Document:-
A/CN.4/SR.739

Summary record of the 739th meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1964, **vol. I**

47. He agreed with Mr. Elias that it would be advisable to drop article 63 altogether. The best method of dealing with the subject would be to include a passage in the commentary drawing attention to some of the objective effects of treaties and to the difficulty of dealing, within the scope of the law of treaties, with a matter that was closely bound up with other branches of international law. When the Commission came to examine article 64, it could consider whether the reservation it contained was not sufficient to dispose of what the Special Rapporteur, in paragraph (3) of his commentary, called the "admittedly difficult and controversial question" dealt with in article 63.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that it had been far from his intention, in paragraph (10) of his commentary, to make any distinction between one canal and another; he had not taken any absolute position with regard to the differences that might exist between one international waterway and another.

49. Nor could he agree that he had gone into questions outside the scope of the law of treaties; in article 63 he had dealt with treaties and their legal effects. It was perhaps unfortunate that certain of the treaties which set up regimes of the type envisaged in article 63 related to inter-oceanic canals, which were the subject of political controversy.

50. Mr. VERDROSS said that, in principle, he approved of the text of article 63. It covered cases which had occurred in practice and remained topical; for example, by the Antarctic Treaty,[11] a group of States had created a demilitarized regimes which in principle was valid for all States if they did not protest against it. The article was so worded as to avoid the difficulties inherent in the theory of rights *in rem*. Moreover, it was in no way revolutionary, since it was entirely based on the idea of consent; it was solely concerned with the application to special situations of principles already accepted by the Commission.

51. With regard to the drafting, it would be better to delete the words "expressly or impliedly" in paragraph 2 (*a*), so as to bring the text into line with that of other articles. In paragraph 2 (*b*) it would be enough to say "A State not a party to the treaty, which does not manifest its opposition to the regime..." since the idea of protest was included in that manifestation of opposition. At the end of that sub-paragraph, the word "impliedly" seemed superfluous; the essential point was that the State accepted the regime, and there was no need to specify the manner in which it did so.

The meeting rose at 12.20 p.m.

[11] United Nations *Treaty Series*, Vol. 402, p. 72.

739th MEETING

Friday, 5 June 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Law of Treaties
(A/CN.4/167)
(continued)

[Item 3 of the agenda]

ARTICLE 63 (Treaties providing for objective regimes) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 63 in the Special Rapporteur's third report (A/CN.4/167).

2. Mr. de LUNA congratulated the Special Rapporteur on having found, for such a difficult subject, accurate and felicitous formulas which corresponded to the true position in international law. He approved of the principle underlying article 63, which dealt with a particular application of article 62 — the case of a localized regime whose purpose was of general interest.

3. Such a regime was not precisely a *jus in rem*. For although a *jus in rem* had effects *erga omnes*, those effects were not necessarily desired, and not always even foreseen, by the parties; they were produced automatically, regardless of whether the parties wanted them or whether third States consented. For example, if a State ceded a territory to another State by treaty, it would be useless for a third State to claim that the first State must continue to assume responsibility for that territory.

4. As the Special Rapporteur had pointed out, article 63 did not apply to multilateral conventions of general interest; they were a separate case.

5. Article 63 stated rules similar to those in article 62, but in paragraph 2 (*b*) it added a new rule under which consent was presumed if third States remained silent for a certain length of time. Strictly speaking that was no innovation, either for the Commission or in international practice; many treaties concluded by the specialized agencies of the United Nations contained such clauses. In municipal law the presumption attached to the silence of the authorities was intended to protect the citizen againt administrative delays. But that presumption was often a terrible trap. He himself was reluctant to accept silence as giving consent, but that should not be taken as a basic objection on his part.

6. Article 63 purported to settle cases of which there were instances in practice, such as the Antarctic Treaty,[1] to which Mr. Verdross had referred. It did not confer a right or impose an obligation on a third State without its consent, any more than article 62. The basis of

[1] United Nations *Treaty Series*, Vol. 402, p. 72.

equality essential to international law was thus maintained in both articles.

7. Law was not only a logical and harmonious structure, however; it also had to be realistic. And it was to be feared that States might regard such an article as approval of *de facto* legislation or of government of the world by the Great Powers; for "objective regimes" had in fact been used to impose certain conditions on small States at a time when the sovereign equality of States had not been much respected and had not yet been affirmed by the United Nations Charter. The Commission should therefore consider how its draft was likely to be received. It should take steps to ensure that the draft would not meet with the same fate as some earlier drafts, such as that on arbitral procedure.

8. Although he approved of the article in principle, he would accept it only if the whole Commission, or at least a very large majority, was in favour of it.

9. Mr. RUDA said he agreed with Mr. El-Erian that the question dealt with in article 63 was closely connected with a number of other questions of international law.

10. He would examine the central problem raised by article 63 in the context of the provisions proposed by the Special Rapporteur on the effect of treaties on third States. Article 61 laid down the general rule that treaties created neither obligations nor rights for third States and articles 62, 63 and 64 provided for exceptions to that rule. Article 62 dealt with treaties from which obligations or rights derived for third States and were accepted by them; under that article acceptance was always necessary. Article 64 dealt with the case in which a treaty was applicable to third States because its provisions became transformed into rules of customary international law. Article 63 gave recognition to a special kind of treaty which provided for an "objective regime" in the general interest. It laid down that the third States concerned were bound by the objective regime in question if they accepted it; from that it followed that the source of the rights and obligations of the third States was their consent. The Special Rapporteur explained, in paragraph 18 of his commentary, that the objective regime became binding in the absence of timely opposition from other States.

11. Three possibilities had been open to the Special Rapporteur in his endeavour to explain why third States acquired rights or became bound by obligations under a treaty setting up an "objective regime". The first was to recognize that the type of treaty envisaged in article 63, either by its nature or because of the procedure followed in concluding it, had a semi-legislative character and therefore operated *erga omnes*; the Special Rapporteur had not chosen that approach and it must be admitted that, at the present stage of development of the international community, it was hardly possible to adopt an explanation based on the semi-legislative effects of a treaty. The second possibility was to consider that the third States were bound by a customary regime; the Special Rapporteur had not chosen to do that either. He had chosen the third possibility, which was to regard the consent of the third States as the basis of their rights and obligations. On that assumption, article 63 appeared to deal with a special case of the situations covered by article 62, and could therefore be dropped.

12. Consequently without going into certain special cases dealt with in the commentary, he would support the proposal to delete article 63.

13. Mr. TSURUOKA said that on thinking over article 63, his first conclusion had been that it was of no great value; situations created by so-called objective regimes, which were sometimes of a legislative character, would in future be settled, in most cases, by the United Nations or its specialized agencies, and consequently did not really come within the scope of the draft.

14. It must be recognized, however, that sometimes, and especially for political reasons, very important matters were settled outside the United Nations, at least from the legal point of view, as in the case of the Antarctic Treaty and other well-known treaties. Hence, if article 63 could help to settle such matters more easily and improve the international legal order, it would render a great service. The Commission should therefore try to work out a formula acceptable, first, to the majority of its members and then to the majority of States Members of the United Nations.

15. He agreed with Mr. de Luna that article 63 dealt with a particular application of article 62. Consequently, even if article 63 were dropped, the situations to which it applied would still be governed by interpretation of article 62.

16. Lastly, there was the legal question whether article 63 would have retroactive effect. As a general principle, the articles prepared by the Commission should have no immediate retroactive effect, so the Commission could disregard for the time being any effect article 63 would have on existing regimes, such as those of the Suez Canal and the Panama Canal. The Commission should work for the future.

17. Mr. JIMÉNEZ de ARÉCHAGA said that he shared the general misgivings regarding article 63. He could see no valid basis for the extraordinary effects attached to "treaties providing for objective regimes", a description which could be given to a great many treaties, particularly if they were considered from the point of view of States which were not parties to them.

18. States could be said to have a general duty to abstain from interfering with, and thus to have a duty to respect, situations of law or of fact established by lawful and valid treaties to which they were not parties; but it would be going too far to suggest, as was done in paragraph 3 (*a*), that they became "bound by any general obligations" contained in such treaties. The duty to respect such situations was not a rule of treaty law, but a consequence of the principle of non-intervention and perhaps also a corollary of the principle of co-existence, which had been referred to another United Nations body for consideration.

19. Of course, from certain treaties of the type described in paragraph 1, rights could be derived for third States which might involve incidental obligations. More specific obligations could also arise for non-parties as a consequence of their agreement, or because the treaty had supplied the basis for the growth of a rule of customary international law. In the latter case, however, it was the rule of customary international law, rather than the treaty, that would bind the third party concerned.

20. He therefore agreed with Mr. Elias that article 63 should be dropped; the situations envisaged in it were covered either by article 62 or by article 64, and it could thus be safely deleted without leaving any gap in the draft.

21. An additional reason for deleting article 63 was the highly objectionable provision in paragraph 2 (*b*), which would oblige all States to review every treaty entered into by other States and to place on record their disapproval of any treaty they thought might fall within the category described in paragraph 1, under the extremely severe penalty of becoming bound by it if they failed to do so. Such a rule would clearly not constitute codification of existing law and it was extremely unlikely that States would regard it as a progressive development. States would not be prepared to accept a provision that would force them to declare themselves for or against treaties entered into by other States, thereby placing an unduly heavy burden on their foreign ministries. They would undoubtedly prefer the present situation, in which they remained legally unconcerned by what constituted for them *res inter alios acta*, retaining their freedom to take a position with respect to any such treaty only if and when the need to do so arose.

22. Equally objectionable was paragraph 3 (*a*), by which States became bound by the general obligations of a treaty entered into by other States unless they took the invidious course of entering a formal protest against it. It was quite likely that, by the combined effect of the provisions of paragraphs 2 (*b*) and 3 (*a*), certain groups of States might acquire a sort of legislative power over the rest of the world. If the draft allowed it, that power would be exercised mainly by the Great Powers, as in the case of the so-called "international settlements". It was significant that nearly all the examples of "international settlements" given by such authorities as Rousseau and McNair were taken from the acts of the Concert of Europe in the nineteenth century; one example was the provisions of the Treaty of Berlin relating to the River Niger.[2] The Commission could not sanction a formula which might serve as a basis for reviving a situation that belonged to the past.

23. There were, of course, recent examples in which, for very good reasons, a limited number of States had taken it upon themselves to legislate for the rest of the world. But such a power of legislation could only be envisaged in exceptional cases and if the States participating in the treaty constituted the vast majority of the international community, as in the case of the United Nations Charter.

24. Mr. YASSEEN said that the idea underlying article 63 did not seem to be incompatible with the recognized principles of international law. The article sought to base the extension of the treaty on the consent of the third States. He had no more difficulty in accepting the proposed machinery than in the case of article 62, provided that it included a complementary agreement.

25. He was, however, reluctant to accept the details of the proposed rules because they carried the presumption of acceptance by third States too far. The rule in paragraph 2 (*b*), in particular, was artificial; its effect would be to impose on third States an obligation which had no foundation in international law, and to confront those States with a *fait accompli*; it would create a presumption favourable to the parties to the treaty.

26. Some writers had sought to base objective regimes on the idea of *de facto* government: some particularly privileged States considered themselves capable of regulating a situation, and if they were able to enforce the regime they had established, it became mandatory; but that was an explanation, not a justification. The proposed article 63 might give the impression that the Commission wished to facilitate the task of States aspiring to act as a *de facto* international government.

27. Lastly, he did not think the article would be of any use. All the effects which it was expected to produce could be secured by means of article 62. There could be no better procedure for extending the effects of a treaty than a collateral or complementary agreement. Article 63 should therefore be deleted from the Commission's draft.

28. Mr. CASTRÉN congratulated the Special Rapporteur on his objective treatment of a question on which doctrine was much divided and State practice fragmentary. The Special Rapporteur had tried to deduce a few principles, the justification for which he had gone into very fully in his commentary, and he proposed detailed rules on procedure.

29. The idea of objective regimes was defensible in itself, but he doubted whether it was advisable to deal with the problem in the draft and to devote an article to it which embraced a number of different questions of great political importance. Several of the rules proposed were entirely new and might, in practice, create unexpected situations. He was therefore inclined to agree with those who had proposed that article 63 should be deleted and that the question, or some of its aspects, should be dealt with either in articles 62 and 64 or in the commentary.

30. The Special Rapporteur had been right to exclude from the list of treaties which could provide for objective regimes law-making treaties, treaties concerning the cession of territory of the delimitation of frontiers and treaties establishing international organizations. But he (Mr. Castrén) would prefer the list to omit, among others, treaties concerning a particular area of sea or sea-bed, because paragraph (19) of the commentary

[2] *British and Foreign State Papers*, Vol. LXXVI, pp. 17 *et seq.*

showed that treaties of that kind related solely to the territorial sea and not to the high seas.

31. Paragraph (18) of the commentary stated that the assent of the State or States having territorial competence with reference to the subject-matter of the treaty must be express. But in paragraph 1 of the article the idea of consent was presented without further particulars, which seemed preferable. Near the end of paragraph 1, the French text might lead to misunderstanding, because the expression "*un Etat*" did not correspond to the English "any State".

32. As Mr. Verdross had observed, the words "expressly or impliedly" should be deleted from paragraph 2 (*a*), and the word "impliedly" from paragraph 2 (*b*). The words "expressly or impliedly" should also be deleted from paragraph 4.

33. In paragraph 3, the expressions "general obligations" and "general right" were not very precise, and paragraph (23) of the commentary did not throw much light on them.

34. Lastly, the stipulation "and have a substantial interest in its functioning", at the end of paragraph 4, was rather vague: it might well be asked who would decide objectively whether such an interest was involved.

35. Mr. PAL said he fully endorsed the wise suggestion made by Mr. Elias and supported by Mr. Ruda, that article 63 should be dropped; he had found the reasons given by Mr. Jiménez de Aréchaga and Mr. Yasseen very persuasive and his conviction had been further strengthened by the sober and critical analysis contained in the commentary, which made it clear that the Special Rapporteur had put forward the provisions of article 63 with considerable hesitation. The commentary examined the treatment of the subject by the previous Special Rapporteur, then gave the present Rapporteur's comments on it and expressed his inability to support the proposition that there was a general duty to respect, and a general right to invoke, the international regime set up by the treaty. After discussing the relevant State practice, mostly of past centuries, the Special Rapporteur summarized his doubts and hesitations on the whole question of exceptions to the rule *pacta tertiis nec nocent nec prosunt* and presented a few hesitant solutions, including that of recourse to the principle of tacit recognition.

36. It had been said during the discussion that the subject-matter of article 63 reflected real situations. But it should be remembered that present conditions were different from those that had obtained in the past. The many fundamental changes that had taken place included the change in the geography of the international community, the emergence of new trends in the structure of world politics, the progress of the colonial revolution emerging as a mighty new force in world politics calling for new politics, and the activities of the United Nations. International society, which in earlier centuries had consisted of a few European Powers, had changed completely. The period since the end of the nineteenth century had been marked by great political upheavals in which people almost everywhere had been trying to break new historical ground. The end of the World Wars had aroused the latent impulses of gigantic forces in Asia and Africa, bringing huge masses of hitherto dominated colonial peoples into the international political arena in search of independence, and introducing new moral forces of nationalistic universalism.

37. He did not believe that any case had been made out for retaining the article.

38. Mr. AMADO said he did not wish to add to the already numerous arguments advanced against article 63 but he must pay a tribute to the Special Rapporteur who had been the first to realise that the article was out of keeping with all the others he was proposing to the Commission. For it should not be forgotten that a treaty was the outcome of long discussions and even bargaining — a kind of struggle in which self-interest was the prime mover. Hence, common sense could only regard with astonishment the idea that States could acquire rights or obligations by virtue of a treaty in the negotiation of which they had taken no part whatever. But everything had already been said on that point, and he could support the arguments put forward by previous speakers.

39. It was the Commission's function to promote relations between States, and the article did not contribute in any way towards solving the problems that arose. Everyone knew that, when States decided to establish a regime of general interest, it was because each of them saw advantages and compensations in it; their interests were connected.

40. In the case of article 63, if the source of the obligations and rights was to be found in the consent given by the third States, the situation was in effect that which had been dealt with in article 62. But if a legislative process was involved it was a different matter, because law-making treaties were of a different nature — they were theoretical constructions. The present case concerned concrete facts which had many practical aspects and affected many inalienable interests.

41. Mr. PAREDES said he fully agreed with Mr. Jiménez de Aréchaga's objections to paragraph 2 (*b*) because it carried to extremes the obligations of third States under treaties to which they were not parties, recognizing as acceptance not only mere implied consent, but even silence on their part, which might result from not knowing what the other States had stipulated. That would affect the basic principles of freedom and independence. Moreover, as Mr. Yasseen had said, the whole structure of the article suggested that the way was being left open for the Powers which believed themselves called upon to legislate for the world to impose certain conduct on the rest.

42. He urged that when third States were to be bound by the decisions of others, express consent should be required, as Mr. Castrén had emphasized; and he noted that in paragraph 1 the consent was not qualified, while paragraph 2 (*a*) referred both to express and to implied consent.

43. Referring to the desirability of avoiding political discussions in the Commission, which some speakers

had mentioned, he said he found it impossible to do so in many cases, because politics were an aspect of the law as applied to real life and were protected by it.

44. He strongly supported the proposal by Mr. Elias that article 63 should be deleted.

45. Mr. TUNKIN said that article 63 created more problems than it solved. It was concerned with an obsolete practice which might have been common fifty years earlier, but could not be regarded as a rule. For example, in the case of the treaties governing the regime applicable to certain rivers, such as the Danube or the Congo, the Great Powers had played a dominant, if not an exclusive part, and in some cases the riparian countries had not participated in the conclusion of the treaty at all. The practice should be viewed in the light of the general principles of modern international law.

46. When the Commission had considered article 62, it had come to the conclusion that a State or group of States could not impose an obligation or an actual right on other States without their consent. Thus article 62 covered situations which might lawfully arise today. But article 63 seemed to him to be somewhat ambiguous ; although the " objective regimes " envisaged were based on consent, the very term implied the imposition of conditions by a group of States on other States.

47. That had not been the intention of the Special Rapporteur who, after very thorough research, had confessed to many doubts and hesitations. The Special Rapporteur had thought that one possible solution would be for the Commission to limit its proposals to the rule laid down in article 61 and the exceptional cases dealt with in article 62 where a *stipulation pour autrui* could be admitted, and to leave aside all other cases as being essentially cases of custom or recognition. He (Mr. Tunkin) was prepared to accept that suggestion, which, moreover, had been endorsed by most of the previous speakers.

48. The CHAIRMAN,* speaking as a member of the Commission, said that objective regimes unquestionably existed in international law. He had tended to regard them as based on customary international law, even though they might have been initiated by treaties. The process of their creation was a slow one, and the Special Rapporteur had drafted article 63 with the commendable aim of hastening that process in the interests of the progressive development of international law.

49. Paragraph 1 indicated the types of treaty which could create objective regimes, setting aside general law-making instruments or categories so broad as to include all treaties. Paragraph 2 dealt with acceptance, paragraph 3 with the general obligations entailed by acceptance, and paragraph 4 with revocation.

50. The first three paragraphs were perhaps not precise enough. Paragraph 1 failed to take sufficient account of the differences between regimes relating to territory, rivers or waterways and those relating to the neutralization of territory. The wording of paragraph 2 would also give rise to difficulties, as it did not say how a State was to express or imply its consent. Furthermore, there was some lack of sequence between paragraphs 2 and 3, in that no clear provision on acceptance was contained in the former, whereas the latter dealt with the obligations that ensued on acceptance. Nor was it clear what particular rights could be invoked in a given situation.

51. Perhaps the article could be re-shaped in the form of a broad generalization to the effect that a State could become bound by, and entitled to enjoy the benefits of, an objective regime initiated by a treaty to which it was not a party, if it expressly or by its conduct manifested its acceptance of the regime.

52. Mr. BARTOŠ observed that when speaking on article 62 he had expressed the view that because of the *pacta tertiis* rule, rights or obligations could not be imposed on third States, but had said that he could agree to an exception being made in favour of law-making treaties. In that instance, he could agree that the international community could impose obligations and confer rights on States which might not have taken any direct part in the conclusion of the law-making treaty. In reality, such treaties were tantamount to universally accepted rules. But he could not accept the present text of acticle 63, which perpetuated a practice of the Great Powers already abandoned by the international community.

53. On the other hand, there was one practice not mentioned in article 63 which was still current. In certain cases an objective regime could be binding on third States which had not taken part in establishing it, when the situation was quite different from those contemplated in article 63. It was generally accepted in international river law that the riparian States were entitled to establish the regime applicable to a river. For instance, the States which had established the regime of navigation on the Danube by the Belgrade Convention of 1948 [3] had established an objective regime. Third States were bound to comply with it, because the States which had established it had been entitled to do so under the rules of international law. He asked the Special Rapporteur to draw attention in his report to that exceptional case in which it could be said that there was a division of competence between the States of the international community.

54. Mr. ROSENNE said that, although he had given a good deal of thought to the subject-matter of article 63, he would have welcomed further time for reflection because he was opposed to the majority view. The general thesis which underlay article 63 and was advanced in the commentary by the Special Rapporteur, that States could, by treaty, create a state of affairs valid *erga omnes* — and he used those neutral terms advisedly — was established international practice and was *lex lata*. Moreover, that possibility met a real need in international life. Possibly the expression " objective

* Mr. Briggs.

[3] United Nations *Treaty Series*, Vol. 33, p. 197.

regimes" was not a particularly happy one, and it certainly should not be regarded as necessarily denoting the equivalent of something permanent: treaties and treaty arrangements could always change.

55. The obligations and rights referred to in article 62 were intended to extend to a particular State or class of States, whereas those referred to in article 63 would extend to every State having an interest in the subject of the treaty. He was therefore unable to support the contention that the substance of article 63 was already covered in the previous article.

56. Nor did article 63 come within the scope of article 64, which related to the formation of international custom. There were inherent differences between customary and conventional law, the essential one in the present context being that observance of customary law by a State would not depend on any legal interest. Despite the argument advanced during the discussion, he still thought that articles 62, 63 and 64 dealt with entirely separate matters.

57. The drafting of article 63 would require some modification. It failed to differentiate sufficiently between the different kinds of consent required of States in different circumstances. For instance, there would be a great difference between the formal consent required of a State with territorial competence, which must be explicit, and the type of acquiescence which might be required of a State taking advantage of the facilities offered by parties to a treaty whose intention had been to establish a regime in the general interest. The last clause in paragraph 1 "or that any such State...etc.", should be dropped. Paragraph 2 (*a*), if referring to a State possessing territorial competence, seemed to be redundant.

58. Paragraph 2 (*b*) might not be acceptable as it stood and he did not know what importance the Special Rapporteur attached to registration as a form of notice of the existence of a treaty for States wishing to protest against it. It might be advisable to bear in mind the lapse of time between registration of the treaty with the Secretary-General and its publication in the United Nations *Treaty Series*, which could be as much as twelve months. Moreover, Article 102 of the Charter and the Regulations on the Registration of Treaties distinguished between registration and publication; and registration did not mean that other States had any right to study the text before it had been published.

59. He presumed that paragraph 3 was intended to deal with the question of States which were not parties taking advantage of the facilities offered by the regime, when they would be bound to observe all the regulations which validly formed part of the regime, not merely those contained in the treaty itself.

60. Paragraph 4 contained a provision of the kind which certain members, including himself, had thought ought to appear in article 62, in order to ensure that States accepting the regime would be consulted concerning its amendment or revocation; but it went even further by requiring their concurrence.

61. As to the general question of the value of the article, he believed it was legally useful and indeed a necessary consequence of the concept of law-making treaties and of the Commission's definition of a "general multilateral treaty" as one which "concerns general norms of international law or deals with matters of general interest to States as a whole".[4] Personally, he would welcome the development of a genuine system of international legislation, provided that the position of the minority was always adequately safeguarded. Most members of the Commission lived in countries where a qualified parliamentary majority legislated for the minority and that was, after all, not usually regarded as a process of imposition. The Special Rapporteur had rightly stressed, in article 63, the feature of general interest which the treaties in question possessed and the necessity for the consent of the States having direct competence in the matter. That approach was fully consistent with contemporary international law.

62. The question whether such an article was politically opportune would have to be left to governments to decide. The Commission's duty was to state the law as it existed.

63. Though it was a tradition of the Commission not to dwell on political matters, he felt bound to reserve his position on the regimes governing certain interoceanic canals.

64. He suggested that article 63 be referred to the Drafting Committee for consideration in the light of the discussion and in relation to article 62.

65. Mr. TABIBI said that he subscribed to the majority view on article 63. Countries in the region from which he came had reason to know the meaning of the regimes referred to in the commentary, many of which did violence to the sovereign will of States. It should be remembered that there had been cases of regimes imposed by certain States which had thereby enjoyed more extensive rights than those possessing true territorial competence. Such an article was not likely to prove acceptable in the modern world, which was so different from that of the nineteenth century. Moreover, it conflicted with many provisions already adopted by the Commission; its retention might jeopardize the whole draft and create political problems. Some examples of regimes willingly accepted by States not parties to the original treaty could be mentioned in the commentary on article 62.

66. The provision in paragraph 2 (*b*) would raise serious problems for States whose officials found it difficult to keep up with the enormous volume of documents issued by international organizations; new treaties might escape their notice.

67. Sir Humphrey WALDOCK, Special Rapporteur, suggested that some of the criticism of article 63 had been a little exaggerated, since there could be no question of the treaties referred to imposing obligations without the consent of the States concerned. It was perhaps unwise for the Commission, as a body concerned with the codification and progressive development of law, to look back too often to the days of the Concert of Europe, when treaties had been concluded

[4] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 161.

and enforced under very different conditions from those which now prevailed or would be regarded as desirable.

68. He would have thought there was room in the draft for the limited category of treaties with which article 63 was intended to deal, and although treaties concerned with such matters as rights of passage over territory, rivers or maritime waterways could perhaps be covered in article 62 if the drafting of that article was adjusted, the same did not apply to treaties concerned with the demilitarization or neutralization of territory. Such problems did not belong exclusively to the nineteenth century, and although it might be the general hope that the United Nations would assume responsibility for settlements involving treaties of that kind, they were still often left to States. Treaties affecting peace were of very special importance and had been in the forefront of his mind when drafting article 63.

69. Article 63 differed from article 64 in that it was intended to provide a means for the speedy consolidation of a treaty as part of the international legal order, without having to await the longer process of formation of a customary rule of international law. One example was the Antarctic Treaty of 1959, which had dealt with a rather difficult political problem. That treaty had been drawn up by a conference of all the States having pretensions to territorial competence with respect to Antarctica, together with a number of other States which had shown an interest. Although the parties had included an accession clause in the treaty so that other States could accede to it, there was a clear intention to create an objective legal regime for Antarctica. The treaty had been concluded in the interest of all States; it specified that there was no intention of preventing any State from using Antarctica for scientific purposes, but laid down the fundamental rule that the continent must not be used for military purposes. Accordingly, it would be inadmissible for any State not a party to the treaty to claim that Antarctica was *res nullius*.

70. Article 63 was intended as a draft of the law of today; controversial political settlements of the past should be left out of the discussion; the examples from the past which he had given in his commentary were intended merely by way of illustration. It was clear, however, that the majority of the Commission did not favour the retention of article 63. Personally, he believed that, if redrafted, it could be included without putting any State in difficulties; but if the Commission decided to drop it, the gap would to some extent be filled by article 62 in the form in which he suggested that it be redrafted. That article would then cover much, although not the whole, of the ground covered by the present article 63. It would not cover treaties of neutralization or demilitarization, but perhaps those cases could be left to State practice and the development of customary law.

71. The Chairman for the session, Mr. Ago, had expressed the intention of discussing the problem of new States in connexion with article 63. Where the objective regime involved rights for third States, he did not believe that any serious problem would arise; it would be generally admitted that new States were entitled to invoke such rights in the same manner as other States. A problem might arise if an attempt were made to bind a new State by certain obligations, for instance, in relation to the protection of minorities.

72. Mr. LIU said he had not intended to speak because he shared the view of the majority of the members that article 63 should be dropped. But his view was not based on the belief that its subject-matter was already covered by article 62. In fact, he thought that article 63 dealt with a different subject, and the Special Rapporteur had confirmed his interpretation. It was precisely because article 63 covered different situations, which were charged with political implications, that he thought it should be deleted.

73. He supported the arguments advanced by Mr. Jiménez de Aréchaga, which had not lost any of their force as a result of the Special Rapporteur's explanation of the difference between articles 62 and 63.

74. Unfortunately, he could not share the Special Rapporteur's optimism regarding the difference between present conditions and those which had prevailed in the nineteenth century.

75. Sir Humphrey WALDOCK, Special Rapporteur, replied that he was very much aware of the practice of States, and it was not because he took a utopian view of the political scene that he had advocated the inclusion of article 63. As Mr. Rosenne had said, the purpose of the article had been, precisely, to reflect an existing practice. What had changed was the organization of the international community.

76. Mr. TSURUOKA said that, after listening to the Special Rapporteur's explanations, he would suggest that the Commission request the Special Rapporteur to redraft article 63 in the light of the views expressed during the discussion. He did not think that the Commission should decide forthwith simply to drop the article, for its function was always to help to solve the problems confronting the international community.

77. Mr. TUNKIN said he wished to comment briefly on the two procedural issues that had arisen. First, he thought it would be illogical to ask the Special Rapporteur to redraft article 63 when the great majority of the Commission were in favour of deleting that article. Secondly, since Mr. Ago had expressed a desire to speak on a particular point during the consideration of article 63, he suggested that the discussion should not be closed at the present meeting.

78. The CHAIRMAN said that consideration of article 63 would be continued at the next meeting.

The meeting rose at 1 p.m.