

Document:-
A/CN.4/SR.1723

Summary record of the 1723rd meeting

Topic:
Treaties concluded between States and international organizations or between two or more international organizations

Extract from the Yearbook of the International Law Commission:-
1982, vol. I

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53. Mr. USHAKOV said that the answer would be easy if the Commission really dealt, in a general way, with international organizations having exclusive competence. However, it had confined itself to the case in which the rules of the organization provided that a treaty it concluded created obligations for member States. If an ordinary organization, having concluded a treaty that created obligations for its member States which they had explicitly accepted in writing, then withdrew from the treaty, it was clear that the obligations accepted by the member States under collateral agreements, would subsist. But the draft did not say what would happen in such a case to the obligations assumed by States members of an organization to which they had transferred exclusive competence to conclude treaties. It was because article 36 *bis* dealt with the case in which that competence had been transferred, that it was necessary to solve the problems arising from that case in other articles of the draft.

54. Mr. LACLETA MUÑOZ said that the question whether States members of an international organization were third parties with respect to a treaty concluded by the organization had been discussed extensively at the Third United Nations Conference on the Law of the Sea, in connection with the legal nature of the exclusive economic zone. Technically, member States were third parties, yet substantively, they had the same rights and obligations as if they were parties. However, article 36 *bis* was worded in such a way as to dispel doubts. From a technical-legal point of view, the member States were third parties, and for that reason articles 57, 56 and 54 should be read technically: it was the conduct of the international organization which was decisive in matters of termination of, withdrawal from, or denunciation of a treaty. Read in that way, those articles raised no difficulties.

The meeting rose at 1.00 p.m.

1723rd MEETING

Wednesday, 9 June 1982, at 10.05 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (continued) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING² (continued)

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties)³ (concluded)

1. The CHAIRMAN, noting that members of the Commission had no further comments to make, suggested that article 57 should be referred to the Drafting Committee.

*It was so decided.*⁴

ARTICLE 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only)

2. The CHAIRMAN invited the Commission to consider article 58, which had not given rise to any comments by Governments or international organizations and which read:

Article 58. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:

- (a) the possibility of such a suspension is provided for by the treaty; or
- (b) the suspension in question is not prohibited by the treaty, and:
- (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

3. Mr. USHAKOV said that, if article 36 *bis* was retained in its present form, article 58 would give rise to the same type of difficulties as the preceding articles. Under articles 35 and 36 of the draft, it was by means of a collateral agreement that a third State could assume obligations arising for it from a treaty. Direct relations were thus established between the parties to the collateral agreement and the rights and duties deriving from it subsisted, regardless of the fate of the treaty. There was obviously nothing to prevent the parties to the collateral agreement from deciding to amend that agreement. It could be asked whether collateral agreements also existed in the case covered by article 36 *bis*. If so, the rights and obligations of the member States would not depend on the fate of the treaty. If, however, the treaties concluded by the organization really automatically gave rise to rights and obligations

² The draft articles (arts. 1 to 80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

³ For the text, see 1722nd meeting, para. 44.

⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 58.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

for the member States of that organization and if the organization then decided to suspend the operation of those treaties, the rights and obligations of the member States might also be suspended. That problem had not been solved because article 36 *bis* referred only to the relevant rules of the organization providing that the member States were bound by the treaties concluded by the organization. Reference would therefore have to be made to the relevant rules of the organization relating to the denunciation of treaties.

