the conclusion of the treaty establishing the boundary was that the parties should be at least two States.

40. As to the paragraph 2 proposed by Argentina, the words "a treaty between one or more States and one or more international organizations", taken in conjunction with the proposed subparagraph (*a*), implied that an international organization could participate in establishing the boundaries of a State in a treaty. Accordingly, for the article as a whole, his delegation supported the Commission's wording as amended by the Soviet Union proposal.

41. Ms. WILMSHURST (United Kingdom) said that her delegation approved the International Law Commission's text. Paragraph 1 stated the general principle of *rebus sic stantibus*, while paragraph 2 provided the exception concerning boundaries. The Commission had used wording modelled precisely on that of article 62, subparagraph 2 (*a*), of the 1969 Vienna Convention, and in her delegation's view the Conference should leave it as it was. Her delegation therefore opposed both the Argentine amendment and the Soviet Union proposal.

42. Mr. MONNIER (Switzerland) said that his delegation too approved the International Law Commission's draft. With regard to the amendments of Argentina and the Soviet Union, the concept of boundaries was well established in international law and signified solely political boundaries which delimited the territory of a State. A boundary was a line that determined the geographic area over which the State exercised sovereignty. Thus, the term "boundary" could not denote customs boundaries nor could it apply to maritime limits beyond the territorial sea, such as the continental shelf or economic zone. Within such areas, the riparian State had only certain sovereign powers. The term used in that regard was not "boundary", but rather "outer limits". Consequently, a boundary could only be one between States and established by States. The fact that one or more organizations could be parties to a treaty between States establishing a boundary and conferring on those organizations certain supervisory or other functions altered nothing. Furthermore, the term "boundary" could not apply to the "territory" of an international organization, for international organizations did not have territory as such. That was why an international organization had to establish itself on the territory of a State and conclude a treaty with that State in order to regulate its legal status.

43. In his delegation's view, therefore, the proposal by Argentina to add the words "of a State" after the word "boundary" was unnecessary, as was the Soviet Union proposal. As the *rebus sic stantibus* rule could be invoked only in exceptional cases, as provided in the 1969 Vienna Convention and in the draft article itself, similarly the term "boundary" should be understood as expressing the concept that was traditionally and generally recognized. However, the rearrangement of wording which the Argentine amendment proposed might be referred to the Drafting Committee.

44. Mr. HERRON (Australia) said that his delegation could have accepted a broader reference in paragraph 2 of article 62 to a treaty relating to the status of territory, rather than the existing reference to a treaty establishing a boundary. It saw no need to adopt a restrictive approach to paragraph 2, and could accept the International Law Commission's draft. The Commission had advisedly imported into paragraph 2 a reference to two or more States and one or more international organizations: the reference to two or more States made it sufficiently clear that what was involved were boundaries between States, while the reference to international organizations was appropriate because, in a treaty between States establishing a boundary, functions could conceivably be assigned to an international organization with respect to that boundary or other aspects of the relationship between the States. For instance, the International Sea-Bed Authority, the United Nations Council for Namibia or a body associated with the Antarctic Treaty régime might well be involved in such a treaty. His delegation therefore considered that the Commission's text of paragraph 2 was entirely appropriate, and it did not support either of the amendments.

*The meeting rose at 1.05 p.m.*