

**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.23**

**23rd 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)*

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.<sup>1</sup> 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),<sup>2</sup> 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 formula-

tion. 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.

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

<sup>2</sup> *Ibid.*, document A/CONF.39/14, par. 636.

7. That subject was part of the broader question of the internal law of international organizations and the possible liability of States for acts by international organizations of which they were members. In the draft convention, the question arose only in relation to treaty-making, but it could arise in many other spheres as well, including ordinary commercial agreements, damage to the environment and other means by which an organization might become liable beyond its assets. It would be unfortunate if one small aspect of the large issue of liability of member States was dealt with in the present case on the basis of a draft which did not really please anyone. The proper context in which to consider the whole question might be in the second phase of the International Law Commission's discussion of the relations between States and international organizations.

8. If the amendment which had just been presented was adopted, the title of article 73 would have to be modified. Since the proposal was closely linked to the future of article 36 *bis*, the consideration of which had been postponed, he suggested that the proposed addition to article 73 be taken up jointly with that article.

9. Mr. SAHOVIC (Yugoslavia) said that if the Austrian amendment to paragraph 1 was adopted, the formulation of the article would be much broader than what had been proposed by the International Law Commission. That point might perhaps be referred to the Drafting Committee; all the same, his delegation preferred the Commission's text. He agreed that the consideration of the three-organization amendment should be deferred, as suggested.

10. Mr. STEFANINI (France) said that in general his delegation approved both the substance and the drafting of the article. It would not have objected had it contained reference to succession of international organizations—not for the purpose of assimilating that to succession of States, but to draw attention to the rules applicable to the transition from one organization to another. His delegation welcomed the Commission's decision that the article should not deal with hostilities involving international organizations. However, it should be made clear that the enforcement measures envisaged in Chapter VII of the Charter of the United Nations could not—at least in the opinion of the French delegation—be considered as hostilities.

11. His delegation could support the Austrian proposal, but reserved its position on the three-organization amendment, the consideration of which should be deferred until article 36 *bis* was taken up again.

12. Mr. RADY (Egypt) said that he preferred the wording proposed by Austria to the International Law Commission's draft of paragraph 1, which differed from the text in article 73 of the 1969 Vienna Convention; the reasons for that were not altogether clear, notwithstanding the Commission's commentary. He agreed with the suggestion to defer consideration of the three-organization amendment.

13. Mrs. OLIVEROS (Argentina) supported the Austrian amendment, which reinstated the wording of the 1969 Vienna Convention and made article 73 easier to understand; it also broadened its scope in a manner

which conformed with the International Law Commission's original intention.

14. As to the amendment of the three international organizations, she reminded the Committee that her delegation had supported the proposal to delete article 36 *bis* (see 20th meeting). If the Committee adopted that proposal, her delegation would favour the insertion of the proposed new paragraph 3 in the article and would like its wording to be modified so as to make it clear that the obligations and rights of States which it referred to were obligations and rights that were in conformity with the rules of the international organization. Her delegation felt that both amendments might be referred to the Drafting Committee.

15. Mr. SIEV (Ireland) said there was a marked and significant difference between draft article 73 and article 73 of the 1969 Vienna Convention. The difference lay in the addition of the words "parties to that treaty" at the end of paragraph 1. An examination of the International Law Commission's commentary revealed no explanation for those additional words. His delegation accordingly supported the Austrian amendment, which would have the effect of aligning the draft article with the corresponding provision of the 1969 Convention.

16. The problem raised by the three-organization proposal could not be dealt with at present and must await the Committee's decision on article 36 *bis*.

17. Mr. BARRETO (Portugal) said that the International Law Commission had not given any convincing reason for adding the words "parties to that treaty" at the end of paragraph 1. His delegation would like to hear the Expert Consultant's observations on that point, but it could support the Austrian proposal even without them, because that amendment did not alter the meaning of article 73 as drafted by the Commission. Article 73 and the Austrian amendment should therefore be referred to the Drafting Committee. The Committee should defer the consideration of the amendment of the three international organizations for the reasons stated by other speakers in the meeting.

18. Mr. HERRON (Australia) said that his delegation approved article 73 as proposed by the International Law Commission, but could support the Austrian amendment as well.