4. Mr. JAGOTA said that the Special Rapporteur could perhaps clarify the question to which Mr. Ushakov had repeatedly drawn attention, namely, that of the correlation between article 36 *bis* and other articles of the draft. Article 58 dealt with the suspension of the operation of a multilateral treaty as between some of the parties, which could be States or international organizations. If some of the parties wished to modify certain of the treaty provisions in their relations *inter se*, they could temporarily suspend the general provisions and then modify them by concluding a collateral agreement as between themselves. A specific example was provided by the Convention on the Law of the Sea,⁵ to which an international organization such as EEC could become a party. It was his understanding that, if EEC wanted to suspend the operation of the provisions of that treaty, it was free to do so under article 58. It could conclude a collateral agreement regarding certain matters with, for example, Morocco. The question whether the members of EEC had surviving rights and obligations or whether the suspension applied *ipso facto* to the members of the international organization was not regulated by article 36 *bis*, and was thus covered by article 58. As he saw it, once EEC concluded a separate agreement with Morocco suspending certain provisions of the Convention on the Law of the Sea, that suspension applied to all members of EEC. If that was not the case, the provisions of article 36 *bis* should be re-examined. Otherwise, the Commission ran the risk of interfering in the internal relations of the members of an international organization, a matter that was not governed by the law of treaties concluded between States and international organizations or between international organizations.

5. Mr. REUTER (Special Rapporteur) said that he had no intention of repeating the explanations he had already given on several occasions. As to the comments made by Mr. Jagota, he said he agreed that, at the present stage of drafting, the definition of the member States of an international organization was such that those States were not parties. Accordingly, the article under consideration could be referred to the Drafting Committee. The question how article 36 *bis* would be interpreted in its final form was one with which the Commission would deal later, because that article was now before the Drafting Committee. He wished to make it clear that he found it inappropriate to take particular account of the case of organizations to which exclusive

competence had been transferred. He was therefore of the opinion that all the problems that had been raised related to a case which the Commission did not have to consider.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 58 to the Drafting Committee.

*It was so decided.*⁶

ARTICLE 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty)

7. The CHAIRMAN invited the members of the Commission to consider article 59, which had not given rise to any comments by Governments or international organizations and which read:

Article 59. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

8. The CHAIRMAN, noting that no member of the Commission wished to speak on article 59, suggested that it should be referred to the Drafting Committee.

*It was so decided.*⁷

ARTICLE 60 (Termination or suspension of the operation of a treaty as a consequence of its breach)

9. The CHAIRMAN invited the Commission to consider article 60, which had not given rise to any comments by Governments or international organizations and which read:

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it, either:

(i) in the relations between themselves and the defaulting State or international organization, or

(ii) as between all the parties;

(b) a party especially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State or international organizations;

⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 58.

⁷ *Idem.*

⁵ See 1699th meeting, footnote 7.

(c) any party other than the defaulting State or international organization to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

10. The CHAIRMAN noting that no member of the Commission wished to speak on article 60, suggested that it should be referred to the Drafting Committee.

It was so decided.⁸

ARTICLE 61 (Supervening impossibility of performance)

11. The CHAIRMAN invited the Commission to consider article 61, which had not given rise to any comments by Governments or international organizations and which read:

Article 61. Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

12. The CHAIRMAN, noting that no member of the Commission wished to speak on article 61, suggested that it should be referred to the Drafting Committee.

It was so decided.⁹

ARTICLE 62 (Fundamental change of circumstances)

13. The CHAIRMAN invited the Commission to consider article 62, which read:

Article 62. Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations and establishing a boundary.

3. A fundamental change of circumstances may not be invoked by a party as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke the change as a ground for suspending the operation of the treaty.

14. Mr. REUTER (Special Rapporteur) said that a lengthy commentary had been devoted to article 62.¹⁰ Without referring to specific paragraphs of that commentary, several Governments had expressed the view that too much equality had been established between States and international organizations. It was to be noted that the Commission had spent a great deal of time on the drafting of article 62, paragraph 2, and that it had ultimately referred to a treaty between "two" or more States and one or more international organizations in order to draw attention to a boundary problem that could arise only in connection with a boundary between States. That meant, not that an international organization could not be a party to a treaty establishing a boundary between States, but rather, that at least two States must also be parties to such a treaty. In the commentary to article 62, the Commission had explained why it had not been possible to expand the meaning of the term "boundary". He therefore saw no reason to amend that article.