19. With regard to the three-organization proposal, his delegation had expressed support for the inclusion of article 36 *bis* in the future convention. The question, therefore, of introducing a paragraph 3 into article 73 if article 36 *bis* was deleted did not yet arise for the Australian delegation. Nevertheless, should article 36 *bis* be deleted, it would be a sensible precaution for the draft articles to contain a saving provision on the lines of the proposal of the three organizations. For the time being, however, his delegation continued to advocate the retention of article 36 *bis*.

20. Mr. RIPHAGEN (Netherlands) supported the Austrian proposal. There was an additional reason for eliminating the words "parties to that treaty": whatever position was eventually taken about the situation of member States with respect to the treaties of an international organization to which they belonged, it was obvious that if hostilities broke out between a

member State and an outside State, those hostilities could not fail to have an influence on the international organization. If the words "parties to that treaty" were retained at the end of paragraph 1, that situation would be excluded from the purview of the safeguard clause which the paragraph contained.

21. The proposal made by three international organizations could only be discussed when the Committee came to deal with article 36 *bis*.

22. Mr. SWINNEN (Belgium) supported the Austrian proposal. The Committee should take no decision on the proposal of the three organizations until it decided whether to retain article 36 *bis*.

23. Mr. ECONOMIDES (Greece) also supported the Austrian proposal, since it would introduce a desirable element of precision into the text. The three-organization proposal did not really fall within the ambit of article 73; basically, it dealt with questions of international responsibility which were outside the scope of the draft convention. His delegation agreed that its consideration should be deferred until the Committee examined article 36 *bis*.

24. Mr. NGUAYILA (Zaire) said that his delegation would have no difficulty in accepting the text proposed by the International Law Commission. It could also support the Austrian proposal. No decision could be taken on the amendment of the three organizations until the Committee settled the question of article 36 *bis*.

25. The CHAIRMAN said that there appeared to be widespread support for the Austrian amendment, as well as general agreement to defer the consideration of the three-organization proposal. Accordingly, if he heard no objection, he would take it that the Committee agreed to refer the International Law Commission's text of article 73, as amended by the Austrian proposal, to the Drafting Committee and to defer the consideration of the other proposal until it had taken a decision on article 36 *bis*.

*It was so decided.*

#### Article 75 (Case of an aggressor State)

26. The CHAIRMAN invited the Committee to consider article 75, to which no changes had been proposed.

27. Mr. MÜTZELBURG (Federal Republic of Germany) said that draft article 75 was identical in substance with article 75 of the Vienna Convention on the Law of Treaties. At the time of signing that Convention, his country had expressed an understanding of the article<sup>3</sup> which his delegation wished to reiterate in order to make its position clear on the identical aspect of the present draft article. Accordingly, it stated that the Federal Republic of Germany, in conformity with article 4, understood the words "measures taken in conformity with the Charter of the United Nations" in draft article 75 as referring to measures decided upon in future by the Security Council of the United Nations

relating to the maintenance or restoration of international peace and security.

28. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee agreed to refer article 75, as proposed by the International Law Commission, to the Drafting Committee.

*It was so decided.*

#### Article 77 (Functions of depositaries)

29. Mrs. OLIVEROS (Argentina) said that she had considerable misgivings about the text of paragraph 2 of article 77, and especially about the use of the conjunction "or" to link subparagraphs (a) and (b). The International Law Commission, in paragraph (9) of its commentary to the article (see A/CONF.129/4), had given a lengthy explanation of that particular point; it ended with a sentence stating that some members of the Commission had considered that the word "or" was unsatisfactory and should either be replaced by "and" or simply be deleted. Her delegation would not in fact oppose the adoption of article 77 as it stood, but it did wish to put on record its misgivings about the unsatisfactory drafting of paragraph 2, which left the door open to difficulties of interpretation.

30. The CHAIRMAN, speaking as the representative of EGYPT, said that he shared the Argentine representative's concern, particularly about subparagraph 2 (b).

31. Mr. HAFNER (Austria) referred to subparagraph 1 (g), under which the depositary was required to register a treaty with the Secretariat of the United Nations. He noted that the scope of Article 102 of the Charter of the United Nations, which provided for the registration of treaties with the Secretariat, had been broadened by the regulations to give effect to Article 102 adopted by General Assembly resolution 97 (I) in 1946, as amended by General Assembly resolution 482 (V) in 1950. Article 10 of those regulations made provision for the filing and recording by the Secretariat of the United Nations *inter alia* of treaties or international agreements other than those entered into by one or more Members of the United Nations. In his delegation's view, therefore, the word "registering" in article 77, subparagraph 1 (g), should not be interpreted as excluding the right of the Secretariat of the United Nations to file and record treaties or international agreements entered into by bodies not Members of the United Nations. Since the same word was used in article 77 of the 1969 Vienna Convention, it was not his delegation's intention to propose an amendment to article 77.

32. Mr. GAUTIER (France) agreed with the remarks made about paragraph 2. His delegation would not oppose the adoption of article 77, but considered that the Drafting Committee should clarify the meaning of that paragraph.

33. Mr. HERRON (Australia) endorsed the view expressed by the Austrian representative about subparagraph 1 (g), pointing out that article 80, paragraph 1, provided not only for the registration but also for the filing and recording of treaties by the Secretariat. His delegation too saw no need to change the wording of draft article 77 from that of article 77 of

<sup>3</sup> *Ibid.*, (United Nations publication, Sales No. E.68.V.7), Summary records of the meetings of the Committee of the Whole, 76th meeting, paras. 44 to 46.

the 1969 Vienna Convention, although the omission in the latter article of a reference to filing and recording did seem to have been a mistake.

34. With regard to paragraph 2, in its written comments<sup>4</sup> the United Nations had expressed its acceptance of the conjunction "or" between subparagraphs (a) and (b), citing by way of example the manner in which the Secretary-General dealt with instruments of accession to the Convention on the Privileges and Immunities of the Specialized Agencies which were accompanied by reservations, namely, that he did not bring them first to the attention of the General Assembly. It might be preferable for the depositary first to act in that way and withhold the matter from the competent organ of the international organization concerned. Even if the word "or" in subparagraph 2 (a) was replaced by "and", the depositary could still rely on the words "where appropriate" in subpara-

<sup>4</sup> See *Yearbook of the International Law Commission, 1982*, vol. II, Part II, p. 136, para. 12.

graph 2 (b) as justification for not bringing a matter before the competent organ. His delegation therefore considered that the replacement of "or" by "and" was unnecessary and that the existing wording should be retained.

35. Mr. BERNAL (Mexico) expressed his support for the remarks made by the Austrian and Australian representatives.

36. Mr. NETCHAEV (Union of Soviet Socialist Republics) said that his delegation too agreed with the observations which had been made concerning the functions of depositaries.

37. The CHAIRMAN said that, in the absence of further comment, he would take it that the Committee wished to adopt article 77 and refer it to the Drafting Committee.

*It was so decided.*

*The meeting rose at 11.50 a.m.*

## 24th meeting

Monday, 10 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 66 (Procedures for arbitration and conciliation) and**

**Annex (Arbitration and conciliation procedures established in application of article 66)**

1. Mr. AVAKOV (Union of Soviet Socialist Republics), introducing his delegation's amendments to article 66 (A/CONF.129/C.1/L.60) and the annex (A/CONF.129/C.1/L.61), said that the problem with which article 66 dealt was quite an old one but was at the same time new. It had been considered anew at all the six Vienna codification conferences, although in principle it remained the same.

2. International arbitration was one of the oldest institutions in international law, and its creation and development were associated with the search for legal means for the peaceful settlement of disputes. It implied, on the one hand, a special procedure for considering and settling international disputes and, on the other, temporary international bodies established by mutual agreement between States for the settlement either of specific types of disputes or of disputes in general.

3. The practical experience of such arbitration was as yet only limited. Between 1900 and 1940, only 23 cases had been referred to the Permanent Court of Arbitration at The Hague, and from 1940 to the present, only two. Arbitration was sometimes also carried out on an *ad hoc* basis. The distinctive feature of international arbitration was that the procedure was established by the parties to the dispute themselves and the decision was binding on them. Arbitration was dealt with in Article 12 of the Covenant of the League of Nations, and delegations would be familiar with the failure of arbitration in that context in 1938 and 1940.

4. The desirability of parties to any dispute seeking a peaceful means of settlement of their own choice was enshrined in Article 33 of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), of 24 October 1970, annex). Part V of the Final Act of the Conference on Security and Co-operation in Europe signed at Helsinki on 1 August 1975 and the Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10, of 15 November 1982, annex).

5. Under present conditions, however, the concept of limiting the sovereignty of States in favour of international legal institutions appeared to be unrealistic: at best a tribute to pacifism and idealism, at worst a means of exerting pressure on those countries adopting a more balanced position towards the possibility of using international arbitration and other legal institutions. That