15. Mr. NI said that article 62 involved a problem of structure. Paragraph 2 of the corresponding article of the Vienna Convention provided for two exceptions: (a) if the treaty established a boundary; or (b) if the fundamental change was the result of a breach of an obligation by the party invoking it. In draft article 62 as it now stood, paragraph 2 of the Vienna Convention had been divided into two separate paragraphs, paragraphs 2 and 3. That change could have been made for either of two reasons: in order to highlight the presence and participation of international organizations in the treaty-making process, or in order to deal with questions of a different nature in two separate paragraphs. There might have been other reasons as well, but the result was not very satisfactory. The wording of paragraph 2 was somewhat unclear and an explanation of the implications of that provision in its present form would be desirable. Because of the absence of the introductory part of the corresponding provision of the Vienna Convention, the present wording of paragraph 3 was, moreover, necessarily repetitive and cumbersome. Perhaps the Commission could use the same wording as the Vienna Convention; although it did not specifically mention international organizations, they were amply covered by the definition of the term

⁸ *Idem.*

⁹ *Idem.*

¹⁰ *Yearbook ... 1980*, vol. II (Part Two), pp. 81-83.

“treaty” contained in article 2, subparagraph 1 (a), of the draft.

16. Mr. CALERO RODRIGUES said that he shared the views expressed by Mr. Ni. According to paragraph 2, the Special Rapporteur considered that a treaty between two or more States and one or more international organizations represented the only case in which the type of treaty being dealt with in the draft articles could apply to the establishment of a boundary. It was, however, obvious that a boundary could not be established by a treaty to which an international organization was a party unless two or more States were also parties to that treaty. Article 62, paragraph 2, of the Vienna Convention fully covered that case, and its structure and wording should therefore be retained.

17. Mr. FRANCIS said that article 62, paragraph 2, referred to the situation before the entry into force of the Convention on the Law of the Sea. Since a sea-bed Area would come under the jurisdiction of the International Sea-Bed¹¹ Authority and each State was entitled to delineate its territorial sea within given limits, he wondered whether a boundary problem could arise between a State and the Authority, thus calling in question the scope of paragraph 2.

18. Mr. USHAKOV said that, in his view, the *rebus sic stantibus* rule, which had given rise to many difficulties in the Vienna Convention, gave rise to even more in the draft under consideration. Article 62, paragraph 2, of the draft was based on article 62, subparagraph 2 (a), of the Vienna Convention, which provided that a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty if the treaty established a boundary. Although it was not the Commission's task to interpret the term “boundary” within the meaning of the Vienna Convention, it could be said that that term meant a boundary between the respective jurisdictions of two States. The term “boundary” should probably have the same meaning in the draft under consideration. A problem nevertheless arose because an international organization had no boundaries and could not conclude a treaty establishing a boundary between the jurisdictions of States. That was why it had not been possible to use the term “treaty” in article 62, paragraph 2, of the draft without specifying that such a treaty was a treaty concluded between at least two States, with the participation of one or more international organizations. Although practice did not appear to offer any examples of a treaty of that kind, the Commission had been of the opinion that such a treaty was possible, and it had drafted article 62, paragraph 2, accordingly. If such a treaty was thought to be inconceivable, that view would have to be explained in the commentary and paragraph 2 would have to be deleted.

19. Mr. SUCHARITKUL thanked Mr. Ushakov and Mr. Francis for raising a very interesting point, of which he would like to give examples. Whether or not the

Commission was called upon to interpret the Vienna Convention, it had to be acknowledged that the notion of boundaries between States had changed fundamentally and taken on a new dimension, namely, that of maritime boundaries. In addition to a possible maritime boundary between a State and the sea-bed, there were also maritime boundaries between adjacent States and between opposite States. Specific examples were provided by the various coastal States of South-East Asia, which had concluded maritime boundary treaties, and by the European States of France and Spain, which shared a certain undelimited area of the sea-bed that was operated by a joint authority. It would therefore be neither impossible nor inconceivable for a treaty establishing a maritime boundary between, for example, Viet Nam, Thailand and Malaysia, to be signed by the three countries and the joint authority, which would have to become a party to that treaty since it would exercise a great deal of sovereignty collectively within that limited sea-bed area. In cases such as the ones he had just mentioned, article 62, paragraph 2, might be useful.

20. Mr. JAGOTA said that he was in favour of retaining article 62, paragraph 2, in its present form. Although paragraphs 2 and 3 had been combined in the Vienna Convention, the separation in article 62 of the draft was justified on the ground that the parties were different for the two purposes mentioned. Article 62, paragraph 2, like article 63, referred to a specific type of treaty, namely, a treaty between two or more States and one or more international organizations. That specification was intended to emphasize the boundary element in the two provisions. If paragraphs 2 and 3 were combined and no reference was made to the parties to the treaty, the provision might be open to a different interpretation. Some doubt had also been expressed about the utility of paragraph 2. It had been argued that, if that paragraph referred only to boundaries between States, it was confusing and that it was the rule laid down in the Vienna Convention that should apply. If, however, the concept on which that paragraph was based was broader and it could refer to a boundary situation involving an international organization, then it should be retained and it should not be limited to boundaries between States.

21. In article 62, no specific reference was made to boundaries between States, whereas article 63 did refer to the severance of diplomatic or consular relations between States. There were two reasons for that omission: first of all, no reference to boundaries between States had been included in the Vienna Convention and, secondly, the omission made it possible to apply that provision to other situations, such as the ones resulting from the new concepts that had emerged from the Third United Nations Conference on the Law of the Sea. All the work carried out at the United Nations Conference on the Law of the Sea since its first session in 1973 had aimed at defining the limits of national jurisdiction in maritime matters. After years of discussion, the Conference had agreed on specific limitations, which were provided for in detail in the Convention. Those limita-

¹¹ Part XI of the Convention (see 1699th meeting, footnote 7).

tions would be defined precisely by the coastal States concerned in consultation with an international boundary commission. Beyond those limits, the international sea-bed area would be under the control of the International Sea-Bed Authority. Apart from questions of boundaries between States, therefore, there would be the question of boundaries between States and an international organization, namely, the Authority. In such a case, paragraph 2 would prove to be useful.

22. Mr. FLITAN said that he fully endorsed the commentary to article 62. The Commission must, in so far as possible, confine itself to transferring the provisions of the Vienna Convention to the draft. With regard to treaties which established boundaries, it had reached the conclusion that there could be treaties concluded between two or more States and one or more international organizations in connection with a boundary. In the commentary to article 62, it had even referred to the case in which an international organization guaranteed the boundaries between certain States. The Vienna Convention obviously did not cover such cases, since it dealt only with relations between States.

23. However important the trends which had emerged from the Third United Nations Conference on the Law of the Sea might be, the Commission should be careful not to interpret the term "boundary", within the meaning of the Vienna Convention, too narrowly or too broadly, because that term could not have a broader meaning in the draft than it did in the Vienna Convention. The draft should therefore relate only to boundaries between States.

24. Mr. REUTER, speaking as a member of the Commission, said that the Commission was dealing with a rule which had a bearing on the particular legal effect of boundaries and was quite plainly based on a desire for peace: any treaty establishing a boundary had a definite stabilizing effect. The Vienna Convention obviously dealt with terrestrial boundaries; at the very most, it could also relate to the boundaries of the territorial sea. A political problem nevertheless arose as a result of the fact that there were other lines of delimitation and lines would probably separate the jurisdiction of States from that of an international entity. It remained to be seen whether the international community also intended to make those lines stable. None of the members of the Commission who had closely followed the work of the Third United Nations Conference on the Law of the Sea had affirmed that intention, and it was not for the Commission to take a stand on that point. In his own view, the Commission must be extremely cautious. It would be very bold to say that the rule that boundaries could not be changed would be a basic element of the position of an international organization which concluded with two States a treaty establishing a boundary. Although he could agree that the organization might make a commitment, the most typical being a commitment to guarantee a boundary, and that the exception of article 62 would apply to each State with respect to the other, he did not think that that exception would apply to the guarantee by the organization because, if there

was a fundamental change of circumstances, would the organization have to consider that its commitments were also immutable? If so, article 62, paragraph 2, could not be retained, but he would not go as far as that. Perhaps the commentary could indicate that, even though it had still had some doubts, the Commission had not wanted to delete paragraph 2.

25. Speaking as the Special Rapporteur, he said that there were several possible solutions. Despite the serious doubts they had expressed, neither he, as a member of the Commission, nor Mr. Ushakov had proposed such a radical solution as the deletion of paragraph 2. Some members of the Commission had stated that they were in favour of retaining paragraph 2 in its present form. Others, thinking of the future, had suggested that reference should not be made only to treaties concluded between "two" or more States, because that would imply a reversion to the wording of article 62 of the Vienna Convention. That solution would nevertheless make it necessary to include in the commentary quite a few of the comments made during the discussion, in the view expressed by Mr. Calero Rodrigues that the article under consideration quite obviously applied to a boundary between States.

26. Mr. USHAKOV stressed the fact that the term "boundary" must have the same meaning in the draft and in the Vienna Convention. It was States, and not the Commission, that must interpret that term.

27. Mr. JAGOTA said that, if the present paragraph was retained, all his earlier comments would have been reflected. Any further comments he might make should be included in the commentary.

28. Mr. SUCHARITKUL said he agreed with Mr. Ushakov and Mr. Jagota that the term "boundary" must be interpreted as including maritime boundaries. The International Court of Justice had already taken a position on that question in the *Aegean Sea Continental Shelf* case,¹² indicating that the term "boundary" included maritime boundaries.

29. Mr. RIPHAGEN said that, if paragraph 2 really related only to boundaries between States, the situation was covered by article 3, subparagraph (c), of the Vienna Convention. He would, however, not rule out the possibility that an international organization and a State might conclude a treaty relating to the boundary of the State in the case, of course, in which the international organization was responsible for the administration of a territory. In such a case, the same reasons would prevent a fundamental change of circumstances from being invoked with regard to a treaty establishing a boundary. He agreed with the Special Rapporteur on that point.

30. Perhaps it would be advisable to divide the text drawn on article 62, paragraph 2, of the Vienna Convention into two paragraphs, since the two cases referred to in that paragraph had nothing to do with each

¹² *I.C.J. Reports 1978*, p. 3.

other. Stability of international relations, to which the Special Rapporteur had referred, was in no way involved in the second case.

31. Mr. FLITAN said he did not think that the Vienna Convention applied to a treaty concluded between two States and an international organization and establishing a boundary between those States. The effect of the participation of the organization in such a treaty was that legal relations were established not only between the two States, but also between the organization and the two States. The organization was thus under an obligation to respect the boundary established by the treaty. By way of example, he referred to a regional multilateral treaty which related to certain activities that could be carried out in boundary areas and to which the parties were the Danube Commission and the member States of that Commission. The Vienna Convention, which governed only relations between States, did not provide for a case of that kind. He was thus in favour of retaining paragraph 2 of the article under consideration.

32. Mr. RIPHAGEN pointed out that, in the case mentioned by Mr. Flitan, the Danube Commission, which was an international organization, was not a party to the treaty at all. Neither was the Central Commission for the Navigation of the Rhine a party to the Act of Mannheim.¹³ A different situation was involved. The international organization which had been established by the treaty had no specific obligations as a party. If it was a party to the treaty, in the sense that it assumed certain obligations in certain situations, then it could be asked whether a fundamental change of circumstances was really excluded. The boundaries between States were inviolable and a fundamental change of circumstances could not be invoked to alter them, but, as the Special Rapporteur had pointed out, a fundamental change of circumstances was accepted as far as the functions or obligations of an international organization were concerned.

33. Mr. REUTER (Special Rapporteur) said the Commission had always considered that the draft must, in all cases, embody the rules of the Vienna Convention that applied to relations between States. Indeed, the fate of the draft was not known and it was possible that it would be intended for entities other than the States parties to the Vienna Convention. There was nothing to prevent the Commission from referring in the commentary to article 3 (c), of the Vienna Convention, on the understanding that that provision was binding only on the States parties to that instrument.

34. With regard to the *Aegean Sea Continental Shelf* case, it should be made clear that the International Court of Justice had taken a position on the term "boundary" only within the framework of a specific arbitration treaty. It was, for the time being, not possible to know what meaning States would attribute to the

term "boundary" as used in the Vienna Convention or what other lines of delimitation would be regarded as absolutely stable. Referring to the case of an arbitral award relating to a boundary question, he said that it could be asked whether the rule that boundaries could not be changed also applied to such an award. Could a *rebus sic stantibus* clause be invoked to claim that an arbitral award was a legal act resulting from the treaty by which the jurisdiction of the arbitral tribunal had been accepted and that, consequently, article 62 might or might not apply?

35. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 62 to the Drafting Committee.

*It was so decided.*¹⁴

ARTICLE 63 (Severance of diplomatic or consular relations)

36. The CHAIRMAN invited the Commission to consider article 63, which read:

Article 63. Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between States parties to a treaty between two or more States and one or more international organizations does not affect the legal relations established between those States by the treaty except in so far as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

37. Mr. REUTER (Special Rapporteur) said that article 63 defined the treaties in question as treaties concluded between two or more States, since diplomatic or consular relations existed only between States, and not with international organizations. At its thirty-second session in 1980,¹⁵ however, the Commission had considered the question whether article 63 should not also apply to the severance of relations which might be described as "organic" or "institutional" and were established between international organizations and their member States and, sometimes, non-member States, through missions, whose role was, of course, very different from that of embassies or consulates. Although the Commission had found that idea acceptable, it had noted that it should already have been taken into account in the Vienna Convention itself. Since that was not the case, there had been some hesitation about including in the draft articles under consideration a text which would, in a way, draw attention to a gap in the Vienna Convention. No formal objection had, however, been raised in the Commission, and one Government had even requested the Commission to explore the possibility of making the rule enunciated in article 63 applicable to the case of the specific institutional relations that were established between international organizations and States; another Government had joined in that request. He pointed out that that question

¹³ Revised Convention for the Navigation of the Rhine, signed at Mannheim on 17 October 1968 (text in Council of Europe, *Annuaire européen, 1956* (The Hague), vol. II, p. 258).

¹⁴ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 59.

¹⁵ See *Yearbook ... 1980*, vol. I, pp. 19-20, 1588th meeting, paras. 17-20 (summary of the debate by the Special Rapporteur).

would also arise indirectly in article 74, but that there was nothing to prevent the Commission from settling it now in connection with article 63.

38. Mr. USHAKOV said he also did not think that relations between an international organization and its member States, or non-member States, could be described as “diplomatic relations” or “consular relations”. It was therefore neither possible nor necessary to deal with such relations in the present title of article 63, namely, “Severance of diplomatic or consular relations”. He also pointed out that relations between the host State of an international organization and the sending State were governed by the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, article 82 of which was a safeguard clause. Lastly, he said that, in this opinion, it was not really necessary to expand the scope of article 63, whose present wording was entirely satisfactory.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 63 to the Drafting Committee.

*It was so decided.*¹⁶

ARTICLE 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

40. The CHAIRMAN invited the Commission to consider article 64, which read:

Article 64. Emergence of a new peremptory norm of general international law (jus cogens)

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

41. Mr. REUTER (Special Rapporteur) said that article 64 had not given rise to any comments by Governments or international organizations and that he himself had none to make.

42. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 64 to the Drafting Committee.

*It was so decided.*¹⁷

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

43. The CHAIRMAN invited the Commission to consider article 65, which read:

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

1. A party which, under the provisions of the present articles, invokes either a defect in its consent to be bound by a treaty or a ground

for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

4. The notification or objection made by an international organization shall be governed by the relevant rules of that organization.

5. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

6. Without prejudice to article 45, the fact that a State or an international organization has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

44. Mr. REUTER (Special Rapporteur) said that the Commission had been of the opinion that the procedure provided for in article 65 was the minimum that could be done and the maximum that could be envisaged. That article introduced a procedure which related to all of part V of the draft and was based on an obligation of notification, of grounds and, in the case of an objection, on an obligation to seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

45. Perhaps the most important legal effect of article 65 was that it established a moratorium: when a party considered that it had grounds for invoking the invalidity, termination, withdrawal from or suspension of the operation of a treaty, it must make a notification to that effect to the other parties, and the date of the notification would be the starting point for a minimum period of three months during which that party could not, except in cases of special urgency, take any action. If, upon expiry of the period in question, no objection had been raised, the party was free to act or, in other words, to make a unilateral assessment of the situation. It was precisely that period that had given rise to controversy. Within the Commission,¹⁸ it had been asked whether a period of three months was not too short for an international organization, whose governing bodies and, in particular, the organs authorized to take a decision relating, for example, to an objection, might not be meeting during that period.

46. The three-month period had nevertheless been retained because the Commission had been of the opinion that there was always, within an organization, one organ which was permanently in session and could duly raise an objection; such an objection would, of course, give rise to a dispute and to the right to contest the measure taken, but since it could also very easily be

¹⁶ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 60.

¹⁷ *Idem.*

¹⁸ *Yearbook ... 1980*, vol. I, pp. 21-23, 1588th meeting, paras. 34, 43 and 46.

withdrawn, it could serve as a safeguard measure and enable the organ that was competent to take a final decision to do so later. One Government had, moreover, been of the opinion that it would be very difficult to provide in article 65 for two different periods: a three-month period for a State and a period of at least one year for an international organization. That would amount to creating serious discrimination against States and in favour of international organizations. The Commission therefore had to choose between a single period—three months or more—both for States and for international organizations and a period of three months for States and a longer period for international organizations.

47. Mr. NI said that it was unclear whether paragraph 4, which did not appear in article 65 of the Vienna Convention, referred to the general idea of a notification or objection made by an international organization or only to aspects such as the need for such a notification or objection and the form and circumstances in which such a notification or objection could be made. That lack of clarity might enable international organizations to adopt measures that were inconsistent with the practice provided for in the draft as a whole. He would therefore like to know whether the Special Rapporteur thought that the addition of the words “which are not inconsistent with the provisions of the present section” at the end of paragraph 4 would make that provision clearer.

48. Mr. REUTER (Special Rapporteur) said that paragraph 4 dealt primarily with observance of the rules of competence by an international organization and not with existence of rules which would give specific effects to notification or objection. That provision, which the Commission had considered important because it constituted a reminder, was to be found in many other articles, but, in fact, it added nothing. If the Commission so wished, it could specify that the rules in question were the relevant rules governing the competence of the organs of an international organization.

49. Mr. USHAKOV said that, in his opinion, no problem of discrimination between a State and an international organization arose, because States and international organizations were two entirely different subjects of law. It was, however, true that the determination of the period that would be applicable to international organizations gave rise to many difficulties because the machinery of an international organization was slower to get under way than that of a State and because, apart from the secretariat, some of its organs were not permanently in session. In paragraph 2, it might therefore be appropriate to use words such as “a reasonable period” to refer to international organizations on the understanding that, in each case, account would be taken of the particular circumstances of each international organization. Perhaps it would also be appropriate to delete, in that same paragraph, the words “except in cases of special urgency”, which did not appear to apply to the case of international organizations.

In any event, it would be for the Drafting Committee to propose the appropriate wording.

50. Mr. BALANDA said that he endorsed the comments by Mr. Ushakov. In his own view, the Commission should take account of the special nature of international organizations, which was, of course, different from that of States, without fear of creating discrimination between States and international organizations. The Commission had, moreover, already agreed, provisionally at least, to introduce some flexibility in the means of the expression of the consent of international organizations. The real problem was, in fact, one of determining how much time international organizations should have, since their organs obviously did not all meet at the same time.

51. Mr. REUTER (Special Rapporteur), speaking as a member of the Commission, said that, in his view, the comments by Mr. Ushakov and Mr. Balanda were not justified, because an extension of the period would amount to denying the competence of international secretariats—permanent organs—on the basis of the principle that only intergovernmental organs could raise an objection.

52. An international organization must, moreover, not be denied the benefit of the special urgency rule, because, as a party which might, for example, have invoked a ground for the invalidity of a treaty relating to the establishment of a peace-keeping force, to security matters or even to economic matters, an organization must be able to denounce such a treaty immediately and be entitled to take measures immediately. In the opposite situation, when it was a State that had taken the initiative of invoking a ground of invalidity, the problem was one of determining how much time the organization would have to raise an objection, or in other words, to give rise to a dispute. He did not see why an intergovernmental organ should not instruct a secretariat to raise an objection automatically when a State tried in some way to attack a treaty. There would be an objection, and thus a dispute, whose settlement would be delayed until the competent organ met and took the necessary measures either to settle the dispute or to withdraw the objection; but, in such a case, the objection would be only a safeguard measure and nothing more. Organizations could adapt perfectly well to the situation provided for in article 65 because they were protected by the provision of paragraph 4. The words “a reasonable period” proposed by Mr. Ushakov might create discrimination between two organizations whose situations were different.

53. Mr. USHAKOV said that, in his mind, the period related only to the objection and not to the notification. Accordingly, he would not press his proposal for the use of the words “a reasonable period”.

54. Mr. REUTER (Special Rapporteur) said that, if his understanding was correct, the words “except in cases of special urgency” would be retained in the case where it was an organization which made a notification of its ground for terminating a treaty. In other words,

an organization could, in such a case, make a notification without any time limit and take action before the expiry of the three-month period. It could act in the same way as a State, which was, in cases of special urgency, entitled to take the measure in question before the expiry of the three-month period.

55. Mr. RIPHAGEN said he did not think that paragraph 2 meant that an objection could not be made after the expiry of the three-month period. An objection could, in fact, be made at any time. Paragraph 2 also did not mean that a party which took unilateral action was justified in that action, to which an objection could always be made. Legally speaking, paragraph 2 was therefore not of any great importance, particularly in the light of paragraph 6, because if a party considered a treaty to be invalid, it could simply stop performing that treaty. Paragraph 2 could therefore be modelled on the corresponding provision of the Vienna Convention.

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 65 to the Drafting Committee.

*It was so decided.*¹⁹

The meeting rose at 1 p.m.

¹⁹ For consideration of the text proposed by the Drafting Committee, see 1740th meeting, paras. 2 and 61.

1724th MEETING

Thursday, 10 June 1982, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/341 and Add.1,¹ A/CN.4/350 and Add.1-11, A/CN.4/353, A/CN.4/L.339, ILC (XXXIV)/Conf. Room Doc. 1 and 2)

[Agenda item 2]

DRAFT ARTICLES ADOPTED BY THE COMMISSION:
SECOND READING² (*continued*)

ARTICLE 66 (Procedures for judicial settlement, arbitration and conciliation) *and*

ANNEX (Procedures established in application of article 66)

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² The draft articles (arts. 1-80 and annex) adopted on first reading by the Commission at its thirty-second session appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 65 *et seq.* Draft articles 1 to 26, adopted on second reading by the Commission at its thirty-third session, appear in *Yearbook ... 1981*, vol. II (Part Two), pp. 120 *et seq.*

1. The CHAIRMAN invited the Commission to consider draft article 66 and the annex thereto, which read:

Article 66. Procedures for judicial settlement, arbitration and conciliation

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to another State, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by an international organization with respect to another organization, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

3. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised by a State with respect to an international organization or by an organization with respect to a State, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the Annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

ANNEX

Procedures established in application of article 66

I. ESTABLISHMENT OF THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present articles [and any international organization to which the present articles have become applicable] shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph. A copy of the list shall be transmitted to the President of the International Court of Justice.

2. When a request has been made to the Secretary-General under article 66, the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

(a) In the case referred to in article 66, paragraph 1, the State or States constituting one of the parties to the dispute shall appoint:

(i) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(b) In the case referred to in article 66, paragraph 2, the international organization or organizations constituting one of the parties to the dispute shall appoint